Ius Laboris Poland Global HR Lawyers
Raczkowski

PRO HR YEAR BOOK 2024

EDITION 05

EDITORIAL

Katarzyna Dobkowska

Editor-in-Chief Partner

Dear Readers,

I am very happy to present to you the fifth edition of our PRO HR Year Book in which every year we discuss current and practical issues in the area of our main practices: labour law, business crime & compliance, immigration & global mobility, court cases, employee taxes, remunerations (comp & ben), occupational health and safety, personal data protection, and diversity, equity & inclusion (DEI).

In view of a current debate on simplifying the legal definition of workplace bullying, we begin this year's edition starts with this topic. In his text, Łukasz Kuczkowski reminds us how to prevent workplace bullying effectively and minimise the risk of claims in this respect.

In the next article, Damian Tokarczyk summarises the most important rights of whistleblowers and the related employer obligations arising from the Whistleblowers Protection Act passed on 14 June 2024.

Agnieszka Szymańska presents a list of new developments in the area of immigration and informs what can be expected in the near future.

Piotr Graczyk and Piotr Lewandowski present in their text the advantages of resolving employment-related court disputes through mediation.

In her article, Joanna Stolarek brings us closer to the current judicial practice concerning the taxation of employee incentive schemes and indicates that under certain conditions it may beneficially affect the designing and functioning of such schemes.

In another text, Natalia Krzyżankiewicz and Katarzyna Wilczyk suggest how to start preparing now for the implementation of the Pay Transparency Directive in the Polish law, which should take place by 7 June 2026.

Monika Czekanowicz, our expert on occupational health and safety, introduces us to the new obligations of employers (introduced to the Polish law in June this year) whose work environment contains reprotoxic (toxic for human reproduction) substances.

Michalina Kaczmarczyk indicates how long applicants' data can be stored after the recruitment has been completed.

Our annual publication concludes with a text on the most common DEI strategies and initiatives and their benefits written by Zuzanna Rosner-Laskorzyńska, who heads our DEI practice.

I hope you will enjoy the reading!

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TOPIC 1 / BULLYING

Counteracting workplace bullying

Łukasz Kuczkowski
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The obligation to counteract workplace bullying rests with the employer and arises from the fundamental requirement to respect the employee's dignity. This is one of the key obligations of each employer in Poland.

Definition of workplace bullying

Workplace bullying includes acts or behaviour in relation to an employee or directed against an employee, with the effect of persistent and long-term harassment or intimidation of an employee, resulting in a decreased evaluation of his professional abilities, or which is aimed at or results in the humiliation or ridicule of the employee, or the isolation or elimination of the employee from the group of co-workers.

The interpretation of this definition poses many difficulties in practice. This is due to the imprecise language used by the legislator. Many employees interpret unpleasant or demanding actions by superiors as workplace bullying, although they do not always meet the criteria included in the legal definition. Proving workplace bullying in practice is complicated. A social debate is underway on simplifying the definition of this phenomenon and imposing additional obligations on employers to prevent workplace bullying.

All criteria of bullying must be met cumulatively. This means that single action, even if illegal, will not be considered workplace bullying, if it is not of a long-term nature or does not lead to a humiliation or decreasing evaluation of professional ability.

Importantly, the burden of proof in workplace bullying cases rests mainly with the employee. It is the employee who has to prove that specific actions meet all criteria for workplace bullying. If the employee demands compensation, he or she must also prove health problems and a cause-and-effect relationship between the bully's actions and his or her health.

Employer's obligations

The regulations do not specify what precise steps should be taken by the employer in order to prevent workplace bullying. It is up to the employer to choose appropriate tools and solutions which will be assessed in terms of diligence and potential effectiveness. When planning action the specificity of the work environment, relations between employees, the level of risk, and the history of previous incidents must be taken into consideration.

Examples of actions counteracting workplace bullying include:

- creating procedures against bullying;
- effective familiarisation of employees with procedures, especially during onboarding;
- regular training on bullying, preferably culminating in tests;
- enabling anonymous reporting of suspected bullying;
- fair consideration of all reports, including anonymous reports;
- taking specific organisational and disciplinary measures against persons guilty of bullying;
- providing information to informers about the results of procedures, while ensuring confidentiality and the protection of personal rights.

No reports of workplace bullying does not automatically imply the effectiveness of adopted measures. Often it is a sign of employees' distrust of the procedures. This should be treated as a warning sign and recovery measures should be adopted.

It should be emphasised that counteracting workplace bullying is not an obligation of result, but of diligent conduct. The employer is not responsible for complete elimination of workplace bullying, but for undertaking action which counteracts it realistically and effectively.

Claims of an employee – a victim of bullying

An employee who experienced workplace bullying has the right to make two kinds of claims against the employer:

1. **Compensation** – of no less than minimum pay (in 2025 it is PLN 4,666 gross, that is approximately EUR 1080). Importantly, the employee may demand compensation even if the employment contract has not been terminated.
2. **Non-pecuniary damages** – if workplace bullying caused health problems, the employee may demand payment of an appropriate amount of money to compensate for harm suffered.

The Labour Code does not exhaust all possibilities of pursuing claims by an employee. They may also arise from violation of personal rights and criminal liability or liability for a petty offence of the bully.

Preventing workplace bullying as a part of the Compliance system

Preventing workplace bullying is an integral element of the compliance system in an organisation. Its aim is to ensure the compliance of the company's operations with the regulations of the labour law, as well as civil and criminal law. The employer, while ensuring an appropriate work environment, creates bullying-free conditions which is a part of a broadly defined safety and health at work.

It is difficult to imagine an effective compliance system without the implementation of procedures preventing bullying and harassment. Companies which neglect this aspect expose themselves to legal risk, but also to a loss of trust on the part of the employees and their reputation in the labour market.

Considerate and consistently implemented anti-bullying measures are not only a legal requirement, but also a crucial element of responsible management of human capital in any organisation.

Mediation in employment cases

Piotr Graczyk
Advocate

Piotr Lewandowski
Attorney-at-law

Mediation is one of the methods of resolving disputes which is gaining importance in the Polish legal system. Regulated by the Civil Procedure Code, mediation aims to enable parties to reach agreement in a less formal, faster, and more flexible way than a standard court procedure. Mediation may be used in both civil cases, including labour law cases, and in business cases.

Voluntary nature of mediation

Mediation is fully voluntary, therefore neither party can be obliged to take part in it. It is carried out on the basis of a mediation agreement or a decision of the court referring the parties for mediation (in practice the latter is by far the most common). In a mediation agreement the parties determine in particular the object of mediation, the mediator or the way of choosing the mediator.

The mediator does not take decisions for the parties, but supports them in seeking compromise, which is one of the key differences compared to a court procedure.

When can mediation be used?

Mediation can be carried out both before the commencement of the proceedings and during them. The parties to the dispute may themselves wish to participate in it or the court may refer them to mediation, if it considers that such a solution may produce a favourable outcome. When referring the parties to mediation, the court sets the duration of the mediation to a period of three months. At a unanimous request of the parties or for other important reasons this period may be extended, if it leads to an amicable settlement of the dispute. In practice we have sometimes concluded settlements after mediations lasting many months, the duration of which has been extended several times by the courts.

What is the role of the mediator?

Mediation is carried out by a third party (a mediator) who should be fully impartial. The mediator uses various methods aiming for an amicable settlement of the dispute, including by supporting the parties in formulating settlement proposals or, at the unanimous request of the parties, may indicate ways of settling the dispute which are not binding for the parties. Therefore, the mediator does not make decisions for the parties, but supports them in seeking compromise which is one of the key differences compared to a court procedure (in a court trial the court passes a judgment deciding about the right of one of the parties).

Parts of mediation

The following stages can be distinguish in mediation:

1. The preliminary meeting – the mediator explains his or her role and the parties have the opportunity to present their position and any potential expectations.
2. Specifying the problem – the parties jointly identify the object of the dispute.
3. Individual talks – the mediator may hold individual meetings with each party in order to discuss their positions and understand the perspective of the mediation participants.
4. Seeking solutions – with the support of the mediator, the parties start suggesting solutions to end the conflict.
5. Negotiations – the parties negotiate the conditions of a potential amicable settlement agreement.
6. Entering a settlement agreement – once a consensus has been reached, the mediator helps the parties formalise the arrangements in the form of a settlement agreement.
7. Concluding the mediation – a protocol of mediation is made in which the place and date of mediation is indicated as well as the names and addresses of the parties, the name and address of the mediator, and the result of mediation. If the parties did not enter a settlement agreement, they may decide about further steps, e.g. having a court trial.

In case of mediation carried out on the basis of a mediation agreement, a party may apply to the court to approve the settlement agreement reached in the course of mediation. If the court has referred the case to mediation, the mediator always submits the report and the settlement agreement to the court which tried the case. The court then approves the settlement agreement, unless it finds the settlement agreement inadmissible (which is very rare in practice).

If the settlement agreement is to be performed by way of enforcement, the court approves it by granting an execution clause; otherwise the court approves the settlement agreement by order. The court will refuse to grant an execution clause or to approve the settlement agreement in whole or in part, if the settlement agreement is contrary to the law or the principles of social coexistence or if it aims to circumvent the law, as well as if it is incomprehensible or contains contradictions.

What is the nature of a mediation settlement agreement?

The settlement agreement entered into before a mediator, after it has been approved by the court, has the legal validity of a settlement made before the court. A settlement agreement made before a mediator which was approved by grating it an execution clause is an enforcement order. The implementation of such settlement agreement may be enforced in enforcement proceedings.

Advantages of mediation

Mediation has many advantages. The most important of them include:

1. Speed – usually the mediation process is much shorter than a court trial.
2. Cost – as a rule mediation is less expensive than the trial, therefore it allows the parties to avoid costs related to court proceedings.
3. Agreeing the outcome – the parties jointly work out the final solution and the conditions of the settlement agreement, whereas in a court dispute the final outcome always depends on the assessment made by the judge (the outcome could thus be different than the conditions of the settlement agreement following mediation).
4. Limiting the participation of third parties – mediation is not attended by witnesses and expert witnesses.
5. Confidentiality – the course of mediation is confidential, while court hearings as a rule are open to the public.

Mediation is not free, but costs of mediation are much lower than the costs of a court trial. In cases for property rights the fee of the mediator is 1% of the value of the object of the dispute, no less however than PLN 150 and no more than PLN 2,000 for the whole mediation procedure. Moreover, the mediator is entitled to reimbursement of expenses (to a limited amount). If the parties do not agree otherwise, they cover the mediations costs fifty-fifty.

In our opinion when conducting mediation in employment cases one should strive to bring all potential disputes between the parties to an end. Entering into a settlement agreement which covers for example only the claim for overtime may lead to the employee obtaining funds to pursue other claims. This would not be in the interest of any employer. Moreover, it is worth introducing the confidentiality of the dispute and the settlement agreement, a ban on public statements about the former employer, and provisions which will penalise an infringement of the settlement agreement by the former employee.

The Whistleblower Protection Act is already in force

Damian Tokarczyk, PhD
Advocate

As the last member state of the European Union, Poland has implemented the EU Directive on the protection of persons who report breaches of Union law. The Whistleblower Protection Act which was adopted on 14 June 2024 introduced a protection regime for persons who report breaches in several areas of law. It also put an obligation on employers with at least 50 employees to implement procedures to make internal reports. All provisions of the Act have come into effect and must be complied with.

Whistleblower – or who is this?

According to the legal definition, reconstructed from several provisions, it is a natural person who in good faith reports (internally or outside the organisation) or publicly discloses a suspected breach of law, which he or she became aware of in relation with his or her work.

Good faith of a whistleblower means that he or she has a justified suspicion that the information reported is true at the time of its reporting and that it concerns a breach of law in the areas listed in the act. The purpose of the whistleblowers action is irrelevant for the assessment of good faith. The whistleblower does not have to act in socially justified interest or for the common good. However, a person who consciously reports or publicly reveals untrue information is not a whistleblower. Such a conduct is a crime punishable by imprisonment for up to 2 years.

Reporting and disclosures – or who can be informed about breaches of law?

A report can be made internally or externally. The former is sent “inside” the organisation in which the breach of law has occurred. Employers who employ at least 50 persons (as at 1 January or 1 July) are obliged to implement procedures for making such reports. The procedures must indicate who accepts the reports, through what channels they can be submitted, and who will investigate them and in what manner. The provisions of the Act on internal reporting came into effect on 25 September 2024.

The regulations concerning making external reports came into effect on 25 December 2024. Whistleblowers may submit them to public authorities which have competences to take follow-up steps in a given matter. For example, if you want to report a breach of consumer rights you can do it before the President of the Office of Competition and Consumer Protection or a district consumer advocate. Special powers (and obligations) are imposed by the law on the Ombudsman. If a whistleblower does not know which authority is competent to undertake the follow-up in a given matter, he or she can make a report to the Ombudsman. The Team for Whistleblowers working in the Office of the Ombudsman will determine the appropriate course of action and inform the whistleblower about it.

In special circumstances, a whistleblower may publicly disclose the information about the breach of law (e.g. on Facebook, other social media or generally speaking on the Internet). A person making such a disclosure will be protected, if he or she:

- has previously made an internal or external report and had not been informed about the follow-up,
- has justified reasons to believe that the public interest is directly at risk,
- has justified reasons to believe that in case of making an external report he or she will be exposed to retaliation or the effectiveness of such a report will be low.

The scope of the act – or what can be reported?

The Act lists several areas of law the breach of which can be the basis for a report that is subject to protection. The list mostly reflects the list in the Directive. Protected reports will include those which concern, among other things:

- corruption,
- public procurement,
- protection of the environment,
- consumer protection,
- protection of privacy and personal data,
- security of network and information systems.

Each entity can extend in their internal procedure the list of areas in which reports can be made. Such additional areas may include for example a breach of internal regulations in ethics and compliance. Persons reporting breaches of such internal regulations will be protected in the same way as “statutory” whistleblowers, in the scope provided for in internal procedures. Information about a breach of internal regulations cannot be however reported to public authorities as part of external protected reports or publicly disclosed.

Whistleblower protection – prohibition of retaliation

No retaliation action or measures can be used against whistleblowers. Such actions are any decisions or actions detrimental to his or her which result from reporting or disclosure which may do any harm or damage to the whistleblower (or a person close to the whistleblower or connected with him or her). The Act lists prohibited actions which can be taken against the whistleblower who is an employee or a person engaged on the basis of other contract, as examples only. These include termination of employment, failure to enter into or renew a contract, reduction in wages or any unfavourable change in employment conditions, withholding of a promotion or training, any form of discrimination or unfair treatment.

Using retaliation (or even a threat of retaliation) is a crime punishable by imprisonment for up to 2 years. If the perpetrator is persistent, he or she is punishable by imprisonment for up to 3 years.

So called persistent procedures cannot be initiated against a whistleblower. Making a report or a public disclosure in good faith cannot be the basis for liability for infringement of personal rights or defamation, violation of business secrets, personal data protection or copyright. The prohibition concerns all types of procedures – disciplinary, civil, criminal, and administrative. If someone brings such claims against a whistleblower and fails to demonstrate that they are not entitled to the whistleblower status, the proceedings should be discontinued.

Confidentiality of whistleblower data and procedure

The most important measure of whistleblower protection is confidentiality of whistleblower data and information disclosed in follow-up procedures. The Act precisely determines the principles of access to such information. It can only be accessed by persons who have been authorised (in writing and by name) by the entity to accept the reports and undertake the follow-up.

The group of people dealing with the reports should be limited to a minimum. Information which allows for establishing the whistleblower's identity should not be revealed to persons who are not involved in the process of accepting and verification of reports. The same principles apply to other people taking part in the follow-up – e.g. witnesses, persons connected to the whistleblower or helping him to make the report.

Confidentiality of data should not be confused with anonymity. The Act on Whistleblower Protection does not oblige the employer to accept anonymous reports. Such anonymous information about breaches of law can be however the basis for undertaking appropriate measures by the employer (e.g. initiating explanatory procedure). If anonymous whistleblower reveals his or her identity during such a procedure or if the whistleblower's identity is revealed, he or she is entitled to statutory protection.

What is next for whistleblower protection?

The Ministry of Family, Labour and Social Policy which authored the draft law announces that two years after the Act coming into force its effectiveness will be reviewed. Errors are to be corrected and loopholes that become apparent in the course of applying the provisions of the Act are to be remedied. A number of such loopholes have already been spotted. The most important shortcomings of the Act are the lack of clear rules concerning capital groups and common internal procedures, the principles of entrusting acceptance of reports to external entities or the possibility of involving them in the follow-up.

The Directive on Pay Transparency – what awaits us?

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The European Union member states, including Poland, have time until 7 June 2026 to implement the Directive on Pay Transparency ("the Directive"). The Directive imposes an obligation to apply mechanisms of transparency of pay and tools for its enforcement in order to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women.

Employers have approximately 18 months to prepare their organisations to the new reality. It may seem that there is still a lot of time, but this could not be further from the truth. Many provisions of the Directive may require significant changes in payroll systems, in particular in companies which so far have not performed the process of valuation of work positions. It should also be borne in mind that 2026 will be the first reporting year in terms of reporting the pay gap for the largest employers. This means that by the start of 2026 payroll systems should have been reviewed and pay ordered.

In 2025 employers should review their payroll systems and implement the first pilot schemes. This will allow for a thoughtful analysis and diagnosis. This will allow time for making any adjustments and a full implementation of standards in 2026. We discuss the key regulations of the Directive below.

New principles of recruitment. Pay brackets in job advertisements – must-have or nice-to-have?

New obligations in the recruitment process will be imposed on all employers, regardless of the number of employees.

Employers will be obliged to present information on pay (or pay brackets) already at the stage of recruitment – before the interview when the proposed pay is discussed at the latest. This aims to enable the applicants to prepare to the interview and ensure informed and transparent negotiations. According to the Directive the information does not have to be included in the job advertisement. We would like to note, however, that in December 2024 a draft law amending the Labour Code appeared ("Transparent pay" draft law) which is a harbinger of a partial implementation of the Directive. According to this draft, employers will be obliged to indicate pay brackets already in job advertisements. Accepting such domestic regulations would mean that a stricter solution that the EU regulations is adopted. Therefore, we have to follow further development of this draft.

Under the Directive, advertisements of vacancies and names of job positions must be gender neutral, which means that their content must not suggest preference for any sex. This means that the contents of the job advertisement should indicate that the job can be performed by a person of any gender. An example of a form of neutralising the nomenclature is using musculatives and feminitives (e.g. we are seeking a steward/stewardess). Companies may decide to introduce other forms of neutralisation of job positions e.g. by adding the genders in brackets, e.g. we will hire a photographer (m/f).

The EU regulations explicitly prohibit employers from asking the applicants during the recruitment process about their current or previous remuneration. The Directive also emphasises that the entire recruitment process must be carried out in a non-discriminatory manner in order to ensure equality of access to jobs and working conditions.

New right of the employees to information on remuneration

One of the main premises of the Directive is employers having payroll systems which ensure equal pay for equal work or work of equal value. Each employer should look into and review the current remuneration structures and evaluate job positions. Employees must be given an easy access to information on the criteria used to determine their remuneration, levels of remuneration, and pay progression.

Additionally the Directive grants employees the right to apply for information (in writing) concerning their individual level of remuneration and average levels of remuneration, by gender, with regards to the category of employees performing equal work or work of equal value. In practice it means that an employee will know how his or her remuneration compares to that of other people of the same sex (doing equal work or work of equal value).

He or she will know whether compared to others he or she earns little, an average amount or a lot. He or she will also find out how his or her pay compares to that of employees of the opposite sex (performing equal work or work of equal value), i.e. whether he or she earns more or less compared to them. Employees will be able to made enquiries in person or through an employee representative (trade unions or other employee representatives). Employers will be obliged to provide information within “reasonable time” – no longer than two months. It will be possible to apply for additional explanations if it turns out that information provided by the employer is imprecise or incomplete. Employers will be obliged to remind employees once a year about their right to receive information concerning the remuneration and the steps which need to be taken to do so.

Employees will have the right to disclose their remuneration for the needs of enforcing the principle of equal pay. The Directive explicitly prohibits the use of clauses in contracts obliging employees to maintain confidentiality of information on their pay (currently these principles result from the judicial practice).

Computation and reporting gender pay gap

Additional obligations will also be imposed on employers concerning the pay gap. According to the Directive, the gender pay gap means the difference in average pay levels between female and male workers of an employer expressed as a percentage of the average pay level of male workers.

As a rule, the obligation to compute and report the gender pay gap will apply to employers with 100 or more workers. Member states may however decide to impose this obligation on smaller companies too.

Information concerning the gender pay gap between workers broken down by categories of workers performing equal work or work of equal value will have to be reported not only to the monitoring authority, but also to employees and the employee representatives (probably trade unions or other employee representatives). The pay gap computed for employees performing equal work or work of the same value seems to be crucial as it may indicate actual inequalities. The intention of the EU legislator was to ensure that the pay gap does not exceed 5% in individual employee categories. The pay gap of 5% or more will result in the need to take further action involving joint assessment of pay in co-operation with the employee representatives.

The frequency of reporting the pay gap should depend on the number of employees. Employers with 250 employees or more will provide this information on gender pay gap by 7 June 2027 (for 2026) and every year thereafter. Companies with 150 to 249 employees will provide the information by 7 June 2027 (and every three years thereafter). Employers with 100 to 149 employees will provide information on pay gap for the first time by 7 June 2031 (and every three years thereafter).

Are we facing the end of global remuneration policies?

The Directive introduces so called single source rule. According to this rule, employees will be able to compare their pay (amount and components) not only at their employer's, but also between various group entities. It is sufficient if the parent company establishes pay policies for other companies, which is often a standard practice in capital groups. This not only applies to pay, but also to bonuses or incentive schemes.

If the regulations concerning the single source rule are implemented in the Polish law as they result from the Directive, employers will have two options. Either it will be necessary to ensure comparable remuneration for the employees in the whole group (who perform comparable work) or the decision making in terms of the remuneration policy will have to be transferred to the local level.

Sanctions for non-compliance with the Directive – it will not be worth it to ignore its provisions

The Directive provides for the need to introduce on national level the measures which will improve enforcement mechanisms for employees in the event of a violation of the principles of pay equality and transparency. It also introduces guarantees of compensation the employees may claim in the event of a violation. They are to be guaranteed the right to full compensation. The compensation should include lost benefits and penalty interest, among other things (without specifying in the national legislation the maximum amount of the compensation).

As far as the proceedings are concerned, the Directive introduces the principle of reverse burden of proof (as is currently the case in discrimination cases). This means that an employee will have to substantiate that he or she has been treated unequally and the employer will have to prove that unequal treatment did not take place or that any difference in pay was objectively justified.

The Directive imposes an obligation on member states to introduce a system of dissuasive penalties (emphasising their preventive role). It is likely that violation of principles and obligations concerning pay equality and transparency will be considered by the national legislation as an offence against employee rights.

Storing applicants' data after completed recruitment

Michalina Kaczmarczyk
Attorney-at-law

Data can be stored for the period of three years after the completed recruitment…

…This was confirmed in February 2024 by the Supreme Administrative Court. The President of the Personal Data Protection Office has disagreed with this assessment and in one of administrative decisions he stated that personal data should be deleted immediately after the completed recruitment and then filed a last resort appeal against the judgement favourable for the data controller. This position was presented by the previous President of the Personal Data Protection Office, Jan Nowak. In the Office of Personal Data Protection work is in progress on a new handbook for employers in which the question of applicant data retention will probably also be addressed. In the opinion of the courts of both instances, the President of the Office wrongly interpreted the legally justified purpose of the controller (i.e. the employer) and failed to take into consideration the interests of other persons taking part in the recruitment.

According to article 183d of the Labour Code a person against whom an employer violated the principle of equal treatment in employment – including an applicant – is entitled to compensation. It is the employer who has to prove that the principle of equal treatment has not been violated, that is in the selection of a new employee in the recruitment process the employer was guided by objective criteria. In order to prove this (whether in a specific case discrimination occurred) it is necessary to compare the qualifications and characteristics of the applicants who have progressed to the next stage of the recruitment process with those for whom the decision to terminate the process has been made. The employer must have the data of both the person who alleges discrimination and other candidates with whom the employer compared him or her.

The legal basis for the processing of data after the recruitment has been completed

Article 6.1(f) of the GDPR introduces a general clause according to which processing of the data without the consent of a person they relate to is allowed if two conditions are met. Firstly, the processing must be necessary for the purposes of the legitimate interest pursued by the controller or by a third party, and secondly, there are no situations in which such interests are overridden by the well-being or the fundamental rights and freedoms of the data subject.

The interest of the controller, i.e. the employer, is the protection against possible claims of unequal treatment in the establishment of the employment relationship. It does not stop when an applicant requests that his or her data should be deleted. Other applicants may claim that they are the ones who have been discriminated against in the recruitment process, e.g. on the basis of gender or age. For these reasons the employer must have all data of all applicants in order to be able to demonstrate that it was guided by objective criteria both when in selecting those qualified for subsequent stages, and in employing the successful applicant.

Counteracting discrimination is the fundamental obligation of an employer under the Labour Code. Employers should undertake preventive action (the same is true for workplace bullying), which will include supervision of recruitment processes by random checks of objectivity in the selection of applicants to specific stages of recruitment. Deleting the applicants' data immediately after the completion of the recruitment would make it impossible to fulfill the anti-discrimination obligation, as the employer would not be able to supervise the transparency of the recruitment processes.

Storing the data is also justified due to third party interest. For example, in case of an allegation of age discrimination, an applicant will want to prove that older applicants were not allowed to subsequent stages of recruitment despite having relevant qualifications, education, and experience. If the employer had deleted all data after the completion of the recruitment, it would be impossible to establish the criteria on the basis of which the employer decided to reject older persons. The applicants would be deprived of evidence in the proceedings they initiated.

DEI becomes more and more appreciated

In the recent years Polish employers (in particular larger ones) have begun to notice the significance of Diversity, Equity and Inclusion (DEI). This was clear in 2024 and it is predicted that this trend will continue in the next few years.

Zuzanna Rosner
Attorney-at-law

What are the benefits of DEI?

DEI strategies and initiatives improve co-operation in the team, increase creativity, support various thinking styles, help to retain employees, attract most valuable candidates, and encourage clients to co-operation. They also have a positive impact on the effectiveness of employees and in long-term perspective contribute to an increase in business competitiveness and results.

Polish employers

Although the awareness of advantages resulting from the implementation of DEI strategies and initiatives is growing among Polish employers, still much needs to be done. Until recently, only half of them knew the concept of diversity management. The same study showed that only a small percentage of companies (taking part in the study) have implemented a separate formal documents for diversity strategy. Moreover, only 20% of Polish companies have programmes supporting a selected group of employees and only one third monitored the levels of pay in terms of gender.

Which employers implement DEI more often?

The employers with the most developed and advanced DEI initiatives generally belong to international groups. In this case they receive top-down guidelines to implement DEI strategies and at the same time they receive ready-made (global) solutions in the DEI area. On the one hand, this makes their task easier. On the other hand, they often encounter difficulties in implementing (adapting) global DEI solutions to the local specificities and the Polish working environment. For example, while recruitment directed to employ diverse candidates and affirmative action may be legal in some jurisdictions, in Poland it can be applied only to a limited extent and under certain conditions.

Polish reality

Before adapting or implementing DEI initiatives it is worthwhile to understand Polish conditions, e g. groups at risk of exclusion. Nowadays the Polish society is quite uniform in terms of ethnicity, although it is estimated that it will gradually become more ethnically diverse due to a growing number of immigrants. The Polish society is one of the fastest ageing societies in the European Union, therefore, the population of senior employees is growing quickly, and with it the need for appropriate management of multi-generational teams. In terms of the LGBTQIA+, some worrying statistics show that approximately two-thirds of transgender employees have not revealed their identity to their colleagues.

Only half of transgender employees who revealed their gender identity in the workplace feel that they have the support of their colleagues and superiors. Last but not least: there is a growing number of neurodiverse employees who bring a different style of thinking, a different approach to work, innovation and creativity to the team. However, many elements of the typical working environment may be challenging for them, therefore it is worth considering solutions which will facilitate their functioning at work and promote their wellbeing.

What DEI initiatives are implemented by Polish employers?

Labour law regulations do not provide for any specific solutions. Therefore, the majority or strategies and initiatives are developed by market practice. Mentoring, support groups (so called Business Resource Groups), scholarship programmes, employee education, training to raise awareness of DEI and elimination of discrimination and unconscious bias, initiatives for social equality, psychological support, quiet rooms, contemplation rooms, flexible forms of work, internal policies e.g. pro-family policies, supporting persons with disabilities, building safe, friendly and inclusive working environment, are becoming more common.

TOPIC 7 / TAX

The effect of changes in judicial practice on Employee Incentive Schemes

Joanna Stolarek
Tax Advisor

Employee incentive schemes based on shares are an effective tool to attract and retain talents. They also motivate employees to long-term involvement in the development of the company. Companies, in particular international ones, are keen to implement them and include employees of their branches in Poland.

It is easy however to get lost in the maze of regulations governing the tax consequences of such schemes. On the one hand, there are very complex and restrictive statutory regulations, on the other hand, there is the increasingly liberal approach of administrative courts. In the last year, many favourable judgements have been passed for participants of such schemes, which means that it is a good moment to analyse the principles of incentive schemes already in place in companies and fight for their preferential taxation. In most cases it will probably not be possible to avoid applying for an interpretation of the tax law. However, the benefits for the company and the employees outweigh these temporary inconveniences. It is worth taking this step!

Employee incentive schemes in Poland

Incentive schemes have become a necessary element of human resource management strategies in many Polish companies. The need to fight for employees, the willingness to attract talents, increase involvement of employees, contribute to their application on an increasingly wider scale, not only by companies with foreign capital, but also by domestic entrepreneurs.

From the point of view of employers, they are an effective tool not only of building involvement, loyalty, and effectiveness of employees, but also creating long-term relations based on trust, safety, and career perspectives. For the employees they are a way of gaining additional income.

Taxation of benefits from incentive schemes

Determining tax consequences of incentive schemes is not easy. On the one hand, we have complicated regulations in the Personal Income Tax Act ("PIT"), on the other hand, we have to know how these regulations are interpreted by tax authorities and administrative courts. Taking into account that these schemes vary significantly, both in terms of their structure and the way of delivering benefits to their participants, the situation gets really complicated.

In simple terms one can say that in a situation in which we receive financial instruments free of charge from a company employing us and then exercise the rights arising from them, the income arising at that time should be qualified to the source under which such a financial instrument was received. In other words, if a manager employed on the basis of a managerial contract has received an option or other financial instrument, at the time of its realisation (i.e. receiving cash settlement or shares) the income will be qualified as income from activities performed personally. Similarly, if such a benefit is received by an employee, the income will be qualified as income from the employment relationship. As a consequence, apart from PIT taxation, it is also subject to social insurance and health insurance contributions. Additionally, it should be noted that in case of incentive schemes based on shares, there will be another point of time when tax obligation arises. It will be the sale of shares.

There is however an exception to the above rule for share-based incentive schemes. In such schemes when certain conditions are met cumulatively, the first (and only) time when the tax obligation arises is when shares are sold. In this case, the income gained at this stage is qualified as capital gains and taxed at 19% tax rate, with no obligation to pay social insurance and health insurance contributions.

In order to benefit from this option, the following conditions must be met:

1. the incentive scheme as part of which the benefits are received, is a remuneration system,
2. it has been formed on the basis of the resolution of the general meeting of shareholders,
3. it has been formed by a joint stock company directly employing its participants or a joint stock company which is its parent company,
4. the participants of the scheme are employees or persons working under civil-law agreements (e.g. mandate agreements, contracts of specific work, managerial contracts),
5. as a result of this scheme the entitled persons, directly/as a result of exercising the rights from derivatives/exercising the rights from specific securities/exercising other property rights, acquire the right to actual taking up or acquisition of company shares in which they are employed or its parent company,
6. the participants receive shares of the company the management board or registered seat of which is located in the territory of the European Union member state, a state which is in the European Economic Area or a state with which Poland has signed a double taxation agreement.

Direct effect – What is to be done?

The structure of this provision indicates therefore, that failing to meet any of the above conditions should result in the lack of preferences involving deferring the moment of arising tax obligation until the date of sale of shares.

For example, if: (i) the scheme were to be organised by a limited liability company, not a joint stock company, (ii) as a result of this incentive scheme its participants were given shares in a limited liability company, rather than shares in a joint stock company, (iii) the scheme were to be organised on the basis of other document than a resolution of the general meeting, (iv) it were offered to persons conducting business activity, not employees and persons carrying out personally performed activities or (v) shares in a company with a registered seat outside the EU or EEA were to be received, its participants could not count of deferring the moment of tax obligation arising.

Beneficial judicial practice

In the last few years administrative courts have issued a number of decisions in which they interpreted the tax consequences of participation in employee incentive schemes in a way beneficial for their participants. In their judgements the courts found that, among other things:

- ✓ receiving shares in itself does not grant any benefits, because they are an asset which generates income in future, i.e. at the time of disposing by way of sale or exchange,
- ✓ in case of taking up shares of a limited liability company at a nominal value lower than their actual value, "the actual income" arises at the time of disposing of these shares,
- ✓ even if the share-based incentive scheme is organised by a company with its registered seat in Hong Kong, with which Poland has not signed a double taxation agreement, the income arises only at the time of sale of shares received as part of the scheme,
- ✓ considering that incentive schemes may be organised not only by Polish entities, but also by foreign entities, the requirement of passing a resolution of a general shareholders' meeting should not be interpreted in a strict way. In other jurisdictions incentive schemes may be formed e.g. by the management board or the board of directors and in such cases it should be allowed that a given scheme is adopted not necessarily by a general shareholders' meeting, but also by a different body which on the basis of a foreign law is entitled to perform such activities,
- ✓ participation in a given incentive scheme of co-operators (i.e. persons with whom the company entered into service agreements) does not rule out the possibility of finding it to be a remuneration system.

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What can a company do

Taking into account the changing approach of administrative courts, more favourable for the participants of incentive schemes, now is certainly a good moment to verify the manner of taxation of benefits arising from incentive schemes adopted in companies and consider whether it is possible to apply more favourable principles. In many cases it will be necessary to confirm such an approach in an individual interpretation of the tax law. However, it is worth doing, as the benefits for the employees and the company definitely outweigh any inconvenience related to this process.

TOPIC 8 / HSE

Reprotoxic substances in the working environment

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Harmful effect of reprotoxic substances on sexual function and fertility in adult males and females, as well as on the development of their offspring resulted in adopting in 9 March 2022 the Directive (EU) 2022/431 of the European Parliament and of the Council amending the Directive 2004/37/EC on the protection of workers from the risks related to exposure to carcinogens or mutagens at work. More than two years later, on 29 June 2024, the regulations of the Directive 2022/431 were implemented in the Polish law. The current classification of chemical substances which imposes on the employers the obligation to undertake protective measures includes carcinogenic, mutagenic, and reprotoxic substances – called CMR substances.

The amendment of the Labour Code gave rise to the issuing of the new Regulation of the Minister of Health of 26 July 2024 on chemical substances, their mixtures, factors and technological processes with carcinogenic, mutagenic or reprotoxic effect in the working environment. A reprotoxic substance has been defined as a chemical substance or a mixture of substances which meets the criteria for classification as toxic for reproduction category 1A (it is known to have produced an adverse effect on reproduction) or 1B (it is presumed to produce an adverse effect on reproduction). Harmful effect on reproduction means that as a result of exposure adverse effect occurs on:

1. reproductive functions and fertility, including among other things, changes in reproductive system of adult males and females, the onset of puberty, production and transport of gametes, normal sexual cycle, sexual behaviour, pregnancy and labour, premature ageing of the sexual system or changes in other functions depending on the normal functioning of the reproductive system;

2. development of offspring, including among other things, disrupting normal foetal development in the period of prenatal development or a child from the birth until reaching sexual maturity, including functional disorders, structural defects, or even death of the developing foetus.

Also reprotoxic substances have been classified as those for which no safe level of exposure of employees' health exists (non-threshold reprotoxic substance) and those for which a safe level of exposure exists (threshold reprotoxic substance).

Measurements and limiting exposure

Employing workers for work the performance of which necessitates exposure to reprotoxic substances imposes on obligation on the employer to perform measurements of these substances in order to determine the level of their concentration.

Preventing the exposure of employees to reprotoxic substances involves mainly replacing them with safe substances or substances less hazardous for the health or safety of an employee. If it is not possible, a reprotoxic substance should be manufactured and used, if technically possible, in a closed system. If for technical reasons the substitution and a closed system are not possible, the employer is entitled to introduce preventive measures limiting the exposure to reprotoxic substances remaining in the working environment and:

1. to decrease the employees' exposure to the lowest technically possible level – in case of a non-threshold reprotoxic substance,
2. to ensure limiting to a minimum the risk related to exposure of employees – in case of a threshold reprotoxic substance.

The employer's measures should always take into consideration current developments in science and technology in the area of its activities, i.e. the use of the latest scientific and technical solutions to the extent allowed by the conditions (including economic conditions) in which the employer operates. Failing to modernise the technological process in spite of having economic means to do so may result in the liability for violation of employees' rights.

Organisational and registration obligations of an employer

In case of using reprotoxic substances the employer is obliged to:

1. limit the amount of a reprotoxic substance in the workplace,
2. maintain the lowest possible number of employees who are or may be exposed to reprotoxic substances,
3. design work processes and technical control measures in such a way as to avoid producing reprotoxic substances in the workplace or limit their production to a minimum,
4. remove reprotoxic substances in the place of their origination, to a local fume hood or a general ventilation system, in an appropriate manner and in accordance with the requirements of health and environmental protection,
5. use appropriate work methods and procedures, including the use of existing procedures of examinations and measurements of reprotoxic substances for an early detection of the risk arising as a result of an unpredictable event or accident,
6. use means of collective protection or – wherever exposure to reprotoxic substances cannot be avoided using other means – personal protective equipment,
7. use hygiene measures, in particular regular cleaning of floors, walls and other surfaces,
8. demarcate areas at risk and use appropriate warning signs, including "no smoking" signs, in places where employees are or may be exposed to reprotoxic substances,
9. establish an action plan for emergencies which may arise from excessive exposure to reprotoxic substances,
10. apply methods of safe storage, handling and transport, in particular by using sealed and clearly and visibly marked containers,
11. apply methods of safe collecting, storage and disposal of waste, including using sealed and clearly and visibly marked containers.

Work in contact with reprotoxic substances must be registered on an on-going basis, as must employees performing such work. Information from the register of work, the performance of which results in the need to remain in contact with reprotoxic substances is forwarded to a relevant state province sanitary inspector and relevant district labour inspector immediately following the commencement of activities and annually, by 15 January for the prior year or at their request. Due to the possible consequences which may become evident many years after the exposure, the period of retaining records is 40 years after the cessation of exposure.

Employers' obligations to employees and their representatives

The employer also has a number of obligations towards workers employed in exposed conditions. These include:

1. informing about packaging, container and installation containing reprotoxic substances, and about the requirements concerning the labelling and warning signs which should be clear and visible;
2. carrying out periodic training in the area of:
    a) health risks that result from the assessment of exposure to reprotoxic substances and additional risk that results from smoking and on the precautions which should be taken in order to reduce this exposure,
    b) hygiene requirements to be met in order to reduce the exposure to reprotoxic substances, including no consumption of food and drink in a place where there is a risk of contamination with reprotoxins,
    c) the need to use personal protective equipment, including protective clothing, and to leave a separate place for the separate storage of daily and protective clothing,
    d) accident prevention measures and actions which should be taken by the employees, including employees on rescue duty, during rescue operations and accidents,
3. providing health checks related to individual employee assessment – in order to determine the state of employee's health in relation to exposure to reprotoxic substances during work,
4. informing, before entrusting work with reprotoxic substance in case of which the value of concentration limit has been established for certain substances in biological material, of the need to carry out health checks related to these limit values.

It is essential that the training is updated on an ongoing basis as soon as the working conditions change or the regulations concerning individual reprotoxic substances are amended.

Employee representatives, like in case of all activities related to occupational health and safety, should be involved in designing and performance of activities preventing the exposure to reprotoxic substances or limiting this exposure, in particular by participation in consultations on the application of requirements set out in EU and national regulations. The employer is obliged to enable them to monitor the application of the requirements set out in specific regulations and inform them on an ongoing basis about exposure to reprotoxic substances, and in case of exposure resulting from breakdowns and other disturbances in the technological process or as a result of repair and maintenance works and in other circumstances – on reasons for exposure which has arisen and on preventative measures which have been or will be taken in order to remedy the situation.

The consequences of the amendment

The amendment of the Labour Code imposed on the employers using reprotoxic substances a number of obligations, both towards the inspection authorities and employees and their representatives. Employers should remember about them not only because of penalisation of neglecting some actions, which is an offence against employee rights, but also due to a serious social problem related to the harmful effects of reprotoxic substances.

As announced by the State Labour Inspectorate and the State Sanitary Inspectorate, one of the key priorities to be taken into account when performing inspection and supervision tasks in 2025, will be evaluation of risks related to reprotoxic substances.

TOPIC 9 / IMMIGRATION

2024 in immigration

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Last year was marked mainly by another amendment of the regulations relating to the citizens of Ukraine who arrived to Poland due to the war. The change in the ruling party brought also modifications in the visa system and the draft immigration strategy for 2025-2030. New draft laws on concerning regulations on the legalisation of employment and residence of foreigners in Poland were presented.

Ukrainian citizens and their family members

On 1 July 2024 the amended Act on assistance for the citizens of Ukraine in relation to the armed conflict in the territory of the country (hereinafter referred to as the special purpose Act) extended the temporary protection until 30 September 2025. Thus, temporary residence documents of Ukrainian citizens (national visas, temporary residence permits) have been extended as will non-visa residence, which does not directly arise from a special status of special purpose act. The suspension of statutory deadlines obliging province governors to carry out the remaining residence proceedings was also similarly extended.

The list of persons allowed to apply for temporary residence permit was extended to include non-working family members with the UKR status. Earlier this possibility was open only to employed persons or persons carrying out business activity.

A new manner of applying and issuing Residence Cards was introduced with granting temporary residence permit for three years at the same time. This variant should be available to persons who made an electronic application and meet the following criteria:

- had the UKR status on 4 March 2024,
- have the UKR status on the day of applying for Residence Card,
- have an uninterrupted UKR status for at least 365 days.

The system of electronic applications is to be launched in 2025. So far appropriate IT infrastructure has not been provided.

The time limit to fulfill the obligation imposed on the employer to submit a notification on the assignment of work to a person covered by the special purpose Act has been shortened from 14 to 7 days. In the amended Act the list of cases when the submission of new notification is required, i.e.:

1. the type of contract between the entity entrusting the work and the citizen of Ukraine has changed or
2. the position or type of work performed has changed, or
3. the working hours or the number of working hours per week or month specified in the notification has been reduced, or
4. the monthly or hourly wage rate specified in the notification has been reduced.

Suspension of the Poland. Business Harbour programme

With effect from 2024, the Ministry of Foreign Affairs suspended the PBH visa programme. This decision was motivated by concerns about abuses in the issuing of and the use of PBH visas. The suspension is to last until solutions are adopted to guarantee appropriate verification of beneficiaries of the programme. At the moment there are no solutions for obtaining visas dedicated to IT industry.

Immigration strategy 2025-2030

In February 2024 a schedule of works on creating a comprehensive, responsible, and safe immigration strategy of Poland for 2025-2030 was presented. Less than a month later a draft amendment of the Foreigners Act was announced. It stipulates among other things:

- changes for persons applying and holding EU Blue Card,
- change in the manner of applying for temporary residence permit from paper to electronic form,
- replacing a stamp placed in a passport to confirm submitting an application with a certificate.

In mid-2024 a long awaited draft law on employing foreigners in Poland was presented. Initially the draft was called an Act on the Access of Foreigners to the Labour Market, however after a few months it was changed to the Act on the Conditions for Admissibility of Employment of Foreigners in the Territory of the Republic of Poland. From the point of view of the employer the most important assumption of the draft seems the elimination of the procedure of the so called labour market test. Instead, the district governors will be given flexibility in deciding on the professions in which the possibility to employ foreigners in a given district will be restricted. The deadline for notifying the province governor about non-starting the employment was shortened from three to one month from the date of expiry of the work permit.

Another draft in line with the assumptions of the government immigration strategy is the draft law on the change of some acts in order to eliminate irregularities within the visa system of the Republic of Poland. Modifications will include in particular the system of issuing visas in order to study at higher education institutions. The regulations concerning verification of visa applications will undergo the following restrictions:

- the obligation to document skills and knowledge necessary to undertake studies in a given field;
- the obligation of a vice-chancellor or a head of a higher education institution to notify the authorities about a person with a student visa failing to undertake studies;
- introduction of a limit on the number of foreigners studying in a given unit of higher education institution.

All of the above drafts have been adopted by the Council of Ministers and in the first quarter of 2025 should come before the Parliament.

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