EMPLOYMENT LAW – UPCOMING CHANGES

- **Alignment of the Labour Code with the GDPR**
- **Amendments to the Act on Employee Capital Plans (PKK's)**
- **Changes to Labour Code provisions concerning, among others, harassment and discrimination, as well as parental benefit rights**
- **Facilitating a better work-life balance for working parents and carers**
- **Transparent and predictable employment conditions across the European Union**
- **Whistleblower protection**

1. The Labour Code and the GDPR

On 4 May, 2019, the Act on amending certain Acts in connection with ensuring the application of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC ("the Act") came into force.

The Act amends the Labour Code by defining the precise scope of personal data which an employer may require from job applicants and employees, as well as the rules for their processing.

A. Basic catalogue of personal data

The new items added to the catalogue of data which an employer may request from a job applicant include:

- contact details provided by that person (previously – their place of residence (address for correspondence)); and
- professional qualifications (the previous catalogue did not include this item at all).

At the same time a new rule was introduced stating that personal data concerning the education, professional qualifications and employment history of the applicant may be requested only when necessary for a specific type of work or a specific position. Unlike the previous catalogue of data, the current catalogue does not allow employers to ask for the applicant's parents' first names.

With regards to employees, the new items in the catalogue of data which an employer may request include:

- residence address (formerly in the catalogue of data regarding applicants);
- type and number of an identity document – where a PESEL number is unavailable (new to this catalogue);
- the personal data of the employee's children and other family members, where such data is necessary due to their claiming specific benefits provided for by employment law (previously this was limited to the employee's children's first names, surnames and birth dates); and
- education and employment history, if there were no grounds to request the job applicant to provide them.

B. Other personal data

Employer's request

- The employer may request that other data be provided only when necessary to ensure the exercise of one's rights or to fulfil a legal obligation (this concerns, among others, information related to criminal offences and convictions, as specified in Article 10 of the GDPR).

Employer's request or the applicant's or employee's initiative

- An employer may process other personal data than those described above –**with the consent of** the applicant or employee (at the employer's request or at the initiative of the applicant or employee themselves). However, this does not apply to information concerning criminal offences or convictions (as specified in Article 10 of the GDPR).
- If the applicant or employee refuse consent to provide the above data (or if they withdraw their consent), this may not result in any negative consequences towards them.

Sole initiative of the applicant or employee

- It is also possible to process the personal data falling into the special categories of personal data specified in Article 9(1) of the GDPR (such as data revealing racial or ethnic origin, trade union membership, data concerning health, biometric data) **with the consent** of the applicant or employee, but only where such data are provided at the initiative of the applicant or employee. Moreover, such special categories of personal data may only be processed by persons with the employer's written authorisation to process such data (with such persons being under a duty to keep this data secret). Likewise, the lack of an applicant's or employee's consent to provide such data (or if they withdraw their consent) may not result in any negative consequences towards them.
- An employer's processing of an employee's **biometric data** (which are included in the above catalogue) is also permitted where obtaining such data is necessary in order to control access to particularly sensitive information, the disclosure of which could expose the employer to harm, or access to premises requiring special protection. Up till recently, this issue has been quite controversial, especially in relation to large manufacturing plants, where access to secure areas required authorisation based on the employee's biometric data, obtained via a fingerprint scanner.

C. Video surveillance rules

The Act will also make the recently introduced video surveillance rules more precise:

- Video surveillance of areas made available to the company's trade union organisation is strictly prohibited.
- Video surveillance of sanitary facilities requires the prior consent of the company's trade union organisation, and if no such organisation exists – from the employees' representatives.

D. Employee Social Benefit Fund – amendments:

The Act will also introduce the following amendments to the Act on Employee Social Benefit Funds:

- Personal data for the purposes of claiming benefits or a discount for services, and a subsidy from the workplace Employee Social Benefit Fund, and for the purpose of determining their amount, are to be provided in the first place in the form of a declaration; the employer may then demand that proof of the above personal data be provided, to the extent necessary for their confirmation;
- Personal data concerning health (Article 9(1) of the GDPR) may only be processed by persons with the employer's written authorisation to process such data (with such persons being under a duty to keep this data secret);
- Employers shall process the above data only for the time necessary in order to provide the benefit or the discounted service, or to provide a subsidy from the Employee Social Benefit Fund, and to determine their amount, as well as for such time as necessary to exercise one's rights, or to pursue claims;
- Employers shall review the above personal data at least once per calendar year in order to establish whether their continued storage is needed; employers shall erase any personal data which does not need to be stored for the purposes specified in points (a) and (c).

2. Amendments to the Act on Employee Capital Plans (PPK)

On 6 June 2019, the President signed the Act amending the Act on Employee Capital Plans (PPKs), which **removes the cap on PPK contributions, which used to be equal to 30 times the contribution assessment basis, and also introduced several solutions aimed at simplifying the entire PPK system**. Importantly, the amendments

- extends the definition of employed persons (for the purposes of the Act on Employee Capital Plans) to include persons on child-rearing leave, claiming maternity benefit, or benefits equivalent to maternity benefit , which removes the previous doubts in the law's interpretation.
- standardizes the timing of contributions from salaries made by employers. With these new changes, contributions from salaries will be made by the 15th day of the month following the month in which they were assessed and withheld, regardless of the period for which the salary is paid. The Act will enter into force 14 days from its publication.

3. Changes to the Labour Code concerning mobbing and discrimination, as well as parental benefit rights, etc.

The Act of 16 May amending the Labour Code and certain other Acts was published on 6 June, 2019. This Act will enter into force on 7 September, 2019.

In accordance with the Act, **employees will enjoy greater protection in cases of workplace discrimination and mobbing**, i.e.:

- Employees will be entitled to claim damages from their employer due to being the victim of mobbing (previously this was possible only when the employee terminated their employment contract due to mobbing), with the minimum amount of damages remaining the same, that is, it will remain equal to the employee's minimum salary; regardless of whether mobbing results in a medical disorder, the employee will remain entitled to seek compensation from their employer;
- The catalogue of discriminatory practices will be expressly opened, which means that any unequal treatment of employees, without an objective reason to do so, will be considered to be discrimination.

Furthermore, the Act introduces **a range of additional entitlements for employees, and their other immediate family members, who are on parental leave**, including:

- Protection against the termination of employment contracts during parental leave, on identical conditions to those applicable to mothers taking such leave;
- A right to go on leave immediately after returning from parental leave;
- A right to receive their salary for the entire period they were not working, if the employee is reinstated;
- Broader protections in the event of the termination of a fixed-term or probationary employment contract, meaning that if such contracts are unlawfully or unreasonably terminated, employees will have the right to seek not only damages, but also have their termination deemed ineffective, or be reinstated on the same conditions as earlier.

The Act extends the time limit (to 14 days) for employees to:

- submit a request for the rectification of their employment separation certificate, and
- file a demand for the rectification of their employment separation certificate with the labour court.

Failing to issue an employment separation certificate within the prescribed time limit is now subject to a fine of between PLN 1,000 to PLN 30,000.

Furthermore, the Act introduces a new provision under which employees may file a motion with the courts to require their employer to issue them an employment separation certificate, if the employer has failed to issue such a certificate themselves.

The Act has also amended the wording of the provisions on the limitation period for claims regarding an employment relationship, bringing them into alignment with the dominant trends in both case-law and practice, and with the corresponding provisions of the Civil Code. Therefore, the Act confirms that it is permissible to seek claims after the expiration of the limitation period, however, the other party may then invoke the limitation period as an objection to these claims.

4. Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU

On 13 June 2019, the Council of the European Union adopted the abovementioned Directive, **meaning that more changes to the Labour Code can be expected in the near future**.

The objective of the Directive is to promote work-life balance, as well as to ensure equal opportunities for men and women in the labour market. The Directive, once implemented, is expected to lead to a situation where men will use their parental leave entitlements more extensively than before, and where women will dedicate more of their time to employment.

One of the major changes will be the **partial non-transferability of parental leave**.

According to the Directive, every employee will have an individual right to four months parental leave, to be taken before the child reaches a given age, up to the age of eight. This age will be determined by each Member State in a way that each parent will be able to exercise their right to parental leave effectively and on equal terms.

A period of two months of this leave is non-transferable, which means that such a minimum period of leave should be used by both the child's mother and father and, if not taken, it will be lost.

The Directive also provides for **paternity leave** of up to 10 working days, to be taken on the occasion of the birth of the employee's child, with particular Member States being able to decide if fathers will be able to take part of such leave before the child's birth.

The Directive also provides for a **carers' leave** of up to 5 working days per year, to enable workers to personally care for, or support, relatives or persons they share their household with (the Directive does not specify that such a person must be the employee's relative), who require significant care or support on account of important medical reasons, which are left to the Member States to determine.

Another benefit set out in the Directive is **time off of work due to force majeure of 'Acts of God'** – such as for urgent family reasons resulting from a disease or an accident, and where the employee's immediate presence is required. Member States may limit employees' right to such time off to a specific period per year or to specific cases.

According to the Directive, Member States are also required to adopt the necessary measures to ensure that employees with children up to a particular age (at least up to the age of 8) and carers have the right to apply for **flexible working arrangements** to enable them to provide such care (e.g. through remote working arrangements, flexible work schedules, or a reduction in working hours). The duration of such flexible working arrangements may be "reasonably" limited, and Member States are also entitled to make them dependent on the employee's previous period of work or length of service (up to a maximum of 6 months).

The Directive must be transposed into national law within three years of the Directive coming into force.

5. Transparent and predictable working conditions for all European Union Member State citizens

On 13 June 2019, the Council of the European Union voted in favour of a Directive aimed at creating more transparent and predictable working conditions.

The Directive assumes, among other things, that:

- there will be a new catalogue of information which employees should be provided with (for example, information about the duration and terms of a probationary period, if any, training courses offered by the employer, if applicable, as well as the terms of overtime work and overtime pay);
- probationary periods will be limited to a maximum of six months (longer probationary periods will be allowed where justified, and probationary periods may be extended by the duration of any of the employee's absences during that period);
- employees with at least six months' service with the same employer, who have completed the required probationary period, will be entitled to request a form of employment with more predictable and secure working conditions, if it is available, and to receive a written response with justification.
- Following the Directive's implementation into Polish law, employers will not be able to prohibit their employee from taking up employment with other employers outside their scheduled working hours with that employer, except in cases where this is justified by the need to protect trade secrets or the existence of a conflict of interest.

After the Directive comes into force, Member States will have three years to introduce the relevant amendments to their national laws.

6. The "Whistleblowing Directive"

On 16 April, 2019, the European Parliament adopted the Directive on the protection of persons reporting on breaches of Union law.

The aim of this new regulation is to improve the enforcement of EU laws and policies in areas such as public procurement, environmental protection, product and transport safety, consumer protection, and personal data protection.

The regulation primarily provides for the imposition of an obligation on Member States to establish internal and external channels for the reporting of irregularities, and developing internal procedures on receiving and following-up on such reports.

One of the elements which will enable the implementation of these new solutions will be the designation of authorities competent to receive, handle and follow-up on the reports. Additionally, the Directive will require that measures be implemented to protect persons reporting breaches of EU law, and prohibiting retaliation against such persons.

According to the proposal, Member States will be required to enact or adopt the laws, regulations and administrative arrangements necessary to comply with the Directive by 15 May, 2021.

Should you have any questions, please do not hesitate to contact the lawyers in our employment law team:

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