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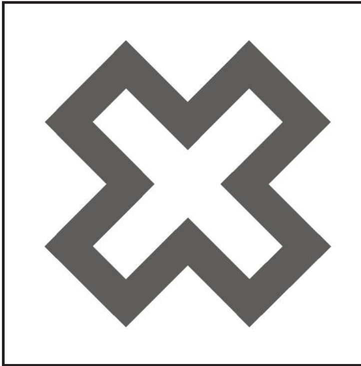
newsletter
labour and employment law
WARDYŃSKI+ PARTNERS•
4-6/2018

I Changes in law



Surveillance at the workplace - changes in the Labour Code

By virtue of the Act of 10 May 2018 on the Protection of Personal Data, provisions governing the issue of surveillance in the workplace were introduced to the Labour Code. These regulations confirm that surveillance of employees is acceptable, but its application must comply with restrictions provided for in the Labour Code.

Video surveillance is allowed only to ensure personnel safety, protect property, control production and maintain the secrecy of information which, if disclosed, could expose the employer to damage. Whereas e-mail surveillance can be introduced to ensure such organization of work which would provide for the best use of working time and the appropriate use of work tools entrusted to the employee.

In principle, the legislator excluded the possibility of monitoring personnel's private premises such as toilets, dressing rooms, canteens or smoking rooms. Neither is the employer allowed to install video cameras in premises which he made available to the local trade union organization. As mentioned earlier, there is an exception to these regulations in a situation where video surveillance in these premises is necessary to ensure personnel safety, protect property, control production and maintain the secrecy of information which, if disclosed, could expose the employer to damage. Then, however, the employer must take appropriate measures necessary to protect the dignity, personal rights and the principle of freedom and independence of trade unions.

The employer may process videotaped images only for the purposes for which the material was collected. Recordings are kept for a period not exceeding three months, after which they should be destroyed. The acceptable period of storage of recordings may exceptionally be extended when they happen to serve as evidence in legal proceedings, but not longer than until the final conclusion of the proceedings.

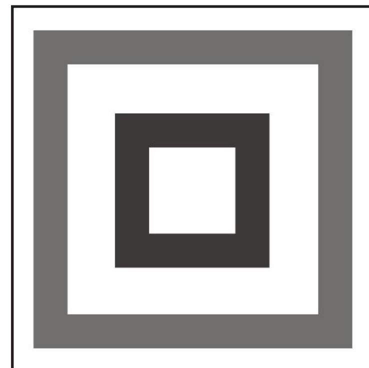
Every employer introducing surveillance should:

- Specify in the collective labour agreement, work regulations or announcement the purpose, scope and manner of surveillance implementation;

- Inform employees about the implementation of surveillance not later than two weeks before it is put in place;
- Distribute among personnel a notice about the purpose, scope and manner of surveillance implementation;
- Indicate in a visible and legible manner which premises and areas are monitored, for example by way of voice announcements or graphic signs.

Importantly, surveillance regulations do not provide for a transitional period for employers who have started video surveillance before these regulations were introduced, which is why employers in this situation should adapt their internal regulations and practices to the binding requirements as soon as possible.

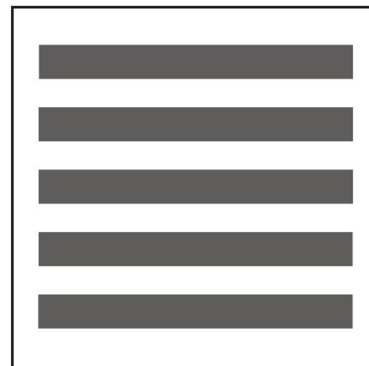
The obligation to maintain a register of employee data processing activities



The General Inspector for Personal Data Protection (currently - the President of the Office for Personal Data Protection) shared the interpretation of the provisions of GDPR adopted by the Article 29 Group. According to this interpretation, the exemption from the obligation to keep records of personal data processing activities provided for in Article 30.5 of GDPR does not apply to employers processing data related to their personnel, even if the employing establishment has less than 250 staff. Employers are therefore obliged to maintain a register of employee personal data processing activities regardless of how many people they employ.

The register should indicate, inter alia, the purpose of processing, describe the categories of data subjects and personal data, inform on the recipients of that data and the length of its storage, and provide a general description of the applied security measures.

The Act of 12 April 2018 on the Principles of Obtaining Information about the Criminal Record of Candidates for Employment and Employees of Entities Operating in the Financial Sector



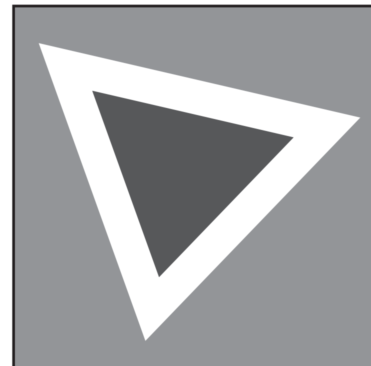
As of 27 June 2018, employers in the financial sector have the possibility of verifying whether their current employees and candidates for employment have a criminal record. This possibility applies to employment in positions related to property management, access to legally protected information, decision-making that involves a high risk of the loss of property by a financial institution or third parties, or of causing other significant damage to the employer or a third party. According to the new law:

- The employer may request candidates for employment and

current employees to submit a declaration of not having a criminal record or to provide relevant information from the National Register of Criminal Offences;

- The right to request criminal record information is limited to information on offenses specified in the Act;
- The employer will have the right to request criminal record information from an employee not more frequently than once every 12 months, and also whenever there is a reasonable suspicion that the employee has been convicted of a type of offence listed in the statutory catalogue;
- A failure to provide the above information may be cause for not being hired or for the employer terminating with notice the employment contract or another agreement binding the parties;
- When the employer requests information concerning the criminal record, the candidate for employment or the employee applies to the National Register of Criminal Offences for this information, and the employer immediately reimburses him the equivalent of the fee incurred on this account.

II Ongoing work on…



Lower social insurance contributions by the self--employed

On z27 June 2018, the Council of Ministers adopted a bill on the amendment of certain laws for the purpose of reducing the rate of social insurance contributions by natural persons running small businesses. The bill provides that, as of 1 January 2019, lower contributions will apply to individuals running one-person businesses whose annual income does not exceed 30 times the minimum wage, where:

- They do not benefit simultaneously from the preferential contribution assessment base for persons starting a business (so-called "small ZUS");
- They conducted a non-agricultural business in the previous calendar year for at least 60 days; and
- They are not engaged in a non-agricultural business for the benefit of a former employer.

Directive on the protection of whistle-blowers

On 23 April 2018, the European Commission published a proposal for a directive entirely devoted to the protection of whistle-blowers (COM (2018 218 final, 2018/0106 COD). It provides the minimum standards of protection of persons who report information on unlawful acts or abuse of rights obtained in connection with their employment in the public or private sector. Reported infringements must concern specific areas of law listed in the draft directive, including:

- Public procurement
- Financial services, money laundering, terrorism financing
- Product safety
- Transport safety
- Environmental protection
- Nuclear safety
- Food, feed and animal health safety
- Public health
- Consumer protection
- Protection of privacy and personal data, network and information system security
- Violations affecting the financial interest of the community

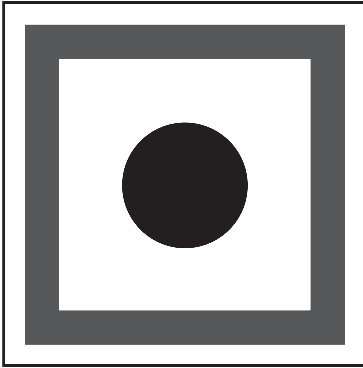
The draft provides that, in principle, irregularities should be reported first and foremost within the organization, and in certain cases to the empowered authorities.

According to the draft, a person who reported or publicised information while being justifiably convinced that it was true at the time of its reporting or publicizing, and was within the scope of the application of the directive should not bare any negative consequences on this account. In the event of a dispute, it would be the employing entity that would be burdened with proving that its action against the whistle-blower was not taken in retaliation for his reporting but was objectively justified.

In addition, the draft directive requires Member States to ensure that entities in the public and private sector will put in place internal procedures for reporting and clarifying irregularities. This obligation would apply to private sector entities employing at least 50 people, as well as smaller ones which achieve a certain level of turnover or operate in specific industries. The draft directive provides for the conditions that must be met by such procedure, including the need to ensure the confidentiality of the whistle-blower's report, specification of the units designated to examine reported cases and a reasonable time to provide feedback to the whistle-blower - not longer than three months from the date of the report.

The draft assumes that the implementation of the directive into national law should take place before 15 May 2021.

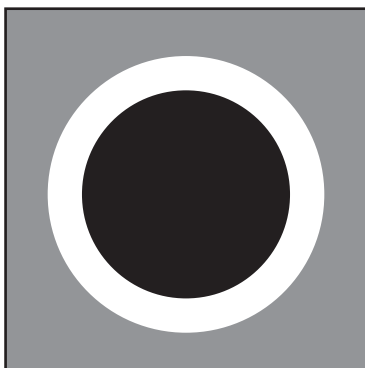
III From the court room



Compensation for unjustified or illegal termination of the employment contract cannot be higher than remuneration for a period of three months, even if the employee benefitted from a longer notice period - the judgment of the Supreme Court of 7 November 2017, case no. I PK 308/16

The plaintiff questioned the legitimacy of termination of his employment contract and on this account demanded compensation from the former employer in the amount of six months' his remuneration. Indeed, according to the collective labour agreement binding in the workplace, the period of notice of termination of his employment contract was six months. The courts of both instances found no grounds to award damages to the plaintiff in an amount higher than three months of his remuneration.

The Supreme Court considered this position to be correct, even though in the past this issue was not uniformly settled. It was accepted in older case law that, under Labour Code Art. 45 in connection with Labour Code Art. 47 [1] § 1, the employee was entitled to remuneration for the period of notice, even if on the basis of the collective labour agreement a longer than statutory notice period applied to the employee. However, the Supreme Court accepted the position presented in more recent rulings, that the upper limit of compensation for unjustified termination of the employment contract was equal to remuneration for a period of three months. According to the court, the semantic wording of the provision was also confirmed by its systemic interpretation – indeed, compensation for an unlawful termination of employment is not related to the actual damage suffered by the employee and applies regardless of the occurrence of that damage. Consequently, it is a flat rate amount set within statutory boundaries (from a minimum of two weeks' to a maximum of three months' remuneration).



When changing employers, it is reasonable to verify the scope of the competition ban - the Supreme Court decision of 10 May 2018, case no. II PK 319/17

The plaintiff concluded a post-employment non-competition agreement with his employer for a period of six months after termination of the employment relationship. The agreement provided for a ban on engaging in competitive activities in the countries where the V. International Holding Group was active. As a result of a takeover, the company which has been the em-

ployer moved to another capital group, while the scope of its operations coincided with the scope of activities conducted in the previous group. However, as a result of corporate changes, the V. International Holding Group ceased to operate in Poland.

Still before the end of the competition ban, the plaintiff began operating a competitive business in Poland. As a result, his former employer refrained from paying compensation under the non-competition agreement. The employee in turn demanded compensation, indicating that he did not violate the ban when he started to operate in Poland.

The courts which heard the case agreed with the former employee indicated that he had not violated the ban. The Supreme Court, despite refusing to examine the last resort appeal, interpreted the regulations on the prohibition of competition, noting that, in the case of a vague determination of the scope of the competition ban, a question may arise whether the former employee is bound by the competition ban only in that field of the employer's activity where he has particularly important information, or whether he is obliged to refrain from competition in all spheres of activity of the former employer. The Court emphasized that, despite the corporate changes on the side of the employer, the parties have not made any changes in the non-competition agreement, and a change of the employing entity is not a base for making use of a broad interpretation of the ban.

This newsletter is provided free-ofcharge to clients of Wardyński & Partners law firm. The contents are current at the time they were sent for publication. However, this does not constitute a legal advice service and should not be used as the sole basis for making business decisions.

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