



LEGAL UPDATE

WEINHOLD LEGAL

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The information in this newsletter is correct to the best of our knowledge and belief at the time of going to press. Specific advice should be sought, however, before investment and other decisions are made.

For further information, please contact your usual partner/manager or an attorney with the Weinhold Legal labour law team:



Milan Polák
Partner



Tereza Kadlecová
Attorney



Eva Svobodová
Attorney

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INTRODUCTION

A big shake-up is in store for labour law in 2012, with most key regulations undergoing quite major changes.

No doubt the most significant change is the comprehensive Labour Code amendment that will also affect, inter alia, several key provisions of the Employment and Labour Inspection Acts. A law implementing Ministry of Labour and Social Affairs (MLSA) austerity measures has also come into force. All of these legal regulations are amended effective 1 January 2012.

COMPREHENSIVE LABOUR CODE AMENDMENT

Act No. 365/2011 Coll. is a comprehensive amendment of Act No. 262/2006 Coll., the Labour Code, as amended (the “LC”), primarily pertaining to the following areas:

RELATIONSHIP TO THE CIVIL CODE

The LC amendment explicitly defines the possibility of invoking the Civil Code in relations governed by labour law. In essence, the relationship between both codes is based on the **principle of subsidiarity** (i.e. if the LC fails to address a particular issue, civil law regulations may be applied). However, the LC does define situations in which such subsidiary use is not possible.

RELATIVE INVALIDITY

The **consequences of defects in legal acts** is another conceptual matter **to be addressed**. In this respect, the LC continues to give precedence to the principle of relative invalidity (defective legal acts are considered valid if the aggrieved party fails to seek recourse for the respective defects). Nonetheless, the amended LC greatly limits the application of this principle by stipulating a number of exceptions where absolute invalidity is applied (which

the court must consider even if no petition has been filed). As these exceptions have been worded rather vaguely, this is not a welcome or user-friendly solution.

The changes also apply to the **consequences of deviation from the (written) form** of legal acts. For example, the LC newly stipulates that if a contract of employment was not executed in writing, its invalidity may only be invoked if contractual performance has not been initiated, i.e. if the employee has not started work. The same applies for employment contract “addenda” executed orally. Another important change is the stipulation of an obligatory written form for unilateral legal acts, i.e. employment cannot be terminated orally or by telephone during the probation period.

PROBATION PERIOD

Another relatively major innovation is the possibility of negotiating a trial period of a maximum duration of **6 months** in the case of a “senior” employee, which the LC identifies as an employee who has at least one subordinate (§ 11 of the LC) and ranks at the top of the organisational management chain. The maximum probation period duration will continue to be 3 months for other “regular” employees. Nonetheless, the LC introduces a new rule that the probation period may not be agreed for longer than half the agreed duration of the employment, and is to be extended by a period equal to any full-day impediments to work or full-day holidays.

TERMINATION OF EMPLOYMENT

The LC introduces **new grounds for dismissal**: especially gross breach of a medical treatment regimen by an employee. Given the entirely unclear definition of the required degree of regimen adherence, the practicality of this reason for dismissal remains open to discussion.



There will also be a **change in the legal treatment of severance**, the amount of which will depend on employment duration. Employees should be entitled to severance of one, two or three average monthly earnings contingent on whether employment has lasted less than 1 year, from 1 to 2 years or more than 2 years (in the case of a special working time account, it is increased three-fold). The severance amount is determined as a minimum, which the employer is naturally free to increase.

The third important change in this area deals with **notice served by an employee in connection with the transfer of the rights and obligations** of a relationship subject to labour law (see below).

MODERATION RIGHT

The LC returns to the modified treatment valid before 2007 and empowers **the court to reduce salary compensation pursuant to an employer petition**, if the employment was invalidly terminated and no work was assigned and if the entire period for which the employee should be eligible to receive salary or wage compensation exceeds 6 months. Thus a court may, if petitioned by an employer, proportionately reduce the obligation to pay salary or wage compensation for a further period, primarily with regard to: whether the employee was employed elsewhere in the interim; the nature of the work performed; the amount of earnings, and the reason the work was not commenced. However, the court does not have the option to grant zero compensation, as was previously the case.

The possibility of moderation shall only apply in cases of invalid employment termination based on a legal act (typically, by letter of dismissal or immediate termination) performed no earlier than the effective date of the amendment, that is 1 January 2012 or later.

EMPLOYMENT FOR A DEFINITE PERIOD

It shall now be the case that the duration of employment for a definite period between the same contracting parties **may not exceed 3 years** and from the inception date of the first employment for a definite period may be **repeated twice at most** (recurrence shall also be understood to mean prolongation).

If a period of 3 years has elapsed since the end of prior employment for a definite period, then such previous employment for a definite period shall be disregarded.

Moreover, **the current exemptions** – compensation for a temporarily absent employee, serious operational reasons on the part of the employer or reasons involving the special nature of the work an employee is to perform – **are abolished**.

Recommendation: The tactic used in employment negotiations with “stand-ins” for employees on maternity or parental leave must change.

CONTRACT TO COMPLETE A JOB

A key change in the LC is an increase in the potential scope of a job for which a contract may be executed to **300 hours**. At the same time, however, a ceiling is introduced for monthly income in a contract to complete a job – if agreed remuneration exceeds this ceiling by ten thousand crowns, health and social insurance shall have to be paid on the amount. The contract must now also indicate the period for which it is being executed.

WORKING TIME

The LC newly defines even and uneven distribution of working time. With an **even distribution** of working time, the employee will always have the same number of weekly work hours.

With an **uneven distribution** of working time, the employee will work varying numbers of hours in individual weeks, though the average weekly working time may not exceed a set number of weekly work hours, or shorter work hours during an adjustment period of at most 26 consecutive weeks (or up to 52 consecutive weeks, where so stipulated in a collective agreement).

In the case of both the even and uneven distribution of working time, a work shift may not exceed 12 hours.

A more precise **definition of an employee working at night**, i.e. an employee who works at least 3 hours of his shift during night hours in a period of 24 consecutive hours on average at least once a week for a maximum period of 26 consecutive weeks, is introduced.

Records of working time – an employer is obliged for every employee to maintain

records of working time that indicate shift start and end, overtime work, night work and so on. It will no longer suffice merely to note that an employee worked 8 hours a day.

Flexible working time – basic working time may now explicitly be set in multiple segments when the employee is obliged to be at work (e.g. 9:00-12:00 and 14:00-16:00). Shift length may not exceed 12 hours and the average weekly working time must be completed in an adjustment period set by the employer, which may not be longer than 26 weeks (or 52 weeks, where so stipulated in a collective agreement).

Recommendation: Further taking into account recent Czech Supreme Court case law dealing with arrangements concerning working time distribution, we can recommend that all provisions specifically regulating the length and manner of working time distribution be deleted. Conversely, we recommend negotiating another (shorter) deadline by which the employer must notify the employee in writing of the working time distribution (pursuant to the LC, this deadline is at least 2 weeks, and 1 week in the case of a working time account, which is a relatively long period that may not correspond to the operational needs of the employer).

Working time account – an employer will no longer be obliged every week to report the difference between the set weekly working time and time actually worked. Moreover, where so agreed in the collective agreement, overtime work in a scope of up to 120 hours may be counted as working time in the immediately following adjustment period. In such a case, however, the employee must receive a fixed monthly salary of at least 85% of that employee's average earnings.

OVERTIME PAY

The amendment broadens **the possibility of negotiating salary taking into account an agreed scope of overtime** for all employees. A salary that reflects any overtime worked may be agreed in a maximum scope of 150 hours of overtime per calendar year for ordinary employees, and for senior staff (§ 11 of the LC) within the total scope of overtime work (roughly 416 hours a year).

Recommendation: Renegotiate salaries reflecting possible overtime in compliance



with the new regulation. This cannot be applied to employees whose salary is determined by a salary assessment.

TRANSFER OF RIGHTS AND OBLIGATIONS

Rights and obligations arising from relations governed by labour law will continue to be transferred in the same cases as to date, though the actual transfer process will be modified as follows:

- § **rights and obligations under a collective agreement** will transfer to the accepting employer for the effective period of the collective agreement, but only until the end of the following calendar year;
- § there is a newly **specified deadline for information obligation fulfilment** – the employer will be obliged to inform affected employees or their representatives about a transfer no less than 30 days before its effectiveness;
- § **the employee is entitled to severance**, if the employee serves notice within 2 months of the effective date of the transfer or if the employment is terminated by agreement by this date, on the condition that a court petitioned by the employee has lawfully ruled that working conditions were compromised as a result of such transfer;
- § the right of **an employee who wishes not to transfer to a new employer** unilaterally to terminate employment by serving notice, where the employment shall end by no later than the day preceding the day on which the transfer becomes effective.

TEMPORARY ASSIGNMENT

The Labour Code newly distinguishes between a temporary assignment as agency employment and a temporary assignment between employers (§ 43a). In the case of agency employment, there are no substantive changes from the perspective of the LC. The amendment provides for an employer to temporarily assign an employee to another employer **with no need of a license to broker employment** under the following conditions:

- § a written temporary assignment agreement is executed between the employee and the employer and contains the name of the accepting employer, the start date of the temporary

assignment, the type or place of work performed and the period for which the temporary assignment has been negotiated;

- § such an agreement may not be executed less than six months after the employment start date;
- § the working and salary conditions of an employee's temporary assignment may not be inferior to what these conditions are or would be for a "comparable" employee;
- § no consideration may be provided (salary and travel expenses may be refunded); under a strict interpretation of the LC, it would not be possible to refund social and health insurance or salary compensation provided for vacation time or impediments to work.

Unfortunately, the new treatment again fails to address the relationship between two employers, does not address liability and insufficiently addresses expense reimbursement.

NON-COMPETE CLAUSE

It will now be possible to negotiate a non-compete clause **during the probation period**.

Further, **the minimum compensation** that may be negotiated in a non-compete clause **is reduced** from the average monthly earnings to one half of the average monthly earnings for every month of non-compete clause duration.

As an employer may only terminate a non-compete clause during the course of employment, such termination will be problematic in the case of employment termination by the employer with immediate effect and employment termination by the employee during the probation period.

VACATION

Should an employee fail to use the vacation entitlement accrued for a calendar year by 30 June of the following calendar year, the employee shall have **the right to determine the vacation time**, and will be obliged to inform the employer in writing of the use of the vacation time at least 14 days in advance, if the parties do not otherwise agree. The entitlement to unused vacation does not expire, though payment in lieu of time off may only be made in the case of employment termination.

EMPLOYMENT ACT AMENDMENT

Ban on under-the-table employment

The definition of illegal work will revert to the previous definition valid until 31 December 2006 and once again include the performance of independent work by a natural person outside of employment. In the case of the use of commercial and civil contracts for the performance of work to be performed as employment or based on agreements for the performance of work outside employment, the "employer" risks a fine of CZK 250,000 to CZK 10,000,000 and the "employee" a fine of up to CZK 100,000.

Ban on employment of foreigners without residency permits

As part of the implementation of Directive 2009/52/EC, **the definition of illegal work** shall be broadened to include a natural person-foreigner performing work for another without a valid residency permit for the Czech Republic, where such permit is required (also "**illegal work of a foreigner**"). Facilitating this form of illegal work is subject to:

- § a fine of up to CZK 10,000,000, though no less than CZK 250,000;
- § a ban on the provision of a contribution for publicly beneficial work, a purpose-tied job creation contribution, a bridging allowance, a start-up contribution and a contribution for a change-over to a new business program for a period of three years from the legal effectiveness of imposition of the fine for illegal work of a foreigner;
- § a ban on participation in public tenders for a period of three years from the legal effectiveness of imposition of the fine for illegal work of a foreigner;
- § the obligation to return any of the foregoing contributions paid within 12 months of the effective date of the decision to impose a fine for illegal work of a foreigner.

Persons participating in the illegal work of a foreigner will now be liable for fine payment.

Changes in agency employment

Employment agencies may not temporarily assign foreigners who are blue or green card holders; this ban shall also apply for



types of work set out in Regulation No. 64/2009 Coll. **It will now be the case** that agencies **may not temporarily assign foreigners** who have been issued a work permit or **persons with disabilities**.

A **new insurance regulation** addressing guarantees for employment agency bankruptcy insurance is designed to ensure salary payment in an amount of at least three times the average net monthly earnings of all employees who have been or are to be temporarily assigned. Under a transitory provision, insurance policies executed per the current legislation shall remain in force.

Public service

As of the third month that unemployment benefits are drawn, job seekers will be obliged to perform up to 20 hours a week of public service, if so required by a Labour Office.

Employing persons with disabilities (OZP)

The new legislation should limit the abuse of support for employing OZP.

The category of physically disadvantaged persons as OZP is abolished (nevertheless, a decision to recognise a physically disadvantaged person as an OZP issued before the effective date of this amendment will continue to be valid for the duration of the period for which it was issued, though no later than 1 January 2015). In future, only natural persons recognised as disabled by a social security authority will be deemed persons with disabilities.

The amendment **abolishes the institute of the sheltered workshop** (jobs that will be considered as sheltered work for OZP in compliance with transitory provisions); the institute of sheltered work remains. The amount of the contribution to the establishment of sheltered work is not changing, but the employer shall have to commit to keep such positions filled for a period of 3 years.

Facultative compensation – employers may meet their obligation to employ OZP

by purchasing products or services from an employer with at least 50% OZP, while such employer may only provide such facultative goods or services in a scope not exceeding 36 times the average annual Czech wage for every adjusted OZP employee (approx. CZK 830,000). In practice, this means any employer whose workforce comprises more than 50% OZP may provide facultative compensation, for example in an amount of CZK 8,300,000 for a total number of 10 OZP. It will be difficult for an employer to ascertain whether purchased services or goods fall within this statutory limit for facultative compensation.

Control activities

Control activities in the area of unemployment will be transferred from the Labour Authority to the State Labour Inspection Authority and its regional offices.

LABOUR INSPECTION ACT AMENDMENT

If an employer fails to execute an employment contract, a contract to complete a job or a contract for work, the Labour Inspection can impose a fine of up to CZK 10,000,000.

MLSA AUSTERITY MEASURES

Act No. 364/2011 Coll. amending some laws connected with austerity measures within the remit of the Ministry of Labour and Social Affairs introduces the institute of **financial compensation of employees who are not duly paid severance**. If severance is not paid to an employee at the date of employment termination or the first employer pay-day following employment termination, the Labour Office shall pay the employee financial compensation commensurate with a multiple of the severance entitlement period, generally an amount of 65% of the average net monthly earnings of the employee. The locally competent regional office of the Labour Authority will decide on the payment of financial compensation. If such compensation is paid, the Labour Authority will inform the respective employer within 3 business days and the employer will be obliged to reimburse

the Labour Authority within 10 business days of notification, **even if the employer has paid the owed severance in the interim**.

COMMERCIAL CODE AMENDMENT

This amendment enables concurrent execution of the roles of statutory body member / statutory body ("statutory body") and employee of a given company.

The statutory body may authorise another person to manage company business, while this business management may be performed in a relationship subject to labour law and by an employee who is also a company statutory body. Even where an employee is authorised to manage the business, such authorisation shall not prejudice the Commercial Code-stipulated statutory body liability for breach of the obligation to execute this role with due diligence.

If a statutory body performs a part of business management based on employee authorisation, the salary should in this case be negotiated or set by the company body whose powers include deciding on statutory body remuneration (most often, the General Meeting). The amendment stipulates a list of activities that may not be delegated in the performance of the role of statutory body (e.g. participation in a statutory body meeting, deciding on key business strategies and other tasks enjoined by law to the statutory body alone).

There will also be a change in the tax and social security regulations: statutory body remuneration (including for Board of Directors members of a joint stock company) will mimic employee salaries, i.e. will be subject to deductions for social insurance premiums and will represent a tax deductible expense of the company.

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