Legal Update

July 2019

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.

Banking and Financial Services:
Pavel Jendrulek, Ondřej Havlíček

Mergers and Acquisitions:
Daniel Weinhold, Dušan Kmoch, Dalibor Šimeček

Litigation / Arbitration:
Milan Polák, Ondřej Havránek, Zbyšek Kordač

Information Rechnology and Intellectual Property:
Martin Lukáš, Jan Turek

Competition Law / EU Law:
Tomáš Čermák

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Ondřej Havránek, Anna Bartůňková

Real Estate:
Pav Younis, Václav Štraser

eSicknotes and other changes to sickness insurance as of 2020

On 13 June 2018, the Government submitted a bill amending the Act on Sickness Insurance and other related laws (the "Amendment") to the Chamber of Deputies. The Amendment was approved by the Chamber of Deputies as Act No. 164/2019 Coll. and signed into law by the President on 18 June.

The most significant change introduced by the Amendment is a mandatory electronic procedure for reporting temporary incapacity for work and quarantine, the so-called eSicknote. Originally, the eSicknote was to be introduced only voluntarily with effect from 1 July 2019; nonetheless, the Amendment effective date has been postponed until 1 January 2020 and the obligation of all requiring physicians to send sick notes to the Czech Social Security Administration (ČSSZ) in electronic form within 1 working day of incapacity for work, is introduced. Doctors will only be able to send information in paper form in the event of technical problems (a power outage or IT system shutdown). However, employees will continue to receive, and employers to submit, paper-based decisions on temporary incapacity to work (sick notes).

Thanks to computerization, the whole process should be accelerated and employers will no longer have to wait approximately a week for the documentation of their employee's temporary incapacity for work, but will receive it from the District Social Security Administration (OSSZ) immediately after the temporary incapacity for work arises. In particular, regarding an application filed electronically by an employer, the OSSZ shall send notification of:

a) its receipt of a decision on temporary incapacity for work of an employee registered in the Insured Register,

b) whether the treating physician's decision indicated a suspicion of an accident at work, culpability of another for the incapacity for work or the consumption of alcohol / drugs,

c) the residential address of the employee and the scope and duration of the authorized leaves of absence,

d) the contact details of the treating physician and health service provider who issued the decision.

This change should make it easier for employers to monitor compliance with the temporary work scheme for incapacitated workers, i.e. whether, at the time of temporary incapacity for work, they are staying at the address specified in the decision and respecting the prescribed leave period. Employers may exercise this control only during the first 14 calendar days of temporary incapacity for work, during which they are providing wage compensation. The time available for performing a review is thus very short in the current procedure for sending documents to employers.

In addition to the eSicknote itself, an electronic form will also be introduced for further communication in the area of sickness insurance. Employers will now have to send the OSSZ documents for calculating sickness insurance in electronic form immediately after the 14 days of temporary incapacity for work have elapsed. If demonstrable objective technical reasons prevent electronic submission, they can send the OSSZ documents in paper form (stating the reason for so doing). Furthermore, for example, in the case of an application for a change of employee's residence outside the country during a period of temporary incapacity for work or approval of a special leave regime, the treating physicians will only communicate with the OSSZ electronically.

The Amendment was approved and promulgated in the Collection of Laws and will enter into effect on 1 January 2020, with the exception of certain provisions that are to enter into force either on the day the Amendment is promulgated or on 1 January 2022.

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Recent case law

Non-compete clause in an employment contract

(Supreme Court Judgment No. 21 Cdo 5337/2017 of 19 December 2018)

In this case, the Supreme Court dealt with a situation in which the applicant – employee demanded that the respondent – the former employer – be paid an amount in cash, as the parties had executed a non-compete clause in the employment contract in which the applicant undertook to refrain from performing gainful activity that would be identical to, or be in competition with, the respondent's business for a period of one year after termination of the employment with the respondent. The respondent, on the other hand, undertook to pay the applicant monetary compensation equal to the average monthly earnings for each month of the applicant's performance of this obligation. The applicant fulfilled his obligation, but the respondent failed to pay him the financial compensation. The respondent alleged the applicant had breached the non-compete clause by taking up employment with a company operating in the same line of business (production, trade and services not listed in Annexes 1 to 3 of the Trade Licensing Act and in the field of mechanical engineering).

The Supreme Court ruled that unacceptable gainful activity within the meaning of Section 310 (1) of Act No. 262/2006 Coll., the Labour Code, as amended, is gainful activity of an employee (for a new employer) whose subject of activity registered in the Commercial Register or specified in the trade license fails even partially to coincide with the similarly registered subject of activity of the employer, if the employee (his new employer) and the employer may nevertheless find themselves in a competitive position with each other and if, therefore, the employee's gainful activity vis-à-vis the employer is of a competitive nature. Even if, in the event of a different subject of activity (the respondent manufactures aluminium wheels for passenger cars and the applicant's new employer manufactures components for gearboxes and complete gearbox sets), the employee (his new employer) and the employer manufacture or offer different products, goods or services, their conflict on the so-called market for products and services cannot be ruled out, as their product or service offering can also meet the demand of the same customers on the market.

However, the competitive nature of the gainful activity of an employee (his new employer) vis-à-vis the employer cannot be inferred solely from the fact that their gainful activity upon the employee's recruitment requires (at least in part) the same or similar production factors. The employee (his new employer) and the employer could be in a competitive position if, given the specific nature of their (otherwise different) gainful activities or the specific situation on the market of production factors used in these activities, satisfying demand by the employee (his new employer) would make it difficult to satisfy the same or similar demand of the employer and thus the actual performance of his gainful activity.

In the present case, the Court acknowledged the applicant's claim, concluding that, despite the same information on the subject of enterprise in the Commercial Register, those activities were neither of the same kind nor interchangeable. It follows that the applicant (his new employer) and the respondent could not find themselves in a competitive position on the grounds that the supply of their products, goods or services of the same kind could meet the demand of the same customers on the market. The subject of enterprise of the two companies was different and their production was not targeted at the same customer needs.

In light of the above, we recommend that any assessment of possible gainful employment of a former employee bound by a non-compete clause not be confined merely to the consistency of the two employers' subjects of activity, but that an assessment also be made of whether the satisfaction of the same or similar customer demand, and hence the employer's own gainful activity, could be seriously infringed.

General Meeting approval to transfer part of a plant

(Supreme Court Judgment No. 27 Cdo 2645/2018 of 29 May 2019)

In this decision, the Supreme Court commented on the interpretation of § 190 (i) of Act No. 90/2012 Coll. on business corporations, as amended.

A contract of sale was concluded between the applicant and the respondent for the transfer of real estate, which the applicant had sold to the respondent inclusive of all accessories: "original technology from the years 1962 and 1993 and a transformer station". However, the General Meeting of the applicant did not consent to the transfer of assets under the contract of sale. In the action, the applicant sought a declaration of invalidity of the sales contract, as the General Meeting of the applicant did not consent to the transfer of the assets comprising the applicant's plant and by means of whose transfer the existing structure of the plant was substantively changed, which in turn gave rise to a major change in the applicant's subject of enterprise and activity. This requirement for a substantive change in the structure of a plant or subject of enterprise raises the question of whether the concept of "part of a plant" should be understood "materially" (as a part of assets), or whether it must be viewed as a separate organisational component. The Supreme Court ruled that in a purely "material" interpretation, in many cases it will not be possible without disproportionate effort and cost to ascertain whether the transfer or pledge of a certain part of the company's assets is subject to General Meeting approval.

The Supreme Court therefore concluded that the term "part of a plant" should be understood to mean a separate organizational unit of the plant (and not a materially significant component of the plant). As regards the transfer, the transfer of a separate organizational component pursuant to Sections 2175 through 2183 of Act No. 89/2012 Coll., the Civil Code, as amended, is subject to General Meeting approval, and only on condition that it entails a substantive change in the existing structure of the plant or the subject of enterprise or activity of the company. Both prerequisites must be met at the same time. Therefore, if one of the many branches of a company operating in the same line of business and having approximately the same turnover is transferred, the material condition will not be met (though it will be a transfer of a separate organizational unit), and General Meeting approval will not be required.

We strongly believe that you will find Legal Update a useful source of information. We are interested in your feedback on this newsletter, in particular its content, format and periodicity.

Please e-mail any comments to kristina.kupkova@weinholdlegal.com or fax them care of Kristína Kupková to +420 225 385 444, or contact your usual partner or manager.