Legal update

February 2021

Weinhold Legal

Contents

The information contained in this bulletin is presented to the best of our knowledge and belief at the time of going to press. However, specific information related to the topics listed in this bulletin should be consulted before any investment decisions are made.

Banking, Finance & Insurance:
Pavel Jendrulek, Věra Tovey

Mergers and acquisitions:
Daniel Weinhold, Václav Smetana, Václav Štraser

Insolvency and Restructuring:
Zbyšek Kordač, Václav Smetana

IT, Media & Telecommunication:
Martin Lukáš, Václav Smetana

Real estate:
Pav Younis, Václav Štraser

Personal Data Protection
Martin Lukáš, Anna Bartůňková, Tereza Hošková

Labour law:
Anna Bartůňková, Eva Procházková, Daša Aradská

Slovak law:
Tomáš Čermák, Karin Konečná

Dispute resolution: Milan Polák, Zbyšek Kordač, Anna Bartůňková, Michaela Koblasová

Competition law / EU law:
Tomáš Čermák, Jana Duchoňová

Public procurement & Public sector:
Martin Lukáš, Monika Skálová, Tereza Hošková

News in legislation

Job sharing

The amendment of law No. 262/2006 Coll., Labour Code ("Labour Code"), introduced several important changes. The amendment became effective on 30 July 2020, some provisions, however, had postponed effectiveness to 1 January 2021, including the establishment of job sharing in Section 317a of Labour Code.

This modification enables an employer to employ two or more employees in one position with the same type of work. Employees with a contract governed by this provision must have shorter working hours as the position is not their own but, as is apparent from the name of this institute, the position is shared. Employees can share the assigned work but also e.g., working equipment.

At the beginning of the establishment of the shared position there has to be a written agreement between an employer and each involved employee. Each employee has a right for a proportional amount of wage and vacation. The agreement concluded separately, or within the current employment contract or be part of it. The period for notice of termination of this agreement is 15 days. In case the obligation arising from the agreement of the shared position of one employee terminates, the working regime of the shared position applies for the rest of the sharing employees applies until the end of the current equalizing period.

Employees are obliged to provide their employer with a schedule of working hours of the shared position a week before the beginning of the scheduled period at the latest. If employees want to additionally change the provided schedule, they can do so two days beforehand, unless they have a different agreement with their employer. If employees do not provide the schedule in time, employer is to determine the schedule without further delay. If the employee is absent due to a obstacle in work or vacation, the employer cannot ask another employee to stand in without his or her consent.

The main advantage is the reduction of the administrative load of an employer who does not have to create the schedules of working hours as he would be obliged to do in case of shortened working hours. The main disadvantage is the fact that job sharing cannot be used for employees with agreements on work performed outside of employment.

The Ministry of Labour and Social Affairs promised that employers who use job sharing, will be able to acquire a certain benefit which should add up to 14.600.- CZK per month for one shared position for the period of six months.

Newly published case law

Courts are obliged to determine appropriate requirements for the proving an entrepreneur's lost profit

(Judgment of the Constitutional Court file no. I ÚS 922/18 of 30 November 2020)

The Constitutional Court concluded that when courts apply Act No. 82/1998 Coll., on liability for damage caused in the exercise of public authority by a decision or maladministration ("act on state's liability for damage"), they have to take into consideration the particular character of the entrepreneur's business so that the requirements set by the courts on proving lost profit are appropriate for the particular type of business.

The complainant demanded the annulment of decisions made by the previous court which did not award damages for the lost profit in accordance with the act on state's liability for damages. The profit was lost due to his criminal prosecution which ended with his acquittal.

Legal update

February 2021

Weinhold Legal

The complainant calculated his lost profit based on his tax return and working days of the concerned year, when he could not have worked due to his defence of the criminal proceedings. The complainant assumed that entrepreneur's lost profit is calculated based on his tax return which is used for example for the calculation of witness' earnings.

The court of first instance concluded that lost profit cannot be determined and dismissed the action. The court argued that causal link is established if the profit was lost solely based on the criminal procedure, his wealth did not improve solely because of the criminal procedure and if the criminal procedure did not take place, his profit would increase.

Subsequently, the appellate court dismissed the complainant's appeal. According to the appellate court it is necessary to precisely prove that the state of the property would improve if not for the criminal procedure, therefore it is necessary to provide evidence such as contracts for the performance of work or at least their promises of work. The appellate court did not take into consideration the complainant's wife's statement who organized the complainant's work that on days where was supposed to be any activity connected with the criminal procedure, she did not plan any work that could have led to complainant making a profit.

In his constitutional complaint, the complainant stated that the courts of lower instances could have determined the lost profit based on a qualified estimation in accordance with the provided tax returns.

The Constitutional Court referred to his previous case law when in the judgment file no. II. ÚS 590/08 of 17 June 2008 follows that:

> *"On one hand, it is the obligation of law enforcement authorities to investigate and prosecute illegal activities, on the other hand the state cannot be liberated of the liability for the procedure of these authorities if it is later revealed their procedure was incorrect, intervening with fundamental rights." The right for the damages in case of criminal procedure, which ends with exemption, does not arise just from article 36 (3) of the Charter of Fundamental Rights and Freedoms, but also from the principles of a material legal state. Based on this principle any intervention into individual's right must be properly compensated when courts have to take into account the character of business, especially with regard to so called small entrepreneurs, as those very often do not conclude agreements on future contracts."*

Based on this, the Constitutional Court nullified the decisions of general courts and sent the case back for the calculation of the amount of the complainant's lost profit.

Employer cannot unilaterally withdraw from a non-compete clause based solely on his own "free consideration"

(Judgment of the Supreme Court file no. 21 Cdo 4779/2018 of 5 November 2020)

The Supreme Court expressed its disagreement that an employer could withdraw from a non-compete clause during employment based on any or even without reason.

The plaintiff claimed payment of 200.000,- CZK from his previous employer based on a non-compete clause.

The plaintiff worked for the defendant for 10 months. Employment on a position of the director of the corporation began on 4 January 2016 and since 1 July 2016 the plaintiff had worked as an operating director with a wage of 200.000,- CZK per month.

In an amendment to his employment contract, a non-compete clause was concluded that forbade the plaintiff to perform profitable activities which would be identical or similar with the subject of the defendant's business or which would have a competing character for the duration of 6 months.

They also agreed that the defendant could withdraw from the clause in a case of

> "*termination of the defendant or its substantial part*" or if "*the defendant came to a conclusion based on his free consideration that given the value of information, knowledge or the acquaintance with working and technological procedures obtained by the plaintiff by working for the defendant or in another way, it would not be proportionate and/or effective to enforce the non-compete clause and provide the negotiated payment*".

The plaintiff delivered on 31 August 2016, therefore only two months after he had become the operating director, his notice and thus the employment terminated on 31 August 2016. On 20 October 2016, the defendant withdrew from the non-compete clause on the basis that during the 2 months of working as the operating director the plaintiff could not gain enough valuable information, knowledge, acquaintance and overall know-how and therefore it would not be proportionate and effective to enforce the non-compete clause. The plaintiff objected that he had been looking for a new job with respect to the non-compete clause and also had rejected one job offer because of the clause as he proved during the current proceedings. The plaintiff also stated that he had performed the same work for the whole 10 months.

The court of first instance dismissed the action as it came to the conclusion that it would be against good manners for the defendant to pay the payment arising from the non-compete clause as the plaintiff was the one to terminate the employment contract after 2 months and the defendant withdrew from the non-compete clause based on a reason agreed in the clause as he did not insist on the protection of his know-how.

The appellate Court affirmed the judgment of the first instance court as it agreed that a reason stated in the clause for the withdrawal was fulfilled. According to the appellate court, the protection of an employee as the weaker contractual party cannot be perceived as limitless.

According to the Supreme Court, the reason stated in the non-compete clause is invalid if this reason intervenes with the constitutionally guaranteed rights and disrupts public order - the invalidity is taken to account even without motion and therefore is invalid from the beginning. As it was in this case. On this basis, the defendant's withdrawal as a subsequent unilateral legal action was proclaimed invalid. The Supreme Court nullified previous decisions and sent the case back to court of first instance for further proceedings.