

Expected changes in the Polish Labour Code by employers

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Abstract

As of 22nd February 2016 the Act of 25th June 2015 was introduced, amending the Labour Code and some other laws. First of all, it focuses on the changes to the scope of inclusion, as well as termination of employment contracts of limited duration. These changes have not only strengthened the position of the employee, but also are to stabilize the labour market. The most significant changes relate to the following issues: contributory contracts of service, reduction in concluding fixed-term contracts and changes in parental rights. It is worth noting, that the regulations apply to both employers and employees. The limits of employment with contracts concluded on a fixed period is one of the most important and probably the most anticipated changes in the labour law. After changes, the Labour Code distinguishes three types of employment contracts: a contract for an indefinite term, fixed-term contract and the contract for a trial period. The changes also assume easier operations of companies. Employers may unilaterally relieve the employee from the duty of work performance during the trial period with the right to remuneration.

Key words: labour market, employees, labour law

JEL classification: K31

1. Introduction

According to the opinion of an expert of RP Employers of Poland, Ms. Wioletta Żukowska, it is high time to finish the work of codification and necessarily adopt the new Labour Code. In her opinion, it should be "definitely thinner, because the obligatory version is over-regulated, which contains too much detailed regulation"¹.

Through this type of operation it will be possible to develop autonomous dialogue in many companies. Both agreements, as well as collective settlements would automatically turn into small codes for companies. It is important, that the employer had the opportunity to establish working conditions during the dialogue with the employee. In addition to the labour code, an element which is the specificity of small and medium-sized businesses should be introduced. This is related to the fact, that it currently applies to large companies, employing thousands of people. For small businesses, it is very hard to expand both records, as well as reporting. One idea is the introduction of lack of necessity to terminate the contract for an indefinite period for the company, which employs up to 20 people.

Importantly, it is noted, that the Labour Code should be written in a simple, comprehensible language, which would provide the standards of general application, that everyone could understand. As can be observed in Germany, approx. 80 percent of the

¹<http://www.polskieradio.pl/42/275/Artykul/1313772.Nowy-Kodeks-pracy-chudszy-stawiajacy-na-uklady-zbiorowe> [Internet access 09.02.2016]

guidelines regulating labour relations include collective agreements, while in Poland it is only 20 percent.

In 2015, changes have been made in labour law, which have been awaited for a long time. As can be noticed, it is presented favourably in terms of both the employers as well as employees.

1. Medical examinations

As can be observed, employers above all will benefit from this change. Thanks to it, an obligation for employees to undergo medical examination was abolished. Those, who were accepted to work in another company, have been exempted from the preliminary medical examinations. Until now, each new employee had to be given a certificate by the employer, that confirmed conducting preliminary tests. Under new amendments, it is no longer necessary. In addition, those who "within 30 days of termination of employment in one company will begin work in another place"² will not be subject to research. Existing certificate is sufficient to be able to work.

2. Contributions of contracts

The changes also apply to forms of employment under a mandatory contract / contract for work. According to the amended Act on social security "from 1st January 2015, income supervisory board members will be subject to contributions of Social Insurance Institution, and only from 1st January 2016 there will be an obligation to pay contributions to the Social Insurance Institution of any mandatory contracts to the amount of a minimum work salary"³.

3. The contract of employment for a specified period

The changes also apply to the period of occupation in the case of contracts of employment for a specified period. In accordance with the provisions of the Act, the maximum period of employment will be 33 months. It is pointed out, that at that time, the employer may issue a maximum of three such agreements for the employee. In the case of the fourth contract, it will be tantamount to a permanent employment contract. So far, the third contract was converted into a permanent contract of employment. These changes relate primarily to employees, whose employment is protected in a systemic way.

4. Periods of notice

Termination of contract of employment have been unified in this case. Under the new regulations, these will range as follows:

2 weeks - in the case of employment by the employer for less than 6 months,

1 month - in the case of employment for at least 6 months,

3 months - in the case of employment period of at least 3 years⁴.

5. Changes to contracts of employment

With the amendment are contracts of employment are also subject to changes. The employment contract for the duration of a particular job will be completely eliminated. It is worth noting, that it was rarely used, and in most cases it was convergent with a contract of employment for a specified period. In addition, the changes also apply to the contract for a trial period. The employer will be able to use it "in order to check the qualifications of the employee and the possibility of his/her employment to execute work of a particular kind"⁵. Important is the fact, that employment for a trial period will be possible only once.

As shown in the contents of the justification of the Act's project, the main intention of the employer include "reduction of the unjustified use of contracts of employment for a specified period by introducing strict regulations specifying the maximum number of fixed-

²<http://rm-law.pl/zmiany-w-prawie-pracy/> [Internet access 09.02.2016]

³Ibidem.

⁴Ibidem.

⁵Ibidem.

term contracts signed with the employee and the total time, on which it may be concluded"⁶. At this point most important evolutionary factors both for the employer and employees will be discussed.

From the point of view of the amending Act, its most important point is undoubtedly a regulation, that limits the total duration of contracts of employment for a specified period to 33 months. As it can be noted up to now, temporal dimension regarding the validity of such contracts has not functioned. On the other hand, there is an abundant case law of the Supreme Court relating the above gap. As already mentioned, during these 33 months the maximum number of fixed-term contracts may not exceed amount of three. Every next contract must be treated as a contract of employment for an indefinite period⁷.

However, there are exceptions, such as replacement of the employee during his excused absence from work, performing work as seasonal or casual, performing work for the term of office, or if the employer indicates objective reasons underlying on his side⁸.

Exceptions are, however, permissible only if the conclusion of these types of agreements in a particular case „acts to satisfy the actual periodic needs and is necessary in this area in the light of all circumstances of the conclusion of the agreement"⁹. It should be noted, that the contract for a fixed period may be extended in relation to the statutory 33 months, if there are objective reasons for the employer. In this case, however, he/she must notify the Labour Inspectorate.

Another important modification is the withdrawal from the existing terms associated with the period of termination of the contracts of employment. Art. 36 § 1 in the new version states, that in the case of both contracts of employment for an indefinite and definite period, phase of notice depends primarily on the period of employment for the employer. Additionally, in this article the record can be found, that "the rights of employees related to the employer by a contract of employment for a specific period with empowerments, that so far have had only workers employed indefinitely" has been levelled.

It should be noted, that when a contract for an indefinite period is terminated due to liquidation or bankruptcy of the entity, then the employer has the possibility to shorten the period of three months' notice to one month for early termination. In this case, the employee retains the right to compensation in the amount of remuneration for the remainder of the period of notice¹⁰.

An important element is also, from the point of view of the employer, the introduction of art. 36, through which the employer has "the ability to exonerate the employee from the obligation to perform work during the notice period, while maintaining worker's salary." Until now, it was possible only, when both sides have agreed, though it was not always possible to reach a compromise in this matter.

The changes also apply to art. 50 § 3 of the Labour Code. It refers to "compensation for unlawful termination by the employer of an employment contract with an employee employed for a specific period or for the duration of a particular job, which would deprive workers employed for the duration of a particular job previously owed compensation from the amendment's date of entry into force".

Another of the amended regulations is art. 55 § 1 of the Labour Code. According to his record, an employee who has been employed under a fixed-term contract, which will

⁶<http://www.mpips.gov.pl/bip/projekty-aktow-prawnych/projekty-ustaw/prawo-pracy/projekt-ustawy-o-zmianie-ustawy---kodeks-pracy-oraz-niektorych-innych-ustaw-/> [Internet access 09.02.2016]

⁷Art. 25 § 1, 2 i 3 nowel. k.p.

⁸Art. 25 § 4 k.p.

⁹Ibidem.

¹⁰<http://www.gofin.pl/prawo-pracy/17,2,95,127858,wypowiedzenie-umowy-o-prace-mozna-skrocic.html> [Internet access 09.02.2016]

terminate the contract due to the fact that the employer has committed a serious breach of fundamental obligations, has the right to apply for compensation, which corresponds to the remuneration for the period to which he/she had a valid contract. It cannot be, however, longer than the period of notice. Under current regulations, an employee may demand compensation in the amount of the salary of two weeks of work.

Additionally, thanks to the amendment, an employee who has been employed for a specified period, which an agreement was terminated contrary to the provisions on termination of employment contracts may also apply for compensation. It is to be equal to the remuneration for the period, when the contract was valid, but it cannot be on more than the period of notice.

It should not be forgotten, that art. 61 § 1 was exacerbated with the disadvantage for employees. It refers to the situation of the payment of compensation to the person of the employer, if it comes to a situation unjustified from the fault of an employee, who is employed on a periodic contract and the termination of employment will occur. In this situation, the employer may apply for compensation, which will amount to as much as remuneration for the period until the end of the contract, but no more than the period of notice. In practice this means, that the previous two weeks was raised to the maximum amount of compensation of the notice period.

Another article is 63 § 2 LC, which refers to "the amount of compensation, which is due to the employee for a specified period after the death of the employer and the expiration of the contract between the sides". Until now, it was possible to obtain compensation in the amount of two-week remittance. At the current moment it was increased to an amount corresponding to the amount due for the period of notice. The changed article 7 of the Act of 9th July 2003 on employing temporary workers should also be noted, in which the statement, that "the temporary work agency employs temporary workers on the basis of a contract of employment for a specified period" can be found.

However, employers sharply criticize provisions in the Labour Code. As already mentioned, the employer has the right to conclude up to three contracts for a specified period, not exceeding a total duration of 33 months. When this period is exceeded, the contract is automatically converted into a contract employment of indefinite duration. It is stated, that this provision is to prevent a fairly widespread practice - concluding long-term contracts for a specified period. Specialists¹¹ state, however, that this should be done by labour law reform, which should be complex, as well as adjustments of legislation to economic fluctuations.

As can be perceived, constant amendments to the Labour Code of 1974, when it was adopted, do not really bring any changes on the labour market, that not only would be beneficial, but also permanent. The legislator, despite the opposition of employers, introduced double limiting of employment contracts for a specified period. It refers to both the number of allowable number of contracts, as well as the total duration. It is also worth mentioning, that there are a number of derogations from the rules, which these provisions do not relate to. For the record, it should be noted, that it is: the conclusion of the contract in order to replace an absent employee, for a term, or in the case of objective reasons attributable to the employer. An important change is the "dependence the length of the termination of fixed-term employment from the years of service to the particular employer", however question of termination remains unsettled. In the case of contracts of employment for an indefinite period, the employer is not obliged to indicate the cause of its decision of termination of the contract, which is seen as positive, but only on the part of employers.

As it has been mentioned before, a contract of employment for the duration of a particular job will be liquidated, however, in relation to this type of agreements, that have

¹¹Business Center Club

been concluded prior to February 22nd 2016, the existing rules will continue to apply. Although employers are not allowed to employ an employee on trial for a second time, it is nevertheless permissible in a situation where "the employee has been employed in carrying out the work of another kind or after at least 3 years from the date of termination or expiry of the previous contract of employment, if the employee is to be employed in executing professional duties of the same kind"¹².

An important element related to the amendment of the Code is the request of about extending the *vacatio legis*. This objection refers to the change, by which the employer must confirm in writing the conditions of the contract of employment before an employee is allowed to work. Theoretically this is to tackle with the gray area, but in practice this does not solve the actual problem. However, as can be noted, due to administrative difficulties, it is necessary to extend the application period up to 3 months, so that companies have the opportunity to adapt to the amended provisions.

On this matter Grazyna Spytek Bandurska, PhD., speaks as an expert of Lewiatan Confederation, which states as follows - "we agree, that the proposed solutions can counteract illegal employment of employees and facilitate the fight against the gray area, which results in unfair competition and brings financial losses for the state budget and demoralizing impact on society. The new rules, however, can generate additional administrative problems for large companies with complex organizational structure or where the headquarters of the company is far from the place of work of the employees. In addition, an increasingly common practice is the management of records and accounting-personnel data of the company by third parties"¹³.

This period should be extended from two weeks to up to three months. This will include support employers for both acknowledgement, as well as the implementation of introduced new regulations. The new regulations require streamlining the activities of HR and accounting, as well as obliging employers to prepare for the administrative duties related to the provision relating to the employment of employee before they are allowed to work.

In a statement, Grazyna Spytek-Bandurska says, that "in our opinion, a general rule in projects relating to the issues of labour law should be prepared, which are or will introduce, that the *vacatio legis* at least 3 months. We believe, that employers should be given a reasonable time to reorganize its operations and the ability to adapt to the new legislation"¹⁴.

In the case of fixed-term contracts, opposition of employers can also be perceived. They believe, that the maximum duration of employment on the basis of contracts of employment for a specified period should amount to 48 months. Additionally, they note, that it is necessary to detail the exceptions, that apply to this rule. For example, they indicate the case of the agreements prepared in connection with the implementation of specific projects.

The confederation of Lewiatan, BCC, Employers of Poland and the Polish Craft Association in the common position on temporary contracts explicitly stated: "We believe that the maximum duration of employment on the basis of contracts of employment for a specified period should be 48 months"¹⁵. In addition, the creation of the appropriate directory exceptions should be focused, which is in the later part of the statement.

The employers' organization issued the following proposals for amendments, which should be concluded within the framework of the Labour Code:

¹²<http://kodeks-pracy.org/II-stosunek-pracy/rozdzial-II/zawarcie-umowy-o-prace> [Internet access 09.02.2016]

¹³<http://www.kadry.abc.com.pl/informacje-o-zrodle/j/konfederacja-lewiatan?refererPlid=2> [Internet access 09.02.2016]

¹⁴<https://legislacja.rcl.gov.pl/docs//2/12280256/12329677/12329680/dokument206268.pdf> [Internet access 09.02.2016]

¹⁵<http://www.kadry.abc.com.pl/informacje-o-zrodle/j/konfederacja-lewiatan?refererPlid=2> [Internet access 09.02.2016]

1. Introduction of the maximum duration of the employment contract for a definite period between the same employee and the employer,
2. Extension of the maximum duration of a trial contract for a period of 6 months,
3. The introduction of the possibility of termination of employment contracts for the duration of a specific job with the two weeks' notice period,
4. Introduction of different notice periods in contracts of employment for a specified period depending on the length of employment,
5. Shorter notice periods in contracts of employment for an indefinite period,
6. Abolition of the requirement to provide employer's reasons for the termination of an employment contract for an indefinite period in companies employing up to 50 employees.

The mechanism, which was proposed by the union side, which refers to a longer period in the way of collective agreements and regulations to be agreed with the trade unions, could be implemented only in the case if similar rights will have representatives of the employee, who were selected under the procedure adopted by the employer. If this is not executed, then the situation occurs, when the employer will be discriminated, just because of the fact, that trade union organizations do not exist in the company. It shall not be forgotten, that the sector of small and medium-sized businesses account for almost 99.8% of all companies in Poland. Referring to this fact, such a mechanism ought to be created, which would refer to the agreements with the employees' representatives, as these were identical solutions, which are contained within the Labour Code –art. 91, 150 § 3.

The maximum duration of fixed-term contracts

It is worth at this point to draw attention to the fact, what is the relation between the proposed solution relating to the maximum duration of employment contracts for a specific period. So far, in accordance with art. 25 1 PC, the conclusion of the third fixed-term contract is legally equivalent to signing a contract of employment for an indefinite period. Scripture union does not contain any changes, which would relate to the above provision, which in practice means, that they could coexist. It should be noted, however, that the current provisions apply to 4 contracts and 33 months.

It should not be overlooked, that the legal structure of the quoted art. 25, as well as the introduction of a maximum total length of the sequence of contracts is consistent in accordance with clause 5 of the Annex to Council Directive 99/70/WE of 28th June 1999 concerning the framework agreement on fixed-term work .

Referring to termination of contracts, the employers' organization agrees with the proposal, which indicates the varied periods of notice in the case of fixed-term contracts. As can be motivated, it should be dependent on work experience. This has been confirmed within the judgment of the Court of Justice of the European Union case C 38/13 of 13th March 2014. In accordance with art. 36 of the Labour Code, "the notice periods of fixed-term contracts should be similar to the notice periods of contracts of employment with indefinite duration".

Employers propose the following notice periods of fixed-term contracts:

- 2 weeks - if the employee has been employed for less than 12 months,
- one month - if the employee has been employed for at least 12 months,
- two months - if the employee has been employed for at least 36 months¹⁶.

Change of time requires the consent of employees

According to employers, also changes are important in contracts of employment of indefinite duration. In their view, it will not only to introduce greater stability of employment, but, more importantly, will reduce the scale of fixed-term contracts. Such changes are to encourage employers to use the specified legal base. Employers propose the following notice periods of fixed-term contracts:

¹⁶<http://ksiegowosc.infor.pl/wiadomosci/143987,2,Pracodawcy-chca-zmian-w-umowach-terminowych.html>
[Internet access 09.02.2016]

- 2 weeks - if the employee has been employed for less than 12 months,
- one month - if the employee has been employed for at least 12 months,
- two months - if the employee has been employed for at least 36 months¹⁷.

Additionally, demands are stated as follows:

- weakening of the obligation to give reasons for termination of a contract concluded for an indefinite period (art. 30, § 4 LC),
- modification of the principles of consultation following intention to terminate the contract of employment for an indefinite period by introducing a follow-up audit (art. 38 and 52 LC),
- repealing or reducing the 4-year term of protection for pre-retirement contracts (art. 39 LC),
- limiting the group directory of employees benefiting from the special protection of the employment relation.

As can be observed, people who were previously employed under an employment contract for a fixed term, after three years, have a three month notice. But employers also expect changes relating to: abandonment of administered obligation of the employer to enlist reasons for the termination of an employment contract for an indefinite period, if the company employs up to 20 employees.

As it can be read, the post, which was issued by employers, they support the introduction of various kinds of legal changes, but those, that "contribute to the stabilization of employment on the basis of temporary contracts. We recognize the draft of amendment to the Labour Code prepared in this regard as balanced, but at the same time we would like to report a number of key objections"¹⁸.

The document draws attention to the fact, that the new rules do not really apply to specifics of the Polish labour market. As it can be read: "Excessive stiffening of the rules on the use of fixed-term contracts may lead to counterproductive effects - instead contribute to a wider use of contracts of employment for an indefinite period, these may lead to growth of illegal employment"¹⁹.

The most doubtful part of application applies to the usage of the period of fixed-term contracts, which is 33 months. The fixed-term contract can be conducted up to three times. Entrepreneurs, however, draw attention to the fact, that "the proposal to limit to 33 months the duration of contracts of this kind is contrary to earlier announcements, of the Minister Wladyslaw Kosiniak-Kamysz, who declared that it would be 36 months. Furthermore, in our opinion, a limit of two years and nine months is separated from market conditions, where the most popular contracts are concluded for a full year"²⁰.

Furthermore, „the limit of 33 months does not correspond to a 3-month notice period (...), which refers to the employment of at least three years. Therefore, we are maintaining our position, that the duration of fixed-term contracts should be 48 months"²¹.

In their view, the transitional provisions also raise a lot of doubts. They state, that the new regulations should apply only to contracts, that were concluded after implementation of the amendment - "this way there will be no violation of the constitutional principles of non-retroactivity and citizens' trust in the state and its regulations. We fear, that the application of the new regulations also to the ongoing fixed-term contracts may result in termination of contracts by employers before implementation of the amendment"²².

¹⁷Ibidem.

¹⁸http://wzp.org.pl/pl/aktualnosci/wspolne_stanowisko_strony_pracodawcow_trojstronnej_komisji_ds_spoleczn_o_gospodarczych_dotyczace_propozycji_zawartych_w_projekcie_ustawy_o_zmianie_ustawy_kodeks_pracy_oraz_niektorych_innych_ustaw [Internet access 09.02.2016]

¹⁹Ibidem.

²⁰Ibidem.

²¹Ibidem.

²²Ibidem.

Additionally, employers note, that "the proposed regulation will cause, that already on the date of implementation of amendments, contracts concluded for a fixed period, which duration after the date of application of the Act will exceed a period of 33 months, will by law be considered as contracts for an indefinite period"²³.

One of the suggestions is to extend the duration of the trial contracts to 6 months. Employers justify their position as follows: "Although this agreement is one of the fixed-term contracts, it is however different from others with special purpose and optionality of its conclusion. The trial contract is to test the competences and skills of the employee to work and to familiarize the employee with the working conditions in the workplace. It should be emphasized, that the employment of the employee under a trial contract is optional and therefore it should not be taken into account, when explaining the adoption of the 33 months limit duration of fixed-term contracts"²⁴.

Important is fact, that employer do not agree in no case to eliminate the employment contract for the duration of a specific job - "we think, that a two-week notice period should be introduced. But for contracts for seasonal work, casual jobs, the notice period shorter than two weeks should be established". Next, we read that it is necessary to maintain a separation of a contract from a replacement agreement, by maintaining the notice period, which is in use - "it is not appropriate to treat this agreement on a par with a typical fixed-term contract, because it differs, both on the target and the length of its duration". In case of such contracts, the notice period should be 3 work days.

One of the listed proposals was another option to calculate the periods of termination of employment contract. In a situation, where the employee has been employed for less than 12 months, then the period ranges to two weeks. If it was full 12 months - a period of one month, and for 36 months even two months - "in order to clarify doubts regarding the counting of the period of employment contract, it should be clarified, that it concerns continuous years of service in the company"²⁵.

The period of notice of temporary contracts is the same as in the case of contracts concluded for an indefinite period. In March of 2014, the Court of Justice of the EU ruled, that a two-week notice period for temporary contracts, regardless of length of employment, is discriminatory.

noted by Wioletta Żukowska, an expert of the labor law of Employers of Poland - "the need to harmonize the period of termination of employment contracts results from the judgment of the Court of Justice of the EU. This change is intended to align the situation of employees on fixed-term contracts with those employed on indefinite contracts. As a result, the former will gain greater stability of employment. However, the introduction in the fixed-term contracts corresponding periods of notice as in contracts with indefinite period, will be a true revolution in our Labour Code. Employers will no longer be able to terminate a contract with an employee employed for a fixed term by two weeks of notice period, regardless of the length of employee's work experience. Now they have to reckon with the fact, that with longer contracts, when the employee has worked for at least three years, the period will amount to 3 months. It should be noted, that such a long notice periods with indefinite contracts are questioned even by employees themselves (e. g. when they want to start quickly in another company)"²⁶.

Are these changes necessary? Definitely yes. Firstly, Poland poorly implemented rules for the application of the principles of fixed-term contracts, which EU noticed. Secondly, the

²³Ibidem.

²⁴Ibidem.

²⁵Ibidem.

²⁶<http://www.workservice.pl/Centrum-prasowe/Informacje-prasowe/Ekspert-HR-komentuje/6-kluczowych-zmian-dla-polskiego-ryнку-pracy> [Internet access 09.02.2016]

actual practice of agreements of this type adopted grotesque forms. The new rules will not heal the labour market, which can be observed even after fears, that employers issue. This applies even in situations, where the employer rotates employees within a single capital group, at a time, when a period of 33 months under the fixed-term contract is approaching. In practice this will mean, that the agreement, which is to be concluded with the new employer, does not transform to a temporary contract. In addition, employers will have to pay attention to the fact, whether the person was no longer employed within the company to make it possible to transform an contract to a permanent contract.

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