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ECOVIS® LEGAL POLAND

OUR NEWS

IN THIS ISSUE LEGAL NEWS

1. The scope and application of a commercial representation

A commercial representation (prokura) is most frequently associated with companies, despite being regulated by the Civil Code, and not the Commercial Companies Code.

A commercial representative (prokurent) may be appointed by a company or partnership registered in the National Court Register (KRS), as well as by a sole trader registered in the Central Registration and Information on Economic Activity (the CEIDG). They must be an individual with full legal capacity and may be, but do not have to be, an employee or contractor.

Based on a commercial representation, a commercial representative may represent a business in court and out-of-court, in any issues concerning private law and public law – as long as it involves running a business. A commercial representative may perform legal and other acts, such as executing agreements and performing actions connected, for example, with carrying out economic tasks.

A commercial representative cannot specifically:

- dispose of an enterprise
- end an enterprise for temporary use
- dispose of or encumber any real property

For such matters, a commercial representative would need a special power of attorney.
The appointment must be made in writing in order to be valid.

A commercial representation may be:

- joint – granted to a number of individuals acting jointly;
- sole – granted to a single individual acting individually; or
- shared – where the representation is shared with a member of a governing body (such as a member of the management board of a limited liability company) or a partner authorised to represent a partnership.

A commercial representation cannot be assigned to another person, but a commercial representative may grant a power of attorney to perform specific actions or specific types of actions. Despite having extensive powers, a commercial representative may be dismissed at any time.

The dismissal of a commercial representative is a managerial power, therefore a commercial representative may be dismissed by the individuals or bodies indicated by the applicable laws. For example, in a registered partnership, a professional (limited liability) or limited partnership, a commercial representative may be dismissed by any partner authorised to manage the partnership's business; and in a company – by any management board member.
All commercial representations expire upon the de-registration of the business from the KRS or CEIDG, and upon a declaration of bankruptcy, the opening of liquidation, the transformation of the business, the death of the entrepreneur, the death of the commercial representative or upon the appointment of a court administrator.
A commercial representation will not expire if the business loses its legal capacity.
A business must report to the KRS or CEIDG that a commercial representative has been appointed or dismissed.

2. RESTRICTIONS ON THE MANAGEMENT BOARD'S ACTIONS

Not all management board members are aware of the existence of provisions protecting business partners and company property from overextending investments or risky business choices. Management board members must remember that they require relevant resolutions of the shareholders' meeting before they can perform certain actions. A failure to observe this obligation may have very serious consequences.

Protecting the company from excessive spending by the management board

A resolution of the shareholders' meeting is required specifically in order for the company to:

- dispose of or lease an enterprise or its organised part;
- establish a limited property right on an enterprise; or
- acquire or transfer real property, the right of perpetual usufruct to real property, or a share therein.

These are statutory requirements, but the articles of association may contain other restrictions, or even waive the need for the management board to obtain such a resolution. If a company chooses the statutory solution, any action that is performed without a resolution will be invalid. The Commercial Companies Code also includes regulations protecting a newly created company.

Article 229 states that, for the first two years after a company is registered, a resolution of shareholders is required before executing an agreement in which the company acquires real property, a share in real property or assets for a price exceeding one-quarter of the share capital, but not lower than PLN 50,000. Without the required resolution, the agreement is invalid. Specific rules in this respect may be determined in the articles of association.

Disposing of a right or contracting an obligation in a limited liability company with a value more than twice the amount of the share capital

Under Article 230 of the Commercial Companies Code, disposing of a right or contracting an obligation with a value exceeding twice the amount of the share capital requires a resolution of shareholders, unless the articles of association specifies otherwise.

This means that if a company's share capital amounts to PLN 5,000, a decision of the shareholders' meeting is required in order to dispose of a right or contract an obligation worth more than PLN 10,000.

Disposing of a right covers any limitation, removal, encumbrance, sale or transfer of a right, for example the sale or pledge of assets. Contracting an obligation means taking on an obligation towards another entity, such as taking out a loan or executing a service agreement.

In the case of temporary services, such as a lease or rental, the value is determined in a distributive manner, i.e. based on the amount of rent in a given settlement period, and not collectively, i.e. as the sum of rent payments for the entire term of the agreement.

If the required resolution is not obtained, the management board may be held liable for any damage suffered by the company and may be dismissed. However, a breach of this rule does not invalidate the legal transaction – which protects the company's business partners from the negative consequences of the management board's unauthorised actions. Article 230 of the Commercial Companies Code aims to strengthen the control over deals made by members of the management board, while also maintaining the security and certainty of legal transactions.

3. CAN YOU DISMISS AN EMPLOYEE WHO IS OFTEN SICK?

An employer cannot terminate an employment contract with an employee who is on leave or is absent from work for other justified reason, if the period for the termination of the employment contract without notice has not yet ended (Article 41 of the Labour Code of 26 June 1974).

An absence for a justified reason specifically includes sick leave, so employers cannot dismiss an employee while absent on sick leave. **Employers generally know this, but are less certain on whether frequent sickness absences can be a fair reason for dismissal.**

In this context, the Supreme Court (in its judgement of 6 November 2001, I PKN 449/00) ruled that there are grounds for dismissal only if the employer is able to demonstrate that its legitimate interests have been compromised due to the employee's frequent absences while sick.

Employees often argue that frequent absences disrupt the work routine, forcing the employer to delegate the tasks and responsibilities of the absent employee to others, or leave the tasks unperformed (a judgement of the Supreme Court of 3 November 1997, I PKN 327/97; and a judgement of the Supreme Court of 11 July 2006, I PK 305/05).

This results in the need to change work schedules, arrange replacements or allocate

additional duties to other employees, which has a knock-on financial effect in extra salary costs for overtime or replacement cover.

Only unexpected, long-term and repeated absences that require the employer to take certain organisational measures can constitute justified grounds for dismissal, even if they occur due to no fault of the employee and are formally excused (a judgement of the Supreme Court of 4 December 1997, I PKN 422/97).

The employer must prove that the nature of the absences compromise its interests. If not, the employee may claim unfair dismissal and seek reinstatement or compensation.
Although it is not possible to specify a number of days absent on sick leave as a fair reason for dismissal, the days should be counted in months (during a six-month period or annually).

While there are specific situations in which long-term absences due to poor health may justify the termination of the employment contract, such a dismissal may be considered contrary to the rules of social co-existence, especially where it involves a long-term employee who has performed their duties in an impeccable manner before falling ill (a judgement of the Supreme Court of 21 January 2001, I PK 96/02).

A dismissal on the grounds of absence requires a detailed analysis that, if the matter leads to litigation, will allow the employer to present the good reasons for its decision.

4. | CROSS-BORDER EMPLOYMENT

The labour market is adapting to the changing realities and trying to meet people's needs. It is more and more common to see people working from outside the country where their employers are established. This offers a great deal of flexibility in employment, but at the same time, determining and regulating the employment relationship presents a real challenge for both parties.

Every EU Member State has its own labour law regulations, which differ from country to country. Which jurisdiction applies when employees are in a different country to employers? Will it be the jurisdiction where the employer operates, or the jurisdiction where the employee resides? This issue is crucial when determining the principal rights and obligations of the parties. The differences in this respect may involve specifically daily working time or holiday entitlements.

The parties may choose the law governing their employment relationship. This option is offered in Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). Pursuant to Article 8 in conjunction with Article 3 of that regulation, both parties may freely choose the law governing the employment contract.

Importantly, the only reservation made under Rome I is that the choice of law cannot deprive the employee of the protection they

would have had under statutory provisions of the law that would normally have applied. Ideally, the employer and the employee should know the key rights and obligations resulting from the labour law regulations applicable in a given Member State.

In Poland, the most important piece of legislation in this regard is the Labour Code, so if the employment contract is governed by Polish law, then Polish labour law will apply. For example, the notice period applicable to an employment contract for an indefinite term directly results from Article 36 of the Labour Code, even though the corresponding rules applicable in the employer's jurisdiction are entirely different.

In addition, employers must also be aware of the provisions of social insurance law and tax law, as they are permanently linked to employment relationships.

5. NEW REGULATIONS ON WORKING FROM HOME

The COVID pandemic shook up things with respect to legal regulations, with a number of innovative solutions being drawn up to deal with the unprecedented circumstances, and which now have to be introduced in normative acts.

Thanks to the ability to allow staff to work remotely, many companies did not have to interrupt their operations during subsequent lockdowns. Work is now at an advanced stage on permanently including relevant home office regulations into the Labour Code. The relevant bill is to be passed in the third quarter of 2021.

The remote working regulations first introduced in Anti-Crisis Shield 4.0. were intended to deal with the situation under COVID. Now there are certain modifications and specific arrangements being proposed the Labour Code, a draft of which was published on 23 July 2021.

According to the proposed solutions, professional duties may be performed at a location chosen by the employee, and may be partly or fully performed using means of distance communication. Therefore, the employer must be aware of the employee's location each time, and must give its consent to working remotely. At the same time, an employee cannot work from a different place without the employer's prior consent.

Remote work will be performed at the employer's request, for example during an emergency situation, in a state of an epidemiologic emergency or a state of epidemic. Such a request may be made after the employee states that they have appropriate working and technical conditions at the remote location.

An employee can stop remote work and return to the office by making a relevant request to the employer. Both parties will be required to set a deadline for the necessary arrangements. The bill fails to specify the rules for settling home office-related expenses or determining liability for any accidents at work while working from home. Another specific changes include the employer's obligation to approve home office in the case of an employee who provides care for a family member. The bill also addresses issues related to professional risks, personal data protection and occupational health and safety.

The bill allows for the possibility for employees to work from home upon demand (without needing to reach an agreement or establish internal regulations) for up to 24 days in a year.

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