

**Calan Legal Update
for entrepreneurs
on coronavirus crisis**

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Introduction

These days Polish economy faces unprecedented circumstances. That is why Calan team would like to present to our Clients concise information on legal tools that may be useful for entrepreneurs. Information we present has been gathered using our legal knowledge and publicly accessible and reliable sources.

Below you will find information concerning several aspects on legal environment divided into sections such as: Labor law, Contracts, Taxes and Social security, Litigation and public authorities and Government countermeasures.

Labor law

Employees obligation to use annual leave

General rule states that employee's consent is required to send him to annual leave (*urlop wypoczynkowy*). However, there are to exceptions when employer can order the employee to use annual leave despite employee's consent:

- if the employee is in the period of notice (under art. 1671 the Labor Code ("KP") or
- if the employee has overdue leave and the employee's consent is not required¹.

That is why the employer who faces difficulties due to epidemic can order all his employees who has overdue leaves to use it know.

Additional childcare leave for parents – employees

Under art. 4 of special act on combating COVID-19² ("Anti-COV") an employee who looks after a child under 8 years of age is entitled to an additional 14 days of allowance care for the period of release from work in the amount of 80% of remuneration. This benefit may be paid for a period of 60 days yearly, with the Anti-COV extended this period by another 14 days. Allowance care is paid from the first day by social security contrary to sick leave allowance which is at the beginning paid by employer.

Home office

Under art. 3 of Anti-COV employer is entitled to order employees to work outside company premises for a determined period of time. Employee can't object such request as this could constitute the breach of employee's obligations under employment contract. Home office may be an alternative to using the additional childcare leave. The benefit to the employee will be in this case receiving full remuneration; in turn, the employer can avoid absenteeism which may affect company operations.

Remuneration

In accordance with art. 80 KP, the employee is entitled to remuneration for work done, unless labor law provides otherwise. Such exceptions are introduced by art. 81 KP.

Depending on the reason that makes employees unable to work, this situation will have the nature of downtime or obstacles for the employer. In both cases, the employer is obliged to pay the employee's 100 % monthly / hourly salary. If the employee has no fixed remuneration but receives remuneration

¹ Wyrok SN I PK 124/05, OSNP 2006/23-24/354

² Ustawa o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych. (Dz.U.2020.374)

based on commission, then employee is entitled to 60 % of the remuneration, however not lower than minimum wage.

In case the employers face difficulties connected with coronavirus epidemic it may be needed to decrease the remuneration of the employees. This could be done only by changing employment contract. Such change can be done either by bilateral agreement or by unilateral notice changing remuneration which will be effective after period depending on job tenure. In case of employee objection to such change employment contract is terminated after notice period expires.

Employee under quarantine

Under § 2 sec. 2 subsec. 2 of Minister of Health on announcing the state of epidemic³ (“**MH Ordinance**”) any individual who returns to Poland after 14 March 2020 needs to comply with obligatory 14 – days quarantine at home.

Additionally, under the administrative decision of sanitary inspection individual may be ordered to comply with obligatory up 21 – days quarantine at home.

In both this situations if employee is unable to perform work (e.g. don't have tools) he is treated as being on the sick leave⁴ which means that employer needs to pay 80% of the remuneration and after 14 days social security will take over payment of the remuneration during sick leave.

If employee being at home due to undergoing quarantine is able to work (has needed tools and his health condition is not preventing from work) employer can order him to work home office⁵.

Temporary restriction on business activity

MH Ordinance introduced temporary limitations for business activity of certain industries (§ 6 sec. 1 subsec.1) and sec. 2 - 4 of MH Ordinance:

- a) preparation and serving of meals and drinks to guests sitting at the tables or guests making their own choice of dishes from the menu displayed, consumed on site (PKD 56.10.A), with exclusion for take-out food or delivery as well as restaurant or bar operations carried out on means of transport carried out by separate units,
- b) related to the organization, promotion or management of events, such as fairs, exhibitions, congresses, conferences, meetings, including activities of managing and providing employees to service the areas and facilities in which these events take place (PKD 82.30.Z),
- c) all public forms of culture and entertainment (PKD 90.0),
- d) related to sport, entertainment and recreation (PKD 93.0), in particular consisting in running meeting places, clubs, including dance clubs and night clubs as well as swimming pools, gyms, fitness clubs,
- e) related to the projection of films or video recordings in cinemas, in the open air or in other places and the activities of film clubs (PKD 59.14.Z),
- f) related to the consumption and serving of beverages (PKD 56.30),
- g) connected with operating tourist accommodation facilities and short-term accommodation facilities (PKD 55.20),
- h) connected with operating casinos, excluding online casinos;
- i) conducted in commercial buildings with a sales area of over 2000 m²:
 - 1) retail trade to tenants of commercial space except from those whose predominant activity is to trade:

³ Rozporządzenie Ministra Zdrowia w sprawie ogłoszenia na obszarze Rzeczypospolitej Polskiej stanu epidemii (Dz.U. 2020.491)

⁴ Art. 6 ust. 2 pkt 1) ustawy o świadczeniach pieniężnych z ubezpieczenia społecznego w razie choroby i macierzyństwa (Dz.U.2019.645); art. 34 ust. 2 i 5 ustawy o zapobieganiu oraz zwalczaniu zakażeń i chorób zakaźnych u ludzi (Dz.U.2019.1239) and § 2 ust. 2 pkt 2) i ust. 4 Rozporządzenia MZ (Dz.U.2020.433)

⁵ art. 3 Anti-COV

- food as defined in art. 3 clause 1 of the Act of 25 August 2006 on food and nutrition safety (Dz.U. 2019.1252, Dz.U. 2020.284 and 285),
 - cosmetic products within the meaning of art. 2 point 9 of the Act of 4 October 2018 on cosmetic products (Dz.U.2018.2227) other than intended for perfuming or embellishing,
 - toilet articles,
 - cleaning products,
 - medicinal products within the meaning of art. 2 point 32 of the Act of 6 September 2001 - Pharmaceutical Law (Dz.U.2019.499), including in pharmacies or pharmacy outlets,
 - medical devices within the meaning of art. 2 clause 1 point 38 of the Act of 20 May 2010 on medical devices (Dz.U.2020.186),
 - foods for particular nutritional uses within the meaning of Article 3 clause 3 point 43 of the Act of August 25, 2006 on food and nutrition safety,
 - newspapers,
 - construction or renovation articles,
 - pet supplies or
 - fuels;
- 2) conducting service activities for tenants of service space, with the exception of tenants whose predominant activity consists in the provision of: medical, banking, insurance, postal, laundry or catering services consisting only in the preparation and delivery of food;
- 3) conducting retail trade or service activities on island stands (*wyspy handlowe*).
- k) conducting rehabilitation services as part of disability prevention referred to in art. 69 clause 2 point 1 of the Act of October 13, 1998 on the social security system (Dz.U.2020.266 and 321);
- l) the operation of independent public health care facilities for which the President of the Agricultural Social Insurance Fund (KRUS) is the creating entity.

Delegation to perform other tasks

In the event of downtime (art. 81 § 3 KP), the employer may entrust the employee with other appropriate work. There is no such possibility in the case of obstacles concerning the employer which prevent the employee from working (caused by decision of the employer) (art. 81 § 1 KP). Downtime occurs when the employee's inability to perform work results from circumstances that do not depend directly on the employer's decision. That is why it is important to determine the reason why employees cannot work. The MH Ordinance on announcing the state of epidemiological threat introduced temporary limitations for business activity of certain industries. Such circumstances constitute sound reason for entrepreneurs affected by MH Ordinance to access that downtime regulation are relevant.

Change in the work time

In case the employers face difficulties connected with coronavirus epidemic it may be needed to change the working time arrangements from full time to part time. This could be done only by changing employment contract. Such change can be done either by bilateral agreement or by unilateral notice on changing work time arrangements which will be effective after period depending on job tenure. In case employee objection to such change of employment contract is terminated after notice period expires.

Contracts

The occurrence of coronavirus epidemic in Poland territory is associated with a number of difficulties for the execution of contracts. It will be important to diagnose the impact of the epidemic on default liability,

and specifically whether the epidemic and its consequences can be qualified as an example of force majeure. Entrepreneurs affected by coronavirus epidemic should consider starting negotiation or use mediation in order to renegotiate the contracts that due current unprecedented circumstances may not be executed properly.

Force majeure

It is generally accepted that force majeure is (i) an external event that (ii) is unpredictable (low probability of occurrence) and (iii) which event could not be prevented. The above characteristics of force majeure should occur jointly in a given situation.

Many contracts stipulate directly that epidemic and pandemic constitute the event of force majeure. WHO has announced that the pandemic occurred and currently in Poland we have formally the state of epidemic (introduced by MH Ordinance as of 20.03.2020).

For those entrepreneurs directly affected by limitation of economic activity implemented by MH Ordinance this administrative act issued as a result of epidemic may be treated as force majeure.

It should be noted, that a debtor who wishes to exclude his liability for non-performance or improper performance of a contract due to force majeure will have to prove (especially for potential litigation purposes) its actual impact on the impossibility of fulfilling his obligation. Creditors acting with utmost diligence should oblige debtor to precisely demonstrate the impact of force majeure on the ability to perform the obligation, to avoid the risk of abusing force majeure by unreliable contractors.

That is why individual analysis of each situation is necessary for evaluation whether the influence of COVID-19 constitutes force majeure in specific case.

Rebus sic santibus clause and other legal tools

In case it is not possible to change contract as a result of negotiations with business partners company can use one of the legal tools available in Polish Civil code (“**KC**”). Those tools however causes the court to intervene and amend the contract which always bears the risk that such intervention may prove to different that the plaintiff intended.

Under rebus sic santibus clause (art. 357¹ KC) if due to an extraordinary change in circumstances which were not foreseen and could cause serious loss for the party the court may change or even terminate the contract taking into account parties’ interests.

It is also worth mentioning about the provisions of KC which refer to the subsequent impossibility to perform. If the performance becomes impossible due to circumstances for which the debtor is not liable, the obligation expires (art. 475 KC). KC also covers situation in which one performance become impossible in a bilateral relation. Under art. 495 KC is the subsequent impossibility to perform without anyone’s fault the party unable to perform can’t demand reciprocal performance and if already received it, then it must be returned.

Contractual penalties

Generally, in case there are contractual penalties included in the contract the creditor doesn’t have to prove that he suffered the loss. It is enough that he proves that the debtor failed to perform the obligation or made forbidden action. However, it is crucial to carefully analyze the wording of contractual penalty clause. In case of force majeure such as coronavirus epidemic debtor may not be responsible to pay contractual penalty if it is not precisely stipulated that he is responsible despite the cause. If the contract doesn’t state directly this directly the debtor may be able to avoid liability as according to Polish jurisprudence tacit extension of debtor’s obligation is not acceptable⁶.

⁶ Wyrok SN II CSK 180/10, LEX nr 970070

Taxes

Postponing the deadline for tax payment or breaking down in installments

Under art. 67a § 1 subsec. 1 of Tax Code⁷ company can apply to relevant tax authority to postpone the deadline for payment of tax (not yet due). The taxpayer needs to prove that he has sound justification for postponing the payment deadline. The company should provide evidence that justifying why taxpayer is not able to pay taxes within ordinary time frame. If the application is accepted by tax authority, it will issue decision within one month (two months in complex cases). The decision indicates the deadlines for paying taxes and amount of prolongation fee. The prolongation fee amounts to 50% of the default interest rates. Prolongation fee is not applicable if decision to postpone tax payment deadline was justified by natural disaster⁸.

It is worth mention that this solution bears some risks. First of all, sending application to tax authority does not guarantee that tax authority will approve it and issue decision. Processing of the applications (many entrepreneurs may apply to tax authorities) may take longer than the nearest deadline for tax payment. When the deadline payment passes postponing is no longer possible and application in this respect will be probably rejected. Furthermore, when period for postponing will come to end the taxpayer still facing economic difficulties will have to apply again for new decision (which also takes time) or else it will be obliged to pay postponed tax together with current ones.

Cancellation of tax debt entirely or in part

Under art. 67a § 1 subsec. 3 of Tax Code company can apply to relevant tax authority to cancel tax debt entirely or in part. The taxpayer needs to prove that he has sound justification for cancelling the tax debt entirely or partially. The company should provide evidence that justifying why taxpayer is not able to pay taxes at all. If the application is accepted by tax authority, it will issue decision within one month (two months in complex cases). It is much more difficult to successfully justify the need to cancel the tax debt as this is has bigger impact on state budget and tax offices probably could approve only extremely hard cases.

Breaking down unpaid taxes into installments

Under art. 67a § 1 subsec. 2 of Tax Code company can apply to relevant tax authority to broke down into instalments the payment of tax debts. The taxpayer needs to prove his inability to pay tax debts without breaking them down into installments. If the application is accepted by tax authority, it will issue administrative decision within one month (two months in complex cases). The decision indicates the number and deadlines for paying tax debts and amount of prolongation fee. The prolongation fee amounts to 50% of the default interest rates. Prolongation fee is not applicable if decision to postpone tax payment deadline was justified by natural disaster.

There are also risks connected with tax debts that are to be broken down into installments. Uncertain timing for tax office to reply (1-2 months period is not binding) may cause the situation in which taxes for the following months become due while application is not processed yet. What is more even the positive decision will cover only the tax debts and current taxes should be paid in time apart from installments implemented by the decision.

⁷ Ustawa ordynacja podatkowa (Dz.U.2019.900)

⁸ Art. 57 § 5 Ustawa ordynacja podatkowa;

Social security contributions

Postponing the deadline for social security payment

Under art. 29 of act on social security system⁹ company can apply to Social security authority (“ZUS”) to postpone the deadline for payment of social security contributions (not yet due). The company should provide evidence that justifies the application for postponing payment deadlines.

ZUS has announced a new simpler applying procedure due to coronavirus epidemic¹⁰. Application on postponing payments for March – May 2020 can be submitted on-line with scans of the additional documents (financial statements, information how coronavirus affected the company).

If the application is accepted by ZUS, a contract with company is concluded. The contract indicates the deadlines for paying contributions and other contractual terms. In this case, the company does not pay interest for late payment of contributions, but only a prolongation fee of 50% of the default interest rates applicable on the day of signing the contract.

It should be noted that this solution has also some potential risks. First of all, sending application to ZUS does not guarantee that ZUS will approve it and conclude contract on postponing the deadline for payment. Processing of the applications (many entrepreneurs may apply to ZUS) may take longer than the nearest deadline for payment contributions (for March deadline expires mid-April). When the deadline payment passes postponing is not longer possible and application in this respect will be probably rejected. Secondly, we don't know how the contracts will look like and if the negotiations will take more time or the company decide not to sign the contract it automatically become the debtor. Furthermore, when period for postponing will come to end the company still facing economic difficulties will have to renegotiate the contract with ZUS (which also takes time) or else it will be obliged to pay postponed contributions together with current ones.

Breaking down unpaid social security contributions into installments

Under art. 29 of act on social security system company can apply to ZUS to may broke down into instalments the payment of already due social security contributions. The company should provide evidence that justifies inability to pay due contributions without breaking them down into installments.

If the application is accepted by ZUS, a contract with company is concluded. The contract indicates the number of installments, payment dates and other contractual terms. In this case, the company does not pay interest for late payment of contributions, but only a prolongation fee of 50% of the default interest rates applicable on the day of signing the contract.

There are also risks connected with already due contributions that are to be broken down into installments. Uncertain timing for ZUS to reply may cause the situation in which contributions for the following months become due while application is not processed yet. What is more the contract with ZUS will cover only the already due contributions and current ones should be paid in time apart from installments agreed in the contract.

Litigation/ Public administration

Courts

Majority of court are currently working with limitations such as:

- cancellation of the court hearings;
- postponing the announcements of the judgements;

⁹ Ustawa o systemie ubezpieczeń społecznych (Dz.U.2020.266 t.j.)

¹⁰ <https://www.zus.pl/o-zus/aktualnosci/-/publisher/aktualnosc/1/informacja-o-uprawnieniach-do-swadczen-z-powodu-poddania-sie-kwarantannie-lub-izolacji/2534641>, access 19.03.2020

- limiting the work of delivery offices, customer service offices and the files reading rooms;
- limiting access to court for non-employees and examining the body temperature of people entering.

Currently there are no regulations on suspending the court time limits during epidemic. Ordinary regulations are applicable which means that the party is entitled to request the court to reinstate the time limit¹¹. Should the court definitely ceased activity due to epidemic, then under art. 173 of Code of Civil Procedure (“KPC”) all cases in such court will be suspended automatically (the same would happen with court time limits).

Filing a lawsuit or other documents related to the litigation may also be more difficult due to the fact that now it is possible only via public post service as court delivery offices are in majority closed. Public postal service provider (Poczta Polska S.A.) also limited the opening hours of majority of post offices which makes it more difficult to effectively send documents related to litigation.

Current situation is not suspending limitations period as the parties are not deprived of ability to pursue its rights¹². As far as, the courts are still working (even in limited scope as it is today) limitation period is not suspended.

In case more severe limits will be implemented the only way to file a lawsuit (and stop the limitation period) could be using electronic proceeding in simple cases (“EPU”).

Public administration

Majority of public administration offices including tax offices and local authorities suspended all visits of non-employees. Some public administration offices ordered employees to work home office. Due to this limitation there is a risk connected with inability to deliver documents in person to the office and with delays in administrative proceedings.

Restructuration and Bankruptcy

Current situation for some industries and individual entrepreneurs may prove to be dramatic and renegotiations of the contracts may not solve the liquidity problems. Thus, is it crucial to show the ways to rescue the company facing difficulties (restructuration) and the ways to close down the business in order to limit the risk for managers and shareholders.

Restructuration

The essence of the restructuring is to avoid bankruptcy through the implementation of various mechanisms enabling the conclusion of an arrangement with creditors, or also through the implementation of remedial measures (remedial proceedings).

Restructuration can be - unlike bankruptcy proceedings also carried out against companies that are only at risk of insolvency. There are four type of restructuration proceedings tailored for entrepreneurs facing different problems and being in different situations¹³. Some of the enable to still manage the business with supervisory and other require that management is taken over by a manger appointed by the court. It is possible to file an application for opening restructuring proceedings and an application for declaration of bankruptcy at the same time. In the event that it is stated that a person obliged to file for bankruptcy has not done so because he has previously filed for the opening of a restructuring procedure,

¹¹ Art. 168, 169 Kodeksu postępowania cywilnego

¹² Art. 121 pkt 4) Kodeks cywilnego

¹³ Prawo restrukturyzacyjne (Dz.U.2019.243 t.j.)

he does not release him from liability. It is only when the restructuring proceedings are opened that the obligation to file for bankruptcy is expires.

Bankruptcy

Bankruptcy occurs when entrepreneur becomes insolvent and is not able to pay due liabilities. By the law if the company for the period of 3 months is not able to pay due debts and/or its liabilities are larger than his assets for over 24 months it is assumed that company should file for bankruptcy¹⁴.

Unfortunately, the fact that a company is insolvent, not because of managerial negligence, but because of the coronavirus pandemic, in no way affects the company's legal position and does not release from the obligation to file for bankruptcy when it is justified by circumstances. Unfortunately, it is also irrelevant that the entrepreneur or company felt insolvent due to the fact that your contractors were insolvent first and thus the payment chain was broken. Filing for bankruptcy in due time is essential to limit the financial and, in some cases, criminal liability of the company's management board.

Anti-crisis shield

Government has proposed the package of amendments to law called "Anti-crisis shield" which has been adopted by the Parliament and shall enter into force in April 2020. Description of the measures introduced by Anti-crisis shield will be subject to separate document prepared by Calan legal team.

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¹⁴ Prawo upadłościowe (Dz.U.2019.498 t.j.)