

## EXPERT Trade unions

# A NEW UNIONISM?

## Awarding trade union rights to non-employees is only one of major changes

On January 1, 2019, a new Trade Union Act entered into force, which enables not only employees, but also freelancers and persons in B2B relations with employers, to form trade unions. This new law has a chance to rise the level of union membership and increase the role of trade unions. The old Trade Union Act of May 23, 1991 assigned the right to join trade unions to employees, members of agricultural production cooperatives, and persons working under an agency agreement, if they were not also employees. This rule was maintained in Poland for years, even though it was inconsistent with the International Labor Organization's convention no. 87 on freedom of association and protection of the right to organize, which enshrines the right of "workers" to unionize, "without distinction whatsoever." Among other doubts, there were problems with the word "workers," which in the Polish version of the convention was given as *pracownicy*. This word, which may be translated into English as either "workers" or "employees," is defined in the Polish Labor Code as "persons hired under an employment contract, appointment, election, nomination, or a cooperative employment contract." This does not mention employment in any other form. The ILO recommendations in this respect did not achieve the desired result, and thus the nationwide union organization OPZZ filed a challenge with the Polish Constitutional Tribunal, which held in the judgment of June 2, 2015 (Case K 1/13) that the provisions of the Labor Union Act limiting the freedom to establish and join trade unions to persons performing gainful employment as defined in those provisions are inconsistent with the constitutional freedom of association.

Consequently, the law was amended, and the Act of July 5, 2018, Amending the Labor Union Act and Certain Other Acts, entered into force on January 1, 2019. Apart from codifying the ruling of the Constitutional Tribunal, the amending act introduced a number of revolutionary changes in union rights, also covering other issues that had previously been controversial or unclear.

### KEY CHANGES

One of the key changes in the amendment is the expansion of unionizing rights. The amended Art. 2 (1) of the Labor Union Act provides that the right to establish and join unions is enjoyed by persons "performing gainful work," and a "person performing gainful work" is defined as an employee (*pracownik*) or other person performing work for pay on a basis other than an employment relationship, if the person does not employ other persons to perform this type of work (regardless of the basis of employment) and also has rights and interests connected with the performance of the work which could be represented and defended by a trade union. In this way, parliament extended the right to belong to trade unions to persons performing work on the basis of a freelance service contract (*umowa zlecenia*) and to self-employed persons maintaining B2B relationships, who are more and more frequently encountered on the market, often due to the nature of the work they perform. But for recognition of the right to form and join labor organizations, the law also requires that persons such as employees under the Labor Code, not employ others and also hold interests that are generally capable of representation by a trade union. An



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additional hurdle aimed at limiting union rights to persons with ongoing relations with an employer, rather than providing services occasionally or temporarily, is the provisions on workplace union organizations. Under those provisions, the rights of a workplace union organization are enjoyed by organizations whose members include 10 or more employees or other persons performing gainful work for the employer in question for at least six months. It is also significant that along with gaining the right to unionize, persons working on a non-employment basis and performing union functions have obtained the possibility of enjoying protection against termination or unfavorable changes in their working conditions or pay.

Thus if an employer seeks to unilaterally terminate or modify the terms of a civil contract with a protected union activist, the employer must seek the consent of the board of the workplace union organization. The union has 14 days to decide whether to grant or deny its consent in the case of an intention to terminate or amend the contract upon advance notice or seven days in the case of an intention to terminate the contract with immediate effect. If no position is taken by such a deadline, the union is deemed to consent. And if the protected union activist's contract is unilaterally terminated or amended in violation of these provisions, the amended act provides that the activist is entitled to compensation equal to six months' salary, regardless of the actual loss and with the right to seek actual or exemplary damages exceeding that amount. However, unlike activists who fit the definition of an employee under the Labor Code, an activist working on a non-employment basis cannot demand reinstatement.

### OTHER PROVISIONS

Apart from the expansion of unionizing rights discussed above, the amending act also introduced a number of other changes. One cov-

ers the period for workplace unions to submit information to the employer on the number of union members, which determines the rights of the union organization, has changed. Before the amendment, this information was submitted every quarter, but from January 1, 2019, the union is required to provide this information to the employer in half-year cycles, reflecting the number of union members as of June 30 and December 31, respectively, by the 10th day of the following month. If the union fails to provide this information, it will lose its entitlements until the requirement is met.

### CONCLUSIONS

Unfortunately a detailed description of all the changes that entered into force on January 1, 2019, in connection with the amendment of the Trade Union Act and other acts exceeds the scope of this article. Nonetheless, the amending act should be recognized as groundbreaking in numerous aspects of collective labor law. It seems that the most important change is the implementation of the recommendations found in ILO convention no. 87 and the judgment of the Constitutional Tribunal by recognizing the right to form and join trade unions on the part of persons performing gainful work on a basis other than an employment contract. This change may also have a great impact on the size and role of labor unions in Poland. This is particularly vital in an era when civil relationships, largely based on a business-to-business model, are becoming increasingly widespread, and when the labor market is struggling with the demands of the new generation of Millennials, who are less eager to work within standard subordinated employment relationships.