



COVID-19 Czech Legal Analysis

19 March 2020

Employment – Data Protection – Contracts – Damages

The COVID-19 virus continues to spread around the globe, and the rate of infection in the Czech Republic is also increasing dramatically. Understandably, the main goal for everyone at present is to remain safe and healthy. But at the same time, it is also important to ensure the stability and continuity of businesses. To assist in this goal, Kinstellar has prepared the following summary and list of recommendations related to the wider legal issues connected with the current COVID-19 (coronavirus) pandemic:

1. Labour Law Aspects

a. Employees working outside the workplace

Employers and employees can agree on work temporarily being undertaken outside of the usual workplace (i.e. working from home). Employers are not permitted under Czech law to unilaterally order employees to work from home or from any other location. Employees also require the consent of employers to work from home. It is advisable for employers to adopt practical policies and guidelines on remote work, covering issues such as work safety and health protection, working times, employee accessibility, the use of working tools and other practical matters.

If employers specifically want their employees to avoid the usual place of work (for reasons of health and safety), but if a mutual agreement cannot be reached on a suitable alternative place of work for the employee, then an employer may still order employees home on the basis of an obstacle having been created by the employer to standard working procedures. In such cases, employees are entitled to wage compensation in the amount of average earnings.

Annual paid leave can be taken outside scheduled vacations only by mutual agreement between employers and employees. Outside this, the employer is obliged to provide at least 14 days' advance notice of the intended leave. This means that an employer cannot arbitrarily order paid leave from one day to the next without reaching an agreement with

the employee. If the employee has begun drawing annual paid leave prior to the ordering of a quarantine, such leave is not interrupted by any such order.

b. Leave and shift schedules

If an employee has worked overtime and he/she has agreed to take compensatory leave in lieu of a premium, the employer may order him/her to use this compensatory leave within the scope of hours worked overtime.

Employers are also entitled to modify the shift schedules of employees without their consent. However, such shift schedules must be determined 14 days in advance if a shorter period has not been mutually agreed between the employer and the employee.

At the request of the employee, the employer may also allow him/her to take unpaid leave.

c. Employees ordered into quarantine

If the public health authorities order a specific employee into quarantine, this constitutes an obstacle being created against the employee (carrying out regular work), for which the employee is entitled to wage compensation similar to temporary work incapacity. This means that the employee is entitled to paid sick leave from the employer during the first fourteen (14) calendar days; from the fifteenth (15) day onwards he/she is entitled to the sickness benefits provided by the Czech Social Security Administration.

Employees have an obligation to inform employers without undue delay of any work obstacles and to provide the relevant documentation. The employer is obliged to excuse the work absence of an employee during his/her period under the ordered quarantine. Employees cannot be ordered to take annual leave during any such quarantine.

2. Privacy-Related Questions

Employers may need to process employee data, or data on other persons visiting company premises in order to fully implement the appropriate precautionary health and safety measures. Such data could be considered as personal data and thus the implemented measures and related processing activities should be in compliance with the applicable data protection legislation.

Employers may process personal data in connection with the coronavirus pandemic to the extent necessary in order to adopt protective measures without the need to obtain the consent of the data subject. Data on possible diagnoses and symptoms are considered as a special category of personal data and thus require the fulfilment of the specific conditions described in Article 9 of the GDPR.

The adopted measures and related processing of personal data must be necessary and not excessive. For example, employers should be able to ascertain whether employees have visited high-risk countries, whether they have been in close contact with infected persons, or to monitor which persons are present on company premises. On the other hand, employers should avoid systematic monitoring of the health conditions of employees, or systematically measuring the body temperatures of all individuals entering the premises. In case of confirmed coronavirus cases, the employer should not seek to ascertain or to even disclose the identity of the infected employee; however, the employer may anonymously inform others about the potential existence of a confirmed case on the company's premises and then adopt any relevant measures.

3. Impact on Contracts

As preventative measures continue to restrict economic activity, it may prove difficult or impossible to perform or fulfil many contracts in a timely manner, if at all. This situation could result in the cancellation of contracts, late deliveries, delivery refusals, contractual penalties, cash-flow and financing issues, and an increased number of insolvency proceedings and insurance claims.

While it is natural to hope that all the affected parties will seek to identify and apply mutually satisfactory solutions during these difficult times, it is nonetheless important to be aware of certain lesser-known legal provisions designed to cover times of emergency. This will allow an assessment of rights and offer options on mitigating risks if a counterparty or company is unable to perform.

a. Material changes of circumstances

Arguably, circumstances created by COVID-19 may fall under the concept of a material change of circumstances (§ 1765 of the Civil Code). If as a consequence of such changes one party finds itself at an extreme disadvantage (due to a disproportionate increase in the costs of ensuring contractual performance, or vice-versa, such as a decrease in its value), it may seek to renegotiate a contract or request that a court amends or cancels a contract (unless the application of this concept was expressly excluded in the contract). However, this concept should not serve as grounds to delay contractual performance or to avoid a contract the performance of which has merely become more difficult or less advantageous – the borders between these will not always be clear.

b. Force majeure (vis major)

Situations beyond objective control, such as the current COVID-19 pandemic, should be covered by the concept of force majeure as set out in Section 2913 (2) of the Czech Civil Code. The party breaching a contract is not liable to pay damages if it can prove that the breach was caused by an extraordinary obstacle which the party was objectively unable to overcome, and thus caused by circumstances outside of the control of that party.

In order to rely on such a principle, the breach must only have occurred after such a circumstance arose. The current coronavirus pandemic thus cannot be used to justify contractual breaches occurring prior to the outbreak. Also, the concept of force majeure generally does not relieve the breaching party of the obligation to pay contractual penalties. However, it could be argued that contractual penalties imposed in such circumstances would be against the general principle of so-called “proper conduct” (in Czech: *dobré mravy*).

c. Frustration of contracts

In some cases, the concept of the frustration of a contract as set out in § 2006 of the Czech Civil Code may apply, due to the fact that the contract became impossible to perform. This provision may apply to situations where the contract becomes impossible to perform for a significant time period. However, this does not cover situations in which a mere late, more difficult, or more costly (thus imperfect) performance is still possible. On the other hand, any delay in performance of contracts with a fixed time of performance will generally lead to automatic cancellation of the contract (§ 1980 of the Civil Code).

The performance of existing contracts may also be affected by any legislative changes agreed by parliament, or emergency decrees issued by the government in response to the current coronavirus pandemic, which may render the performance of certain contracts illegal. In any event, we recommend carrying out a review of contract(s) to identify any

potential issues and notification obligations in relation to the possible delay/suspension/termination/frustration of any contract(s). Even in the absence of express contractual clauses, notification may be crucial in order to mitigate the scope of any potential damage (as well as for any subsequent recovery efforts). In many cases, termination of a contract either with immediate effect or following a certain notice period may be appropriate.

4. Compensation by the Czech state for incurred damage

According to the Act on Crisis Management, the Czech state is obliged to compensate for any damage caused in direct connection with emergency measures utilised in accordance with this Act. The Czech state is only released from such liability if it can prove that it did not cause such damage.

There are only a handful of past cases under which compensation for such damage was sought – meaning a less-than-definitive understanding of the application of this particular law. Nevertheless, the damaged party must file a claim for compensation no later than 6 months after it has ascertained the relevant damage, or no later than 5 years from the damage occurring. The request must be filed with the specific crisis management authority of the Czech state/government apparatus which ordered the emergency measures as a result of which the damage allegedly occurred. In the event that the specific authority cannot be determined, the request must be filed with the Ministry of the Interior. Failure to notify the respective authority forfeits the right of the damaged party to file a damage claim with the courts.

The amount of damage will be assessed in accordance with the general provisions of the Czech Civil Code – potentially a somewhat complicated affair. In the case of the current coronavirus pandemic, the damaged party must prove that the damage was caused as a result of implemented emergency measures and not by the COVID-19 pandemic itself. Therefore, we strongly recommend reviewing and cataloguing any damage-incurred evidence with a view to the creating an evidentiary basis for any potential future claims.

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