



How to recruit staff without breaking the law



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Polish law prohibits the use of civil-law (or 'freelance') contracts instead of an employment contract if the work is to be performed under conditions typical for an employment relationship. This would be work under the direction, and at the risk, of the employer and at the time and place indicated by him. In such case a civil-law contract could be deemed by the court to be an employment contract.

Polish law does not contain an exhaustive list of the grounds for discrimination, but prohibits unequal treatment of candidates and employees for any reason. At the pre-recruitment stage, it's important to ensure that the job ad and the recruitment process do not discriminate. 'Positive discrimination' may legally be applied only in instances set forth in the law.

Although the ability to check a candidate's personal characteristics and knowledge is quite limited, the employer may check the candidate's level of knowledge in a given field and the foreign language skills which the employee will need to use in everyday work.

Polish employers are not required to issue references, nor is it customary to do so. After completion of a period of employment, an employer must issue an employment certificate. This must contain statutorily defined information about the course of employment and confirm the period of employment, the type of work performed, the manner in which the employment contract was ended, and the number of days of holiday leave or absence from work due to illness during the year when the employment ended.

A non-competition agreement binding on the candidate following the end of his or her previous employment may be a hiring barrier. A mere non-disclosure of trade secrets ban from the previous employer does not disallow hiring the candidate by a competitor, but in practice there may be barriers to performance of the duties if a conflict of interest arises.

If a candidate successfully completes the recruitment process, he or she often receives a letter of intent, confirming selected terms of the employment. Polish law does not specifically regulate this kind of document, and here the regulations concerning offers should apply. The offer is binding on the employer if the candidate accepts the terms set forth in the letter of intent. Amending it requires the consent of the future employee. Sometimes the letter of intent may serve as a preliminary agreement and give the employee grounds to require the employer to conclude the final agreement, or to pay appropriate damages if the employer ultimately refuses to hire the candidate.

The essential elements of an employment contract in the Polish law include:

- type of contract
- parties
- date the contract is concluded
- type of work
- place where it is to be performed
- nature of the position – full-time or part-time
- pay and the commencement day

In general, it should be concluded in writing, in Polish. There are some exceptions concerning foreigners. The employer must also inform the employee of certain matters, such as the employee's working hours, the manner of confirming arrival at work and notifying the employer of absence, the right to annual leave, and the termination notice period.

If the contract is concluded some time in advance, and either of the parties decides to change their mind and not to go through with the employment before it actually begins, it is necessary to enter into an agreement to this effect, or else to terminate the contract in compliance with the termination notice period.

Collecting information about a job candidate is an inherent part of the recruitment process. Naturally, a potential employer wants to obtain as much information as possible, from numerous sources. However, a conflict may arise between justified interests of the employer and the employee's right to privacy.

The basic issue related to the recruitment process concerns the scope of data collected from job candidates. The Labour Code specifies, in Art. 22¹, categories of data which an employer may acquire. The inspector-general for personal data protection (GIODO) has stressed many times that the employer may not require a job candidate to provide a greater amount of information than set out in Art. 22¹. According to GIODO, an employer may not require a candidate to submit a photo. However, a candidate may provide a photo voluntarily (included in the CV).

Another issue faced by employers is the possibility of verifying information provided by job candidates. Although the Labour Code confirms that an employer may demand documentation of the candidate's professional experience, a question arises whether the employer may hire an external entity to conduct a background check of the candidate. It appears that such screening should be permissible if it were limited to employment history and education. It seems doubtful, however, if this verification can cover such matters as criminal record (unless expressly allowed by law) or listing in various registers of debtors. Although such practices might be disputed by the data protection regulator, it would be hard to find that they are unjustified in cases such as recruitment for a financial position.

Third parties, like headhunters, are often involved in the recruitment process. If such an entity is collecting candidates' data on behalf of the employer and storing the data in its own IT system, then a written agreement expressing the candidate's permission to process the data should be concluded. Lack of it may expose the employer to accusations of providing unauthorised access to personal data, which could even lead to criminal liability.

If the recruitment process involves forwarding of data outside the European Economic Area, for example to a data centre located in a "third country" (outside the EEA), the employer must undertake additional measures to assure the legality of this process. Namely, the candidate must give the employer written consent to such transfer. But this may not be feasible, particularly where the recruitment is conducted online.

Also, the issue of consent to data processing in employment relations (including job candidates) may generate controversy because of the aforementioned problem of the employer possibly forcing such consent.

Many employers conducting recruitment involving transfer of personal data outside the EEA conclude data transfer agreements based on model clauses drafted by the European Commission. It should be borne in mind, however, that the mere conclusion of such agreements does not automatically provide grounds for transferring the data outside the EEA. GIODO's consent is also required. It is issued after an analysis of the agreement and other information provided by the employer as the data exporter.