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Employment and Pensions

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New Protection of Trade Secrets Act

The Swedish Parliament has voted to approve the Government's proposal to replace the current Protection of Trade Secrets Act. The new act will implement the 2016 EU directive on the protection of undisclosed know-how and business information (trade secrets). The proposal extends additional protection to trade secrets in comparison to the former act. The new act entered into force 1 July 2018.

According to the government, the former Protection of Trade Secrets Act met most of the EU directive's criteria. The new act does however contain a number of changes. Among the top news is that (i) more infringements than before shall be unlawful and possible to prohibit, (ii) the infringer shall be liable to pay damages in more cases of infringement, (iii) the possibility to keep trade secrets confidential during court procedures is strengthened, and (iv) the maximum penalty for industrial espionage is increased.

The additional infringements protected under the new act include cases where an employee acquires a trade secret that he or she already has access to. This may be the case when an employee brings documents from the workplace to his or her home without the employer's consent, sends files to a private email address or, contrary to the employer's instructions, refrains from returning or destroying a trade secret.

Another important change is that courts may in more cases than before prohibit the use of trade secrets under penalty of fine and use other protective measures. Protective measures may now be used even if the infringer has acted in good faith and already when the infringement has not occurred, but is only imminent.

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Employers have, in part due to the development of new technology, had more and more difficulties protecting themselves from disloyal infringements by their employees. A strengthening of the protection of trade secrets has been discussed in Sweden for a long time. The new act targets some of the weaknesses that have been identified in the current legislation.

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Changes to the Posting of Workers Act

On 1 June 2017 several changes to the Posting of Workers Act (Sw. *utstationeringslagen*) entered into force. The changes extend trade unions' rights to take industrial action against foreign employers who post workers to Sweden ("*posting employers*", sw. *utstationerande arbetsgivare*).

The Posting of Workers Act regulates, among other things, the circumstances under which industrial action can be taken against posting employers. These regulations have generally been left unchanged. Industrial action with the purpose of establishing a collective agreement may still only be taken if the intention is to regulate "essential rights" (Sw: *hårda kärnan av rättigheter*), e.g wages, working hours and annual holidays, and these essential rights constitute minimum terms of a national collective agreement.

The changes to the act mainly regard the so called "rule of evidence" (Sw: *bevisregeln*), that prohibited industrial action if the posting employer could prove that employees enjoyed employment terms that were fundamentally equivalent to minimum terms of a collective agreement. This possibility has now been removed, which means that industrial action, e.g. strikes, may now always be taken against a posting employer for the purpose of making the employer enter into a collective agreement that regulates essential rights. The legal effect of these collective agreements has however been considerably limited. For instance, most of the provisions of the Co-determination in the Workplace Act (Sw: *medbestämmandelagen*) do not apply to them, and neither does the Representatives Act (Sw: *förtroendemannalagen*).

The right to strike has been a debated topic for the past year, partly because of the long lasting labour dispute between employer and trade union in the port of Gothenburg. The government appointed a select committee last year to review trade unions' rights to take industrial action and present a report to the government this summer. However, the social partners anticipated the proposal, and presented their own proposal for amending the right to strike. The proposal prohibits industrial action not taken with the purpose of establishing a collective agreement. The government has declared that it intends to make the social partners' proposal law.

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The General Data Protection Regulation (GDPR) has entered into force, along with a new Swedish Data Protection Act

On 25 May 2018 the EU General Data Protection Regulation (GDPR) entered into force, with direct effect in all member states. In Sweden it replaces the old Data Protection Act, and entails additional obligations for both data controllers and data processors, as well as clarifications of existing obligations. Moreover, additional rights are extended to individuals. In addition to the more comprehensive obligations to document and inform about personal data processing, the GDPR includes the following notable news for employers:

- The Swedish exception for unstructured personal data (Sw: *missbruksregeln*) has been removed. The GDPR will therefore apply in equal measure to personal data in e-mail, text editors and sound, visual or audiovisual recordings.
- The data controller (the employer) must document the processing of personal data in more cases. Additionally, employees, applicants and other individuals whose data is processed must be informed in a clear manner about the purpose of the processing, for how long the data will be retained, who will have access to the personal data and on what lawful ground the data is processed. Individuals should also be informed about their right to access their personal data, to have their personal data erased or corrected and their right to have their personal data transferred to a third party.
- Obligations under a collective agreement will in the future constitute lawful ground for employers to process personal data – including "sensitive" data like trade union memberships. However, employers will generally not be able to process the personal data of employees on the basis of consent. This is due to the inherent imbalance in the employment relationship.
- All personal data breaches (e.g. unauthorized access to personal data) must be thoroughly documented. In case of a serious data intrusion or a similar breach the Swedish Data Protection Agency (Sw: *Datainspektionen*) must be notified within 72 hours.
- New and more severe sanctions will apply to breaches of the GDPR.

Moreover, the Swedish parliament has passed a new Data Protection Act to complement the GDPR. The new act, that also entered into force on 25 May 2018, clarifies and specifies when personal data can be processed under the GDPR. The act states, inter alia, that the obligation to disclose personal data to individuals does not apply to memorandums or other texts that are not final and have not been processed for more than one year.

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Question as to whether banning disposable sleeves during dental work constituted indirect discrimination

Due to religious reasons, an employed dentist covered her forearms while working with patients. Her employer followed certain hygiene routines, that also applied to forearms. The employed dentist's routine, that the employer previously approved of, meant that between each patient the dentist disinfected her forearms and then covered them with disposable sleeves. In February 2016, the employer banned this routine and demanded that the employee comply with ordinary routines and not use disposable sleeves. Because of this the dentist decided to resign. The employer's decision was based on new guidelines from the Swedish National Board of Health and Welfare (Sw. *Socialstyrelsen*).

The Equality Ombudsman (Sw. *Diskrimineringsombudsmannen*) brought an action against the employer, and claimed that the ban on disposable sleeves constituted indirect discrimination against employees who choose to cover their forearms for religious reasons. Indirect discrimination means applying a provision, criterion or a procedure that appears neutral but that may put people of a certain religion or ethnicity (or any other legally defined discriminatory ground e.g. sex, age or disability) at a particular disadvantage, unless the provision, criterion or procedure has a legitimate purpose and the means that are used are appropriate and necessary to achieve that purpose. The Equality Ombudsman admitted that the purpose of the ban, maintaining patient safety, was a legitimate interest, but argued that the ban was neither appropriate nor necessary. The employer contested the Equality Ombudsman's claims.

The Labour Court assessed the merits of the new routine. It found that the routine was only implemented after considerations of relevant circumstances had been made, and that the use of disposable sleeves had proven to involve concrete risks. Moreover, the court found that there were no viable options to the new routine, and that the potential effects of cross-infection were severe. The court therefore concluded that the ban of disposable sleeves was both appropriate and necessary. Even if the risks involved with the use of disposable sleeves were small and the ban meant that certain individuals could not work for the employer, the court considered the interest of maintaining patient safety to be of such importance that the ban on disposable sleeves was proportional. The Labour Court therefore dismissed the Equality Ombudsman's action.

The ruling illustrates the weight given to the protection of life and health when assessing whether potentially discriminatory means are appropriate and necessary. The Labour Court has also recently ruled on another indirect discrimination case regarding religious beliefs, see ruling AD 2018 nr 51. This case, which has attracted a lot of media attention, involved an interpreter who had her employment interview immediately cancelled when she refused to shake hands with the recruiting employer's male representative. The Labour Court found that the interpreter had been discriminated against. This ruling will be touched upon in more detail in our next newsletter.

(AD 2017 NR 65)

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Question of employers' obligation to follow up on accusations of sexual harassment etc.

In this case, a personal assistant had notified her employer about her being subject to sexual and ethnic harassment by the cohabitee of one of her users. The user received personal assistance in accordance with the Law of Support and Service Act (Sw: *lagen om stöd och service till vissa funktionshindrade*). The employee brought an action against the employer and argued that the employer had not fulfilled its duties under the Discrimination Act (Sw: *diskrimineringslagen*) to investigate and take action against the alleged harassment.

Section 3 of Chapter 2 of the Discrimination Act states that employers who become aware that an employee considers himself or herself to have been subject to harassment by someone who performs work, or is undergoing practical training, for the employer, must investigate the matter and if necessary take suitable action. The issue in the case was if the user's cohabitee had such a position that he was to be seen as someone "performing work" for the employer.

The Swedish Labour Court concluded that the user's cohabitee was indeed not under official employment by the employer, but that the expression "someone who performs work for the employer" also includes those who in a given context are equivalent to employees. As a representative for the user, the cohabitee had much influence over the personal assistant's work. This right however, was based on the user's legal rights (as a customer). The cohabitee had not taken over the employer's right to manage and supervise work. The Labour Court therefore concluded that the cohabitee was not to be considered as someone who performed work for the employer and dismissed the action.

The case regards employers' obligation to investigate under the Discrimination Act. In addition, employers have a legal obligation to investigate if there are deficits in the work environment under

the work environment regulation. The issue of what measures employers should take in response to accusations of harassment is becoming increasingly relevant, inter alia by reason of #metoo.

(AD 2017 nr 61)

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Question as to whether a CEO's bonus pay-outs had included holiday pay

Under the Holidays Act (Sw: *semesterlagen*), bonuses that, directly or indirectly, are connected to personal performance entitle employees to holiday pay. Agreements that include holiday pay in the bonus are in principle invalid. However, the Swedish Labour Court has decided that if it can be shown that the employee has acquired the holiday benefits that would be paid anyway, the employee does not have a right to further remuneration. One of the conditions for lawfully including holiday pay in the bonus is that it can be clearly determined which part of the bonus constitutes holiday pay.

This case regarded a CEO who received a yearly bonus in accordance with a specific bonus agreement. After leaving the employment, the CEO claimed that the employer should pay outstanding holiday pay, based on the bonus he had received during the employment. The employer objected that the parties had agreed on the holiday pay being included in the bonus, and that the holiday pay thus had already been paid.

To begin, the Labour Court concluded that the parties had not expressly, neither orally nor in writing, agreed on holiday pay being included in the bonus. However, it was clear that both the employer and the CEO had perceived the bonus contract as a so-called gross expense agreement, meaning that beyond the bonus amount paid it would not accrue any additional wage costs for the employer. The parties had thereby agreed that the CEO's remuneration would not only cover the yearly bonus but also other wage costs connected to the bonus, holiday pay included. The Labour Court also stated that the employee's position as CEO gave him a certain responsibility for the company's compliance with the Holidays Act, as well as for the budget and the annual accounts. After making a cumulative assessment, the Labour Court found that the parties had agreed on the holiday pay being included in the bonus and that this was not contrary to the Holidays Act. The Labour Court therefore dismissed the action.

It is very common that employers and employees agree to include holiday pay in bonus pay outs. This case is a rare example of the employer not being obligated to pay further remuneration even though it had not been clearly regulated (in contract and salary statement) that holiday pay had been included in the bonus amount. It should be pointed out that the circumstances in the case were very special and that it was of importance that the case concerned a CEO. In its decision, the Labour Court indicated that the special responsibility of CEOs to ensure compliance with the Holidays Act can affect the possibilities of demanding remuneration for faults committed.

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