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EU PLATFORM WORK DIRECTIVE

Written by Hans Georg Laimer & Lukas Wieser

The European Commission published a proposal for a European Union Platform Work Directive in December 2021. The proposed directive aims to create more transparency and fairness for platform workers, combat bogus self-employment and implement comprehensive information obligations in the context of platform work.

The draft Platform Work Directive contains the following three main aspects: the legal presumption of an employment, regulations regarding algorithmic management and transparency provisions.

Platform work is defined by the draft directive as any work performance organised via digital work platforms and performed within the European Union.

1. LEGAL PRESUMPTION OF THE EMPLOYMENT STATUS

Pursuant to the draft Platform Work Directive, the crowdworker is considered an employee if at least two of five criteria are met. The five criteria for presuming the employment status are:

- determination or limitation of the level of remuneration by the platform
- instructions on compliance with binding rules regarding appearance, conduct towards the recipient and performance of the work
- (electronic) monitoring of work performance and review of work results by the platform
- effective restriction of freedom in the organisation of the work (e.g. with regard to choice of working hours, acceptance or rejection of assignments, delegation of tasks to third parties, etc.)
- effective limitation to build an own client base or work for third parties

2. ALGORITHMIC MANAGEMENT

The second main part of the draft directive provides for regulations regarding the use of algorithmic management. In addition to the platform's duty to inform about the use of algorithmic management systems, the draft directive stipulates the human monitoring of automated systems and the human review of significant decisions made by automated systems. These regulations should apply to all crowdworkers engaged by a platform, and not only those on an employment contract.

3. TRANSPARENCY

Finally, the draft directive aims to increase transparency of platform work. Therefore, it is planned that platforms will be obliged to report work activities to the competent authorities of the Member State in which the work is performed. Moreover, platforms will also have to make certain information, such as the number of crowdworkers, etc., available to the authorities of the Member State as well as to representatives of crowdworkers.

4. OUTLOOK

Whether the proposed Platform Work Directive will enter into force, in what form and when, now depends in particular on the European Parliament and the Council. Therefore, this and the subsequent implementation in national law of Member States remains to be seen.

The draft directive can be found here.

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THE "ARTIFICIAL INTELLIGENCE ACT" AND ITS IMPACT FOR EMPLOYERS

Written by Andreas Tinhofer & Melina Peer

1. INTRODUCTION

Artificial intelligence (AI) has an enormous impact on our everyday life, especially in the form of algorithmic decision-making. Examples of algorithms can be found in systems for navigation, filtering spam mail, automatic speech recognition and translation, disease diagnosis or recommendation systems for news, music or videos. Algorithmic decision-making systems are to lead to acceleration, flexibility, effectiveness of resource use and simplification of the decision-making process.

Algorithms have also arrived to HR management. A growing number of HR software products promise employers to achieve unrivalled decision-making quality in HR by using artificial intelligence. Such tasks may range from recruiting, to monitoring of employees, creating work schedules, calculating employee bonuses to terminating employment engagements.

However, experience has shown that algorithmic decisions can be flawed by discrimination. Such "algorithmic bias" can result from prejudices of people who were involved in the development of the algorithm or from training data that is not fully representative or reflects existing prejudices.

In Austria, there is currently no legal framework for the use of AI and algorithms. However, this could change soon, as in April 2021 the European Commission presented a proposal for a regulation on AI, the so called "Artificial Intelligence Act" (AI Act). This Act aims to promote the development and use of trustworthy AI and to reduce the risks and disadvantages individuals may face when using AI.

Hereinafter, we provide an overview of the proposal's key points and its impact for employers.

2. KEY POINTS

2.1. What is an AI system according to the AI Act?

The AI Act defines an AI system as a software that has been developed using specific techniques and concepts, such as machine learning, logic and knowledge-based concepts, statistical approaches, etc. It is essential that the software generate output such as content, predictions, recommendations, or decisions for a given set of human-defined objectives. Finally, it is required that this output influence the environment it interacts with. Thus, algorithms that are used in HR management are generally covered by this definition.

2.2. Risk-based approach

The AI Act follows a risk-based approach, since it differentiates between four levels of risk involved by the use of AI systems (from "unacceptable risk" to "minimal risk"). How an AI system is classified within the AI Act depends on its intended purpose and on the likelihood of harm.

AI systems used in HR management for purposes such as recruitment, monitoring or evaluation of employees or for making decisions on task allocation, promotion and termination are classified as "high risk". They are considered to have a substantial impact on future career prospects and the livelihood of employees.

2.3. Obligations for users

The proposal contains obligations for providers of AI systems as well as for users. Employers, who will generally qualify as users, shall operate and monitor such systems in accordance with the instructions of use accompanying the systems. When employers have reason to believe the use of the AI system may present a risk as defined in the Act, they shall inform the provider/distributor and suspend the use of the system. The same applies if a serious incident or malfunction is detected. Moreover, employers shall keep certain records and carry out data protection impact assessments under Art 35 GDPR, based on the information received by the provider.

2.4. Penalties

In principle, it is up to the Member States to lay down effective, proportionate and dissuasive penalties in relation to infringements of the regulation. However, they must take into account the margins and criteria set out in the regulation. As with the General Data Protection Regulation (GDPR), administrative fines for companies can be very high since they are based on their worldwide annual turnover and may amount to up to 6% thereof.

3. NEED FOR ANY ACTION ALREADY?

During the consultation process, the proposal of the AI Act has received much criticism. Whereas representatives of the industry fear that the Act will hinder innovation, civil rights groups criticise the proposal for being too lenient, with cer-

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tain high-risk applications, such as remote biometric identification systems in public spaces, not being outlawed completely. Meanwhile, the European Commission aims for the adoption of the AI Act by the end of 2022. Under the current proposal, the regulation will only apply 24 months following its enterance into force.

There is no doubt that the regulation will have significant implications for employers who use advanced algorithms in HR management. However, even under existing law, employers are held accountable if they use AI systems resulting in illegal discrimination of certain groups, such as women, disabled persons or persons of a specific ethnic origin. Therefore, while we await the AI Act's entrance into force, employers are advised to clarify which AI systems are already in use and what their features are. As most of the AI systems are not created by the employers themselves, they need to contact their external providers for the necessary information. It remains to be seen how cooperative big tech companies will be in this context, but businesses that have successfully adapted to the GDPR requirements in the past, will be in a good position to meet this new challenge as well.

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Additional content on this topic:

U.S. PAY TRANSPARENCY LAWS - SALARY RANGES IN JOB ADVERTISEMENTS FOR NEW YORK CITY EMPLOYERS

Written by Joseph Johnson

A bill was recently passed by the New York City Council that would require New York City employers to include the minimum and maximum starting salary for any advertised job, promotion or transfer opportunity. The new law becomes effective May 15, 2022.

Originally introduced in 2018, the law would amend New York City's administrative code, and would make it an unlawful discriminatory practice to fail to include the salary range in the job posting. The enactment would pertain to any employer or employment agency, employee or agent thereof posting a listing for employment within the City of New York in any media, with the exception of temporary staffing firm postings. The range for the listed maximum and minimum salary would extend from the lowest salary to the highest salary that the employer in good faith believes it would pay for the advertised job, promotion, or transfer.

The law would be an amendment to the New York City Human Rights Law (found within the administrative code), one of the most comprehensive civil rights laws in the US. As a general matter, the NYCHRL prohibits discrimination in employment, housing, and public accommodations based on race, color, religion/creed, age, national origin, immigration or citizenship status, gender, gender identity, sexual orientation, disability, pregnancy, marital status, and partnership status. Enforcement of the proposed law would fall within the auspices of the NYC Commission on Human Rights, which is charged with enforcement of the NYCHRL.

The Commission's Law Enforcement Bureau investigates complaints and enforces the NYCHRL. Penalties for violations of the NYCHRL presently include an order to cease and desist from engaging in the unlawful conduct and an assessment of civil penalties (paid to the City of New York) of up to $125,000 for violations. The new law also empowers the Commission to issue specific rules and regulations to implement and enforce it.

The rationale for the law offered by its sponsor, Helen Rosenthal, is to level the playing field for job applicants. She contended that studies show the lack of upfront pay range disclosures results in less successful wage negotiations and, thus, lower wages for women and people of color. The bill passed in the New Yok City Council with a 41 to 7 vote.

Pay transparency laws are a growing trend in the US, and are intended to promote wage equity for classes of people

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who have historically received lower compensation. In 2021, the states of Connecticut, Colorado and Nevada enacted similar pay scale disclosure laws, although only Colorado's law is as expansive as New York City's recent enactment. Other pay transparency laws in the US include prohibitions on asking about job candidates' salary history.

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Additional content on this topic:

EU DIRECTIVE ON CORPORATE SUSTAINABILITY DUE DILIGENCE – "SUPPLY CHAIN ACT" (LIEFERKETTENGESETZ)

Written by Hans Georg Laimer & Isabella Göschl

Due to low-cost production, millions of people worldwide work under inhumane conditions (wages far below subsistence level, child labour, life-threatening safety standards in factories, etc.), which in turn also generates a negative impact on the environment (pollution of waters, significant CO2 emissions, etc.).

That said, the question arises: who is liable along the supply chain for violations of human rights and the environment?

The European Commission has now published a draft Directive on Corporate Sustainability Due Diligence (SWD (2022) 42 final), the so-called "Supply Chain Act". The proposed Directive basically aims to oblige large companies based in the EU and in third countries (but economically active in the EU) to prevent negative impacts of their business operations on human rights and the environment along the supply chain.

Hereinafter, we will provide you with an overview of the most important provisions and key points of the draft Directive, as well as their significance for companies economically active within the EU.

WHAT IS THE AIM?

The aim of the Supply Chain Act is to ensure that products are produced in compliance with basic human rights and environmental standards. EU companies and companies of third countries which operate economically in the EU, are expected to uphold environmental and human rights standards along the supply chain. The Directive aims to achieve this by establishing and implementing due diligence procedures along the supply chain.

In the future, companies covered by the Directive should be required to identify and, if necessary, prevent, remedy or mitigate negative impacts of their operations on (i.) human rights, such as child labour and labour exploitation, and (ii.) on the environment, such as pollution and biodiversity loss.

WHICH COMPANIES ARE COVERED?

Generally, large companies and their subsidiaries in EU Member States and large companies and their subsidiaries in third countries which are economically operating in the EU, are addressed by the provisions of the draft Directive. This means that the draft does not directly focus on small and medium-sized companies (SMEs).

According to the draft Directive, the following minimum limits apply:

EU companies:

- Group 1: Companies based in the EU that have an average of more than 500 employees and a worldwide annual net turnover of more than 150 million Euros (this is applicable immediately after the Directive enters into force); or

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- Group 2: Companies based in the EU that do not meet the above criteria and generate at least 50% of their annual net turnover in high-risk sectors (such as textile manufacturing, agriculture and extractive industries), with more than 250 employees on average and a worldwide net turnover of at least 40 million Euros (rules for group 2 apply two years later than for group 1); or

Non-EU companies:

- Companies based in third countries that economically operate in the EU and meet the same criteria as mentioned above (group 1 and 2). However, they must generate the relevant amount of annual net turnover within the EU to be subject to the Directive.

RESPONSIBILITIES OF THE COMPANIES

The companies covered by the Directive are expected to continuously monitor whether their suppliers comply with environmental standards and human rights. If there are violations, companies must take measures to improve the situation on site.

In order to comply with the due diligence obligations within the companies' own business operations, their subsidiaries and their value chains, the Directive provides they must:

- include human rights and environmental due diligence as an integral part of their corporate policy,
- identify actual or potential negative impacts (of their business operations) on human rights and the environment,
- prevent or mitigate potential impacts (of their business operations),
- eliminate or minimize actual impacts (of their business operations),
- establish a grievance mechanism,
- monitor the effectiveness of due diligence policies and measures; and
- communicate publicly on how they are performing their due diligence.

SANCTIONS

According to the Directive, companies being affected should not only be liable for their direct contractual partners, but also indirectly for the whole supply chain. The draft Directive provides that the EU Member States are to establish sanctions that are effective, proportionate and dissuasive, but does not provide for specific fines. Specific fines are to be determined by the EU Member States. Independent of the draft Directive, Germany, for example, has already enacted a Supply Chain Act that provides for fines of up to 800,000 Euros. Companies with an average worldwide annual turnover of more than 400 million euros may be subject to fines of up to 2% of their average worldwide annual turnover, therefore potentially reaching millions of Euros.

In addition, aggrieved parties may take legal actions against companies covered by the Directive in case of damages suffered due to a violation of the applicable due diligence requirements.

FURTHER STEPS

The proposal of the Directive will now be submitted to the European Parliament and the European Council for approval. The proposed Directive is not expected to be approved before 2023. After its approval, the EU Member States will have two years to implement the Directive into national law and to send their implementing legislation to the European Commission. As of the applicability of the Directive, companies will have to ensure that products are manufactured in compliance with basic human rights and environmental standards. However, the approval and implemention period already provides the companies with a certain lead time. Once the Directive becomes applicable in the EU Member States, companies may face high penalties. The interim period should therefore be used by the companies addressed in the draft Directive to prepare for the Directive's enterance into force.

The final version of the Directive remains to be awaited.

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DATA PROTECTION BARRIERS WHEN USING ALGORITHMS IN RECRUITING

Written by Melina Peer

Over the last years, employers have increasingly relied on algorithms in the recruiting process, generally leading to a considerable acceleration and simplification of the process.

Recruiting algorithms analyse CVs, filter out the important information from application documents or application videos and evaluate it. These algorithms can focus on a wide range of data, such as contact details, address, skills, knowledge and personality traits like character, openness and conscientiousness.

On this basis, the providers of such algorithmic HR systems claim that algorithms are technically capable of determining the fit of an applicant to the respective job offer, and the selection or elimination of applicants can be left entirely to the algorithm.

1. LEGAL REQUIREMENTS UNDER THE GDPR

Within the European Union, the GDPR restricts the potential uses of algorithms. According to the GDPR, fully automated decision making, including profiling, is prohibited if the decision produces legal or similarly significant effects on an individual person.

Profiling within the GDPR constitues any form of automated processing of personal data to evaluate certain personal aspects. Profiling is particularly established when a person's performance at work, personal preferences, interests, behaviour, reliability or location is analysed or predicted.

The decision of whether an applicant is given or denied an employment opportunity is generally linked to the above listed values. Thus, a recruiting process driven by an algorithm, with no human intervention, can fall under the profiling prohibition of the GDPR.

If, on the other hand, the algorithm only ranks or preselects applicants and the employer initiates further steps in the recruiting process based on this ranking, this is generally not prohibited by the GDPR.

2. ALGORITHM OF AMAZON MECHANICAL TURK

Amazon Mechanical Turk (AMT) operates a platform that connects requesters with crowd workers. Typical tasks that are performed for the requesters by crowd workers are microtasks such as the transcription of sound files, the classification of image material or data cleaning and verification.

AMT has already been using algorithms in recruiting for years. To be able to work as a crowd worker, applicants are required to request the creation of an account on the AMT-platform. In this application process, AMT relies entirely on algorithmic decision management. All applicant data provided in the request is automatically collected and processed by an algorithm. Subsequently, the algorithm has the final say in determining who will be allowed to create an account and start working on the platform.

In case the algorithm decides that an applicant does not fit the requirements, an automatically generated e-mail message is sent to rejected applicants. In this e-mail, the rejection is justified with the non-fulfilment of predefined criteria. However, AMT deliberately keeps what these concrete criteria are confidential.

One of the applicants who had received such automatic rejection messages recently filed a complaint against AMT. The complaint is currently pending before the data protection authority in Luxembourg.

It remains to be awaited how the data protection authority in Luxembourg will evaluate the recruiting process of Amazon Mechanical Turk and whether this will result in further data protection sanctions against Amazon.

3. IMPLICATIONS

More and more employers are counting on algorithmic management in recruiting. However, when using an algorithmic decision-making software, it must be guaranteed that humans have a decisive influence on the final decision. A human verification of the decision that was made by an algorithm is generally not sufficient.

From a data protection perspective, it is only permitted that algorithms support the decision-making process, but not make the final decision. In case of infringements of the GDPR, employers may have to face administrative fines of up to EUR 20 million, or in the case of an undertaking, up to 4% of the total worldwide annual turnover of the preceding financial year.

As a result, employers should ensure that they have a clear strategy for the use of algorithms in recruiting that is com-

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pliant with the regulatory framework of the GDPR.

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Additional content on this topic:

REFUSAL TO WEAR MASKS DOES NOT CONSTITUTE BELIEF

OGH 25. 11. 2021, 9 ObA 130/21i

Written by Lukas Wieser

Being a COVID-19 critic is not a belief (*Weltanschauung*) protected by the Austrian Equal Treatment Act (*Gleichbehandlungsgesetz*) according to a recent Austrian Supreme Court ruling. Thus, a termination of employment due to an employee's refusal to wear a mouth-nose protection or FFP2 mask ("mask") at the workplace does not constitute a belief-based protected discrimination. Therefore, such a termination cannot be successfully challenged by the employee under the Equal Treatment Act.

1. FACTS

In the case at hand, the employee worked as a family care taker for a social institution. The employee's activities, therefore, required close contact with other people and especially with families who are vulnerable to COVID-19. Due to the COVID-19 pandemic, the employer incorporated hygiene measures at the workplace. These hygiene measures included wearing masks. Further work activities of the employee also include visits to relelvant authority offices, where it also was mandatory to wear a mask. However, the employee only covered her mouth and nose with a thin scarf at the authority offices and not with a mask. The employee's obligation to wear a mask was not only ordered by the employer but also required by law.

Due to the employee's reluctance to wear a sufficient mask during work, the employer terminated the employment by giving notice.

The termination of the employment was challenged by the employee under the Equal Treatment Act. The employee argued to be discriminated due to her belief as a critic of the COVID-19 measures. In the court procedure, the employee argued that the corona virus is only as harmful as the influenza virus. Additionally, she stated that many laws and regulations concerning the COVID-19 pandemic were already annulled by the Austrian Constitutional Court. Based on this argumentation, the employee claimed that her belief that constitutional law should be respected and that her employment should not be terminated due to her own concern for her physical health, was violated by the notice.

Both the court of first instance and the court of appeal negated the existence of a relevant belief since the refusal to wear a mask and the denial of the harmfulness of COVID-19 are only selective expressions of political opinion but not

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belief under the Equal Treatment Act.

2. LEGAL QUESTION

Does the refusal to comply with COVID-19 hygiene measures like wearing a mask at the workplace constitute belief within the meaning of the Equal Treatment Act?

3. DECISION

The Supreme Court held that when it comes to the termination of an employment contract, such termination must not be based on protected discriminatory grounds like belief. If this is the case, the termination may be challenged by the employee.

It stated that belief is guiding ideas of life and the world as a whole. Hence, the term "belief" covers personal convictions regarding political, ideological and other issues. Denying the harmfulness of a disease and raise health concerns about hygiene measures like masks to invoke solely the compliance with constitutional laws, however, does not fulfil the term belief.

Therefore, holding a critical position towards COVID-19-related hygiene measures does not constitute a protected belief within the meaning of the Equal Treatment Act. In the absence of belief within the meaning of the Equal Treatment Act, the challenge of the termination by the employee was rejected by the Supreme Court.

4. IMPACT

Holding a critical position towards COVID-19 measures does not constitute a belief in the sense of the Equal Treatment Act. Therefore, the breach of regulations prescribed by law or ordered by the employer to prevent the transmission of diseases, like wearing a mask, may justify the termination of employment. Holding such critical positions does not generally constitute a valid reason for the challenge of a termination under the Equal Treatment Act.

Moreover, even if holding a critical position towards COVID-19 hygiene measures would qualify as belief, an unequal treatment may be justified due to health protection reasons. Thus, even in a case of COVID-19 criticism qualifying as belief, the challenge of the termination of employment may very likely have been unsuccessful.

Furthermore, the court of appeal (*Oberlandesgericht* Innsbruck) held that the refusal to wear obligatory masks, in fact, may even constitute cause for an immediate termination without notice for cause. If wearing a mask is required by law, the refusal would constitute a gross breach of duty by the employee. This also holds true for measures implemented by the employer, if the interests of the employer prevail over the employee's interests. In the case at hand, the employee's work contact with individuals vulnerable to COVID-19 may constitute such prevailing interests of the employer.

To sum up, the employee's refusal to comply with legally required or justified implemented hygiene measures, such as wearing masks, justifies employment law measures carried out by the employer up to a termination of employment for cause.

Read the full decision here.

For additional information and queries, please contact lukas.wieser@zeilerfloydzad.com

Additional content on this topic:

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NEWS & EVENTS

TEAM

| We are delighted that our employment team has been recently recognized both collectively and individually for their work by **Chambers Europe** and by **Leaders League**! Our **Andreas Tinhofer** and **Hans Georg Laimer** were both ranked as leading employment practitioners and our employment team as a leading practice in the Chambers Europe 2022 guide, and as a recommended labor and employment firm in the Leaders League 2022 edition.

| **Hans Georg Laimer** and **Lukas Wieser** are looking forward to their fourth time around teaching the Labour Law and Social Protection course at the University of Applied Science BFI Vienna's Bachelor Program "European Economy and Business Management", starting May 2022.

EVENTS

| **Jahresdialog Arbeitsrecht 2022**
"Aktuelle Entscheidungen im Arbeitsrecht"
With Andreas Tinhofer
Thursday, 7 April 2022
Register here

| **UPDATE ARBEITSRECHT**
"Aktuelle Rechtsprechung und gesetzliche Neuerungen"
With Hans Georg Laimer, Andreas Tinhofer and Lukas Wieser
Thursday, 5 May 2022
09:00 Central European Time
Register here

| **MANZ Rechtsakademie**
"Fehl- und Abwesenheitszeiten"
With Hans Georg Laimer & Lukas Wieser.
Tuesday, 24 May 2022

| **MANZ Rechtsakademie**
"Lehrgang Arbeitsrecht 2022"
With Andreas Tinhofer on aspects employers should consider before terminating an employment relationship.
Wednesday, 1 June 2022
Register here

IN-HOUSE TRAININGS

We are happy to offer our clients in-house seminars and workshops on all labour law topics - from equal treatment issues, to dealing with the works council for managers, the implementation of new technical working methods (keyword: algorithmic management), to (better) termination management and more.

To coordinate a session for your company, please contact Hans Georg Laimer at **hans.laimer@zeilerfloydzad.com**.

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