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The Obligation to Provide Safe and Healthy Working Conditions Within the Meaning of Art. 207 § 2 of the Labour Code. Guidelines of Labour Law Literature and Current Challenges. Outline of the Problem

Abstract

Ensuring safe and healthy working conditions is one of the employer's most important responsibilities. This can be achieved by adopting appropriate procedures, providing employees with personal hygiene products, working with trade unions to develop health and safety policies, or providing appropriate training. In order to take appropriate measures to improve the health of workers, the risk at the workplace must be assessed. It is influenced both by elements already known about the work process, such as the mechanisation of this process, and by new factors present in the workplace. In particular, there are digitalisation, algorithmization of the work process using artificial intelligence systems, or nanotechnology. How should the employer realistically operate in the Polish legal reality? The conclusion is that scientific and technological achievements should be used. In this respect, however, it is problematic to determine on what basis employers should acquire their knowledge in this area. It is not a question of analysing all the scientific publications available, even those that do not have an impact on the assessment of risks in the working environment, but of a rational approach that takes into account the state of scientific knowledge in relation to new challenges in the field of health and safety at work. It is the responsibility of the employer to adapt the organisation of work and the personal and collective protective equipment to the new risks in the workplace and to inform the workers about them.

KEYWORDS: employee health, workplace, nanotechnology, artificial intelligence, occupational health and safety

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1 Introduction

The 21st century has seen a significant increase in the presence of new technologies in the work process. Progress in automation, the algorithmisation of the work process and the use of nanotechnology are examples of constantly changing areas. However, the development of these technologies also brings with it risks in the working environment that are not yet fully understood.

In the Polish labour law, according Art. 207 § 2 of the Act of 26 June 1974 on the Labour Code,[1] the employer is required to protect the health and life of employees by ensuring safe and sanitary working conditions with the appropriate use of scientific and technological accomplishments. It seems that the objectives of solving specific problems should depend to a large extent on the results of reliable scientific research closely related to risk analysis. The obligation to ensure safe and healthy working conditions is part of a broader concept of occupational health and safety. In the literature, it is described as a part of the law that does not protect such or other property interests of workers, but the work itself.[2] According to Tadeusz Zieliński, this protection is generally a set of legal norms designed to protect the employee from loss of life at work and to limit or eliminate the negative consequences of the effects of work on the employee's health.[3] Zbigniew Salwa also suggests a narrow and a broad view of occupational health and safety. The narrow one is for the benefit of the employee, protecting him or her from the risks arising in the work process. The broad one includes activities that protect the needs and interests of employees.[4]

We should answer a question – how can such an obligation be enforced in practice? Does human progress allow an adequate level of health protection for workers? How do new technologies affect health and safety at work? To what extent are the views of labour law literature relevant in the new reality? Can they be directly applied to the current challenges in the field of occupational health and safety?

1 I.e. Journal of Laws of 2000, item 1320, hereinafter: Labour Code.

2 Wacław Szubert, *Ochrona pracy. Studium społeczno-prawne* (Warszawa: PWN, 1966), 16-7.

3 Tadeusz Zieliński, *Prawo pracy. Zarys systemu, cz. III, Ochrona pracy, Prawo sporów pracy, Prawo administracji pracy, Prawo ruchu związkowego* (Warszawa-Kraków: PWN, 1986), 3-4.

4 Zbigniew Salwa, *Prawo pracy w PRL w zarysie* (Warszawa: PWN, 1989), 273.

2 The obligation to ensure occupational health and safety by the employer – historical background

Even in the previous economic system, by the Regulation of the Ministers of Labour and Welfare, Health, Industry, Reconstruction, Public Administration, and Recovered Territories of 6 November 1946 issued in agreement with the Ministers of National Defense, Treasury, Justice, Education, Agriculture and Agricultural Reforms, Communication, Post and Telegraph, Forestry, and Supply and Trade on general provisions on occupational health and safety,[5] the persons responsible for the OHS were indicated. Pursuant to § 1 paragraph 1 of the above-mentioned regulation, both employers and employees are required to comply with its provisions, each within the scope of their duties; in particular, employees are required to use work tools and personal protective equipment as intended, neither destroy nor remove them during work. Pursuant to § 1 paragraph 2 of the Regulation, persons who are in charge of: the management of the workplace or individual work departments, technical or medical and sanitary supervision, are also required to constantly instruct their subordinates on the content of the regulations and to supervise their observance. In turn, according to § 7 of the Resolution No. 592 of the Presidium of the Government of 1 August 1953 on ensuring progress in the field of occupational health and safety,[6] the person responsible for the state of OHS inside enterprises, especially for the implementing the OHS regulations of the governing organisational bodies, is the president of the enterprise (workplace manager). The OHS at work was also regulated during work on the construction and use of machinery by the Act of 18 July 1950 on ensuring occupational health and safety in the construction and operation of machinery and technical devices.[7]

In the 1950s, judicial pronouncements began to delineate a more expansive set of obligations for employers with regard to health and safety in the workplace. For example, in the judgment of the Supreme Court of 30 April 1956,[8] it was stated that employers were obligated to implement not only

5 Journal of Laws of 1946, No. 62, item 344, as amended.
6 Monitor Polski of 1953, No. 83, item 979.
7 Journal of Laws of 1950, No. 36, items 330 and 331.
8 2 CR 885/55, Legalis No. 637219.

the measures stipulated in specific regulations for safeguarding workers, but also those ensuring safety at work in accordance with general regulations and prevailing life experience.[9] In the doctrine of labour law, the obligation to protect employees' health was understood to encompass not only activities aimed at ensuring optimal OHS conditions, but also activities aimed at fostering peace and comfort in the workplace.[10]

Before the regulation of the labour law institution under the Labour Code, the general obligation to ensure safe and hygienic work conditions was introduced in the Act of 30 March 1965 on health and safety at work.[11] This act repealed pre-war legal acts, including the Ordinance of the President of the Republic of Poland of 16 March 1928 on health and safety at work,[12] the Ordinance of the President of the Republic of Poland of 22 August 1927 on the prevention and control of occupational diseases,[13] and the post-war the Act of 18 July 1950 on ensuring occupational health and safety in the construction and the operation of machinery and technical devices.[14] Within the meaning of Art. 1 paragraph 2 of the OHS Act, the fulfillment of the above obligation should include taking advantage of the latest developments in science and technology. The usage of the word "latest" does not necessarily mean that the health of the workers would be protected more effectively than if the term had not been used.[15] The pre-code regulations were analysed in the context of labour law doctrine. Representatives of this doctrine noted that the introduction of an obligation to take advantage of the latest developments had a general, sometimes abstract meaning.[16] This obligation was assessed in a slightly different manner within the judicature. In the judgement of the Supreme Court of 24 September 1968,[17] it was stated that "in light of the provisions of the Act of 30 March 1965 on safety and health at work the obligations

9 Some similar cases were represented in The Supreme Court ruling of 24 April 1959, III CR 907/58, LEX No. 1633028.

10 Szubert, *Ochrona pracy*, 16-7.

11 Journal of Laws of 1965, No. 13, item. 91, hereinafter: the Health and Safety Act.

12 Journal of Laws of 1928, No. 35, item 325.

13 Journal of Laws of 1927, No. 78, item 676.

14 Journal of Laws of 1950, No. 36, items 330 and 331.

15 Teresa Wyka, *Ochrona zdrowia i życia pracownika jako element stosunku pracy* (Warszawa: Dilfin, 2003), 235.

16 Urszula Jackowiak, „Podstawowe zagadnienia prawne ochrony pracy", [in:] *Studia nad Kodeksem pracy*, ed. Wacław Jaśkiewicz (Poznań: Wydawnictwo Naukowe Uniwersytetu im. Adama Mickiewicza w Poznaniu, 1975). 262-3.

17 II PR 363/68, Legalis No. 13503.

of the workplace as pertains to providing employees with safe working conditions cannot be treated statically because the premises of these obligations change as science and technology develop. Hence, tracking the achievements of technological progress is an integral part of the activity of every workplace".

It is worth noting that in the later period of the Polish People's Republic, the obligation to ensure appropriate working conditions was regulated from the very beginning of the codification of labour law in Art. 207 § 1 of the Labour Code. Under this Code's regulation, the workplace was obligated to provide its workers with safe and hygienic working conditions. The fulfillment of this obligation ought to be an integral part of the employer's operations and should make appropriate use of the development of science and technology. Compared to the previous legal framework, the word "latest" has been eliminated, leaving only "development" as part of the employer's desired behaviour. It is indisputable, however, that failure to regulate the fulfillment of this obligation in detail in the Labour Code does not constitute an exclusion of liability due to failure to apply possible and necessary safety measures in accordance with the current state of technical knowledge and experience. It is impossible to discuss the completeness of the regulations due to the volatility of the factors influencing OHS.[18] The appropriate shaping of working conditions is determined not only by the aspects of legal regulations, internal workplace regulations, or organizational issues but also by everyday practices which are directly related to the factors of the work process in a given workplace.[19]

18 Wacław Szubert, *Zarys prawa pracy* (Warszawa: PWN, 1976), 265.
19 Szubert, *Ochrona pracy*, 146.

3 The perceptions of the doctrine of labour law and jurisprudence in the field of ensuring occupational health and safety by the employer

The Act of 2 February 1996 amending the Act – Labour Code and amending certain acts[20] amended Art. 207 of the Labour Code. Currently, the Art. 207 § 2 of the Labour Code, which is worded similarly to the original regulation of Art. 207 § 1 of the Labour Code, states that the employer is obligated to protect the health and lives of employees by providing them with a safe and hygienic working environment. According to this regulation, the employer is obliged to make proper use of the development of science and technology. Factors influencing OHS vary. They may be of a technical or medical nature; the greater the number of factors, the more extensive the obligations of the employer become.[21] Therefore, this act introduced an obligation to provide additional protection for the health and even life of the employee. It is emphasised in the literature that the change in the regulation in question means giving more importance to the employee by including the protection of their life and health.[22] Those interests are included in one's personal rights pursuant to Art. 23 of the Act of 23 April 1964 the Civil Code[23]; and to demonstrate the subjective nature of the employee's right to receive appropriate protection.[24] As stated in Art. 207 § 2 of the Labour Code, the employer's obligations are outlined in a number of fundamental examples.[25] Among other things, in accordance with Art. 207 § 2 (1) of the Labour Code, the employer is obligated to organise work in a manner that ensures safe and hygienic working conditions. The employer is obliged to ensure the provision of occupational health and safety for employees, in accordance with various executive provisions.

20 Journal of Laws of 1996, No. 24, item 110.

21 Wyka, *Ochrona zdrowia*, 221.

22 Teresa Wyka, „Od bezpieczeństwa socjalnego w stronę bezpieczeństwa osobowego – o zmianach w Kodeksie pracy", [in:] *Stosunki zatrudnienia w dwudziestoleciu społecznej gospodarki rynkowej. Księga pamiątkowa z okazji jubileuszu 40-lecia pracy naukowej Profesor Barbary Wagner*, ed. Arkadiusz Sobczyk (Warszawa: Wolters Kluwer Polska, 2010), 115.

23 Consolidated text i.e., Journal of Laws of 2020, item 1740, as amended.

24 Michał Raczkowski, „Komentarz do art. 207 Kodeksu pracy", [in:] *Kodeks pracy. Komentarz*, red. Małgorzata Gersdorf, Krzysztof Rączka, Michał Raczkowski (Warszawa: Lexis Nexis, 2014), 1064-1065.

25 Ibidem, 1066.

These include the Regulation of the Minister of Labour and Social Policy of 28 September 1997 on general occupational health and safety regulations.[26]

The doctrine of labour law indicates that the obligation under Art. 207 § 2 sentence 1 of the Labour Code is an obligation not only towards the person performing work but also towards the state. It allows the employee to obtain the unconditional right to safe work.[27] The judicial practice demonstrates that the fact that an employee undertakes employment while being aware of the risks it poses to his health or life is of no relevance to this obligation.[28] In the event of an employer breaching their obligation as set out in Article 207 § 2 of the Labour Code, the employer would be held liable. This would apply irrespective of whether the employer could be accused of breaching a specific legal regulation.[29] As indicated in the judgment of the Supreme Court of 13 September 2016, III PK 146/15,[30] the culpable failure of the employer in the field of occupational safety, if it has a causal relationship with the damage that has occurred, can lead to liability for damages under Article 415 of the Civil Code. Such liability is independent of the employee's spontaneous illness where it is not proven that the injury would have occurred even without the event justifying such liability.[31] Nor will the employer be relieved of its liability because of the cost of fulfilling the obligation under the regulation under review. According to the judgment of 15 May 2019 issued by the Provincial Administrative Court in Poznań,[32] "the employer must provide financial resources in its budget that will enable its workplace to function in a way that is safe for its employees and in compliance with the law".

As Wacław Szubert pointed out, there is a need to ensure the flexibility of health and safety regulations and to use general clauses relating to technical and medical development, as well as life experience, due to constantly emerging occupational hazards. This obligation is related to the task of managing the work process. However, it is not imposed solely on

26 Consolidated text Journal of Laws of 2003, No. 169, item 1650, as amended.

27 Szubert, *Ochrona pracy*, 147 – 8.

28 Judgment of the Supreme Court of 27 January 2011, II PK 175/10, Lex no. 1130827; Judgment of the Court of Appeal in Warsaw of 10 October 2018., III APa 8/18, LEX no. 2615765.

29 Judgment of the Supreme Court of 27 January 2011, II PK 175/10, Lex no. 1130827.

30 LEX no. 2112315.

31 Judgment of the Supreme Court of 9 September 2011, III PK 4/11, LEX no. 1119709.

32 LEX no. 2679087.

the manager of the workplace, but also on other employees in managerial positions and on the staff, in accordance with their individual functions. Hence, along with specifying the activities and the responsibility for their fulfillment, health and safety obligations ought to be demarcated.[33] Szubert also calls for the appropriate action from public administration bodies, stressing that "the economic administration bodies making these decisions are responsible not only for the output of enterprises, but also, indirectly, for the working conditions they can provide for their employees".[34] Tadeusz Zieliński emphasises that employees are not only entitled to the health and safety regulations, but also obliged to comply with them.[35]

The views recently presented in the literature are based on the acquis of, among others, Szubert. They emphasise that the position which points to the need to take into account non-legal rules, depending on experience as well as scientific and technological development, remains valid.[36] The classification of threats envisaged in the so-called "Szubert school of thought" is often cited. The risks identified within this framework encompass a wide spectrum, including those associated with the construction and layout of buildings and workplaces, work processes (including those of a technological nature), and the organisation of work, as well as a lack of familiarity with health and safety regulations.[37]

In the past, the literature on labour law has indicated that certain organisational issues experienced by employers can have a detrimental effect on the state of OHS in the workplace. In order to combat these issues, the development of a cooperative relationship between managers and their subordinates in the workplace was proposed.[38] Ludwik Florek emphasised that "the management of public establishments may lack the same sense of responsibility that a private employer would have concerning their workplace, and which manifests itself in the care for not only property, but also employees. [...] Mistakes made by rank-and-file employees must be borne by the management staff, unless they can demonstrate that they did not limit themselves to issuing appropriate orders and instructions, but

33 Ibidem, 117.
34 Ibidem, 146.
35 Zieliński, *Prawo pracy*, 15.
36 Teresa Wyka, „Ochrona pracy w dorobku naukowym Profesora Wacława Szuberta", [in:] *Prawo ochrony pracy – współczesność i perspektywy rozwoju*, ed. Teresa Wyka, Marcin Mielcarek (Warszawa: Wolters Kluwer Polska, 2017), 33.
37 Wyka, *Ochrona zdrowia*, 231.
38 Szubert, *Ochrona pracy*, 117.

tried to ensure, by all available means, that their content was followed".[39] These challenges are definitely relevant in the present socio-economic reality. In this context, it is also worth mentioning a jurisprudential view on the interpretation of Art. 207 § 1 of the Labour Code. In the judgement of 6 May 2008, the Supreme Administrative Court[40] presented the position according to which: "the employer is obliged to use every scientific achievement, technical progress and life experience for strengthening the protection of health and life of employees and other people working in a chosen facility. The obligatory usage of science and technology achievements should be understood dynamically. This dynamism means that it is in the employer's interest to constantly monitor development and implement progress".

4 Current challenges regarding occupational health and safety

As mentioned in the introduction, there are currently various new threats that may occur in the work environment in connection with the scientific and technological progress in a rapidly changing world. What is to be expected of the most severe occupational health and safety risks? It is impossible to list them all. However, it is worth focusing on specific elements related to socio-economic progress. Automation, algorithmisation of the work process, digitisation, or nanotechnology are considered as some of the challenges faced by employers who shape the work environment. In addition, biological hazards in the work environment require meticulous attention considering occupational health and safety.

The main risk in the work environment with reference to the automation and the algorithmisation equipped with artificial intelligence, which generally is designed to increase productivity of the work process is the occurrence of accidents during work. They result from the errors of human

39 Ludwik Florek, *Prawna ochrona pracowników* (Warszawa: IPiSS, 1990), 109.
40 I OSK 785/07, SIP Legalis no. 126847.

actions, device software, or work pace.[41] As for nanotechnology, which comes down to the production and use of particles, materials with a relatively small size scale (nanoscale),[42] the risk is due to the toxicity of some nanoparticles.[43] A reference to the chemical hazards of substances is evident in the Regulation of the Minister of Health of 24 July 2012 on chemical substances, their mixtures, and technological process agents related to carcinogenic or mutagenic effects in the work environment.[44] The use of nanomaterials results in, inter alia, better durability of a given component.[45] However, it also entails new toxicity risks, e.g. of carbon nanotubes.[46] Nanotechnology is not the only example of technological progress affecting the work environment. There may be risks linked to ionizing radiation in the field of digitisation in accordance with the Regulation of the Council of Ministers of 18 June 1968 on occupational safety and health when using ionizing radiation,[47] as well as the Regulation of the Council of Ministers of 12 July 2006 on detailed conditions for secure work with ionizing radiation sources.[48]

In addition, there are risks regarding biological factors and the potential for infection with bacteria and viruses, including the SARS-CoV-2 virus in the work environment. These factors are defined in the Regulation of the Minister of Health of 22 April 2005 on biological factors detrimental to health in the work environment and health protection of employees occupationally exposed to these factors.[49] In the past by virtue of the Regu-

41 See Maciej Jarota, „Artificial intelligence and robotisation in the EU – should we change OHS law?" *Journal Occupational Medicine Toxicology*, No. 16 (2021): 1-6, https://doi.org/10.1186/s12995-021-00301-7.

42 Elen Stokes, „Regulating nanotechnologies: sizing up the options" *Legal Studies*, No. 29 (2009): 281.

43 Anna Maria Świdwińska-Gajewska, Sławomir Czerczak, „Nanosrebro – szkodliwe skutki działania biologicznego,". *Medycyna Pracy Work Health Safety*, No. 6 (2014): 831-845. https://doi:10.13075/mp.5893.00114.

44 Journal of Laws of 2012, item 890.

45 Nadia Kaddour, „No Laws in Nanoland: How to Reverse the Trend: The French Example. Pace Environmental" *Law Review*, No. 30 (2013): 486-487.

46 Craig A. Poland, Rodger Duffin, Ian Kinloch, Andrew Maynard, William A.H. Wallace, Anthony Seaton, Vicki Stone, Simon Brown, William MacNee and Ken Donaldson, „Carbon nanotubes introduced into the abdominal cavity of mice show asbestoslike pathogenicity in a pilot study" *Nature Nanotechnology*, No. 3 (2008): 423-427.

47 Journal of Laws of 1968, No. 20, item. 122.

48 Journal of Laws of 2006, No. 140, item 994.

49 Journal of Laws of 2005, No. 81, item 716, as amended.

lation of the Minister of Health of 20 March 2020 on the declaration of an epidemic on the territory of the Republic of Poland,[50] the announcement of an epidemic requires additional measures to be taken by the employer.[51]

5 How to deal with arising risks from the perspective of Art. 207 § 2 of the Labour Code?

As previously mentioned, the legislator resigned from obliging the employer pursuant to Art. 207 § 2 of the Labour Code, in the provision of occupational health and safety conditions for employees considering the analysis of the latest achievements in the fields of science and technology. The validation of the obligation's fulfillment solely depends on a certain case, place, and time.[52] Then, how should the employer react to new threats? How does one obtain knowledge that would allow a proper reaction?

In case law, for example, professional literature is considered to be such a source.[53] In the labour law doctrine, the emphasis is put on the employer's regularly analysis of the achievements of science and knowledge.[54] By way, the employer is responsible for the entire occupational health and safety conditions and should, therefore, have full awareness of new elements which occur during the working process. In this way, the obligation under Art. 207 § 2 of the Labour Code is dynamic.[55] It is problematic that not all aspects of risk in the work environment have been identified by science. For example there are still many questions about the

50 Journal of Laws of 2020, item 491, as amended.

51 Centralny Instytut Ochrony Pracy – Narodowy Instytut Badawczy, *Bezpieczeństwo i ochrona zdrowia osób pracujących w czasie pandemii Covid-19* (Łódź: CIOP-PIB, 2020), 1 – 18, https://pracodawcyrp.pl/upload/files/2020/05/koronawirus-zalecenia-ogolne-ciop-sklad.pdf. [accessed: 31.12.2021].

52 Jakub Stelina, Monika Tomaszewska, Marta Zbucka-Gargas, *Introduction to Polish Labour Law with Cross-Border Aspects* (Warszawa: C.H. Beck, 2021). https://legalis.pl/.

53 II OSK 58/10, SIP Legalis No. 354086.

54 Krzysztof Walczak, Wojciech Muszalski, *Komentarz do Kodeksu pracy* (Warszawa: C.H. Beck, 2021). https://legalis.pl/.

55 Wyka, *Ochrona zdrowia*, 246-247.

way the SARS-CoV-2 coronavirus spreads.[56] In addition, new variants of this virus are also appearing.[57]

Every risk needs individual validation and the incorporation of new security methods for specific dangers in the working environment. In the field of nanoparticles, in retrospect, it is worth analysing the available databases or information about them on various websites (e.g. at https://nano.nature.com/). There are numerous nanomaterials with different characteristics, which makes it impossible to adopt universal rules to all of them.[58]

On the other hand, it is essential to adopt appropriate internal procedures including, for example, equipment manufacturers' user manuals, concerning automation and algorithmisation of the working process. During the creation of interior procedures, it is necessary to keep in mind the selection of measures that could have a reliable impact on occupational health and safety. In addition, the analysis of accident events that occurred in the past may be of significant importance.[59]

In terms of biological threats, it would undoubtedly be advisable to follow the conclusions of medical science continuously and take appropriate measures on the basis of these conslusions. The problem lies in the frequency of the updates of research, which does not exclude the excessive amount of work on the employers' part.

Various guides are another example of the opportunities to learn about OHS risks and the tools to respond to them. In this aspect, particular activities can be seen in the work of the European Agency for Safety and Health at Work. For example, the EU-OSHA has suggested a personalised, automatic assessment of exposure to cancer risk factors in the work environment,

56 Magda Ważna, *Rok z koronawirusem SARS-CoV-2. Wciąż jest wiele niewiadomych*. https://www.medonet.pl/koronawirus/to-musisz-wiedziec,rok-z-koronawirusem-sars-cov-2--wciaz-jest-wiele-niewiadomych,artykul,23380026.html. [accessed: 21.01.2022].

57 Adrian Dąbek, *Nowa odmiana wariantu Delta odkryta na Białorusi. To Delta Light*. https://www.medonet.pl/koronawirus/koronawirus-w-europie,delta-light---nowy-typ-wariantu-delta-odkryto-na-bialorusi,artykul,49449981.html. [accessed: 21.01.2022]; Małgorzata Janik, *Nowy wariant koronawirusa daje nietypowe objawy. Pojawiają się w nocy*. https://zdrowie.interia.pl/covid/news-nowy-wariant-koronawirusa-daje-nietypowe-objawy-pojawiaja-si,nId,7260610 [accessed: 29.08.2024].

58 Nathan Block, „The Very Big Fuss over Very Small Things: Advising on the State of Regulation of Nanotechnologies" *Texas Environmental Law Journal*, No. 1 (2007): 5.

59 See Jarota, *Artificial intelligence*, 1-6.

using algorithms based on the work of scientists and experts.[60] In terms of new OHS risks, the Agency has published a strategy on safe work in relation to its automation, including the development of artificial intelligence. Within this framework, the main tasks for employers should be to involve employees early during in the implementation phase of new automation tools, to design systems taking into account the important role of humans, and to create an appropriate mechanism for employees to communicate.[61] Yet another document pointed out the impact of virtual reality and metaverse technologies on OHS. By highlighting psychosocial risks among others, solutions were suggested for employers to implement as part of their OHS policies.[62] In terms of these psychological hazards, which exemplify current OHS challenges, the Agency has published a report demonstrating the need to support employee mental health in the workplace. In particular, the Agency believes that it is important to create an atmosphere in the workplace that promotes inclusivity, diversity, equal treatment and non-discrimination.[63] For example, measures to improve employee the mental health mentioned in the report include making private areas available to employees, reducing noise in the work premises, changing working time schedules, reducing working hours, or modifying employees' tasks according to current health and safety needs.[64]

Undoubtedly, an extension of Art. 207 § 2 of the Labour Code are further provisions of the Labour Code, including Art. 2221 §1 of the Labour Code, according to which if an employee is employed in conditions of exposure to

60 Nadia Vilahur, Lin Fritschi, Troy Sadkowsky, Sara Gysen, Kim De Cuyper, Kristine Mardumian, Olesia Astapova, Andrew Cleary, Stephen Finlay, Katriina Lepanjuur, *Occupational cancer risk factors in Europe – methodology of the Workers' Exposure Survey*, 1-34. https://osha.europa.eu/sites/default/files/documents/WES-Methodology_EN.pdf. [accessed: 6.09.2024].

61 European Agency for Safety and Health at Work, *Strategies for safety and health in an automated world*, https://healthy-workplaces.osha.europa.eu/en/publications/strategies-safety-and-health-automated-world. [accessed: 6.09.2024], 1.

62 Simone Grassini, *Worker exposure to virtual and augmented reality and metaverse technologies: how much do we know?*, 1-37. https://osha.europa.eu/sites/default/files/documents/worker-exposure-virtual-reality_discussion_paper_EN.pdf. [accessed 6.09.2024].

63 Marianna Virtanen, Kirsi Honkalampi, Petri Karkkola, Maija Korhonen, *A review of good workplace practices to support individuals experiencing mental health problems*, 11-2. https://osha.europa.eu/sites/default/files/documents/Good-workplace-practice-support-individuals-experiencing-mental-health-problems_EN.pdf. [accessed 6.09.2024].

64 Ibidem, 13.

harmful biological agents, the employer shall take all available measures to eliminate the exposure. If this is not possible, measures should be taken to limit the degree of exposure, making appropriate use of scientific and technological achievements. For example, in the context of the recent Covid-19 outbreak, it should be noted that the SARS-CoV-2 virus is a level 3 harmful biological agent like the tick-borne among others encephalitis virusin accordance with the Regulation of the Minister of Health of 11 December 2020 amending the regulation on biological factors detrimental for health in the work environment and health protection of employees occupationally exposed to these factors.[65] Due to this biological danger, employers have been required to update the occupational risk assessment to which the employee is or may be exposed and the measures and degrees of airtightness in the field of acute respiratory distress syndrome 2 (SARS-CoV-2) (§ 2 paragraph 1 point a, and paragraph 2 point a of the above-mentioned regulation). It should be noted, however, that this obligation applies to selected employers specified in Attachment 2 to the regulation, i.a.: health care units, including isolation rooms and facilities where post-mortem examinations are performed. This obligation also applies to other work where the outcome of the risk assessment indicates that biological agents may be present in the work environment.

The guidelines relating to the employers have been published during the last epidemic. As indicated in the recommendations issued by the Central Institute for Labour Protection,[66] "the guidelines have been developed to help the employers to undertake the activities aimed at achieving a safe and healthy working environment during a pandemic. During a pandemic, they can help with implementing the requirements of the Labour Code regarding the obligation to protect the health and life of employees".

This recommendations indicate how to reduce the possibility of contracting the SARS-CoV-2 virus in the work environment. The recommendations include: rules on the distance between employees, restrictions on the number of people staying in the same room at the same time, and rules on local ventilation of rooms,[67] which may mean that workplaces will need to organise workplace appropriately. The obligation to disinfect

65 Journal of Laws of 2020, item 2234.

66 Centralny Instytut Ochrony Pracy – Narodowy Instytut Badawczy, *Bezpieczeństwo i ochrona zdrowia*. https://pracodawcyrp.pl/upload/files/2020/05/koronawirus-zalecenia-ogolne-ciop-sklad.pdf. [accessed: 31.12.2021].

67 Ibidem.

surfaces is also highlighted.[68] Employers have certain methods of operation regarding the organization and process of work. In order to prevent infections in the workplace, the legislator has introduced the possibility of remote work in the legislation.[69] The recommendations depend on a given job, e.g. in a situation of contact with a patient, it is desirable to use personal protective equipment, i.e. a mask with an FFP-2 or FFP-3 filter, a disposable cap, goggles, a disposable gown, and a pair of gloves. When the employees contact the high-risk patient, they should be provided with a visor, a waterproof long-sleeved gown, and at least 2 pairs of gloves.[70]

The abovementioned considerations, introduced only as an example, confirm the potential problems of employers with regard to the application of Art. 207 § 2 of the Labour Code in the near future. Undoubtedly, it is difficult to draw clear conclusions resulting from the rapidly changing science and technology. However, the employers should be highly prudent and responsible, and their actions should be clearly based on scientific research.

6 Conclusions

The obligation to provide safe and healthy working conditions is part of the concept of labour protection, where the subject of protection is the worker. It is the person doing the work that is the most important in the fulfilling this duty.

Meanwhile robotisation, digitisation, as well as intensive development of science (e.g. nanotechnology) may cause new risks in the protection of employees' health. The pace of work controlled by the IT system, the constant exposure of the employee to new, not fully known substances, biological hazards related to bacteria and viruses, including the SARS-CoV-2 virus, may lead to negative consequences for the employee. It is not difficult to

68 Ibidem.

69 Journal of Laws of 2020, item 374.

70 See Jakub Obrębski, Piotr Skorek, Dmitry Tretiakow, Waldemar Narożny, Andrzej Skorek, „Pacjent w gabinecie otolaryngologicznym w dobie pandemii COVID-19 w świetle aktualnych wytycznych, przepisów prawnych i własnych doświadczeń" *Medycyna Pracy Work Health Safety*, No. 3 (2021): 327-334. https://doi.org/10.13075/mp.5893.01081.

imagine that these consequences can be both physical and psychological. How should we respond to these threats?

The current wording of Art. 207 § 2 of the Labour Code is in line with the views of the labour law doctrine developed many years ago with regards to the role of the employer in ensuring safe and hygienic working conditions, especially their desired behaviour towards the staff. In fact, the employer has the assets and specific organizational measures to strive for the protection of the health and life of the employee in accordance with the knowledge of science and technology. In this aspect, the coordination of tasks and the responsible attitude of the management are important, which in the past was emphasised by the literature of labour law.

The very change of Art. 207 § 2 of the Labour Code should not, at this point, constitute a starting point for adopting an appropriate model of operation. Even if the legislator introduced the obligation to apply the latest achievements of science and technology, similar to the act addressing occupational health and safety, it would not seem to fundamentally change the situation in the work environment. It is not an amendment to the provisions of the Labour Code that is lacking, but comprehensive assistance in equipping employers with the appropriate knowledge. Public authorities, whose activities have been advocated in the literature in the past, could play an important role in this regard. In the Polish conditions, the State Labour Inspection currently has certain tools for public education at its disposal. Pursuant to Article 10(7) of the Act of 13 April 2007 on the State Labour Inspection,[71] one of its objectives is to take action to prevent and reduce risks in the working environment. The Inspection can initiate research work in the field of health and safety at work and to provide advice to reduce risks to workers' health and safety. Another body that provides assistance in the field of health and safety is the Labor Protection Board. In accordance with Article 7(7) of the aforementioned Act, the Board takes positions on the tasks of the State Labour Inspection or on nationwide labour protection problems. However, it is not a body with an extensive organizational structure, as opposed to the labour inspection. Given the complexity of the problems associated with new OHS hazards and the need to respond quickly to workers' health protection needs, it may currently be difficult for the named authorities to propose employers a tailored solution to OHS problems. The main challenge would be the range of different OHS risks that continue to change. In addition, the key activities of the labour

71 I.e. Journal of Laws of 2024, item 97.

inspection are control activities while it carries out educational tasks to a basic extent only. However there may be situations where a broader analysis involving an interdisciplinary group of researchers is needed. Explaining technical or scientific aspects to specific employers, e.g. at their request or at the initiative of employees, would probably pose a challenge for the labour inspectorate and possibly even necessitate the creation of an organisational unit within the State Labour Inspectorate, composed of specialists in many scientific and technical fields. Such a unit's ongoing assistance to employers in responding to hitherto unknown risks could positively contribute to the objective of Article 207 § 2 of the Labour Code. Nevertheless, nothing can replace the proper practice of employers, who should analyse the current achievements of science and technology in order to protect the health of employees. This state of knowledge should be primarily derived from scientific publications that are subject to peer review or expert guides from organisations such as EU-OSHA. Supervisors should not limit themselves to giving appropriate orders and instructions, but should seek to take appropriate additional measures to ensure that employee behavior is consistent with accepted health and safety procedures. They should organise the work process in such a way as to comprehensively limit new risks in the workplace. Depending on the degree of risk, individual and collective measures of protection should be implemented. In this aspect, especially it is also worth taking care of regularly updating employees' knowledge of new occupational health and safety hazards.

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