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Employee sobriety control – new legislation in light of past problems. Is the direction of changes reasonable?

Kontrola stanu trzeźwości pracowników – nowe przepisy w świetle dotychczasowych problemów. Czy słuszny kierunek zmian?

Abstract
This article is devoted to the issue of controlling the state of sobriety of employees. It analyses recent legislative changes to the Labour Code, supplementing this act with provisions on controlling the state of sobriety of employees and controlling employees for the presence in their organisms of substances acting similarly to alcohol. These considerations were then related to the legal provisions regulating this issue so far and the problems signaled in this context. This made it possible to formulate some general conclusions on the appropriateness of recent legislative measures, focusing above all on finding an answer to the question of whether the direction of changes chosen by the legislator is able to meet the need to ensure safe working conditions for employees.

Keywords
sobriety obligation, employee sobriety testing, testing /;for presence of substances acting similarly to alcohol, occupational health and safety

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Streszczenie
Artykuł został poświęcony problematyce kontroli stanu trzeźwości pracowników. Dokonano w jego ramach analizy ostatnich zmian legislacyjnych w Kodeksie pracy, uzupełniających ten akt o przepisy dotyczące kontroli stanu trzeźwości pracowników oraz kontroli pracowników na obecność w ich organizmach środków działających podobnie do alkoholu. Rozważania te odniesiono następnie do regulacji prawnych uprzednio normujących tę kwestię i sygnalizowanych na tym tle problemów. Pozwoliło to na sformułowanie kilku ogólnych wniosków na temat słuszności podjętych w ostatnim czasie działań legislacyjnych, skupiając się przede wszystkim na znalezieniu odpowiedzi na pytanie, czy obrany przez ustawodawcę kierunek zmian jest w stanie sprostać potrzebie zapewnienia pracownikom bezpiecznych warunków pracy.

Słowa kluczowe
obowiązek trzeźwości, badanie stanu trzeźwości pracownika, badanie na obecność środków działających podobnie do alkoholu, bezpieczeństwo i higiena pracy

Introduction

The protection of life and health is one of the most important values protected by law. It occupies a prominent place also in the field of labour law, and translates into the safety of employees and other persons in the workplace. The employer is the entity obliged to ensure safe and hygienic working conditions. It is the employer who bears responsibility for failing to fulfil its obligations in this respect. Therefore, the employer should be equipped with tools which will allow early identification of threats to the safety of employees and other protected persons and the implementation of appropriate preventive measures. The source of such a threat may be the employee himself, and the inappropriate condition in which he/she is.

Obligation of sobriety

Under the employment relationship, an employee undertakes to perform work of a specified type for and under the direction of the employer and at a place and time designated by the employer (Article 22 paragraph

1 of the Act of 26 June 1974 – the Labour Code, consolidated text: Journal of Laws of 2022, item 1510, as amended, hereinafter the LC). One of the main components of this obligation, which simultaneously conditions the possibility of its fulfilment, is that the employee remains in a state of actual readiness to provide work. This means full physical and mental capacity to perform employment duties (judgment of the Supreme Court of 23 September 2004, I PK 541/03, OSNP 2005, No 7, item 94). As reasonably stipulated by the Supreme Court in the judgment of 7 March 2006 (I UK 127/05, Lex No 299138), the fact of being physically present at work, while expressing a subjective intention to start work, does not exhaust the content of the obligation to provide work. The employee must also be objectively ready to perform work. Intoxication, as clearly stated by the Supreme Court in the judgment cited above, excludes by its very nature the employee's readiness to work. For this reason, it is considered that maintaining sobriety, despite the lack of a clear indication by the legislator, is one of the core obligations of an employee (see Czichy, 2009). It is imposed on him, not only when he performs work at the workplace, but also when he is in any other place intended for work. The Supreme Court further adds that: "There cannot be any "margin" for tolerating the consumption of alcohol by an employee during the time allocated to the performance of work, even if the consumption of alcohol is practised or tolerated by the employee's superiors" (Supreme Court judgment of 23 July 1987, I PRN 36/87, OSNC 1989, No 2, item 32). In the negative dimension, this obligation takes the form of the employee's refraining from actions which could deprive him or her of readiness to work due to the effects of alcohol or other agents on his or her body. In this case, the obligation under the employment relationship extends to the extra-occupational sphere, since drinking alcohol, not only at work, but also during leisure time, directly or shortly before the commencement of work, may have a significant impact on physical readiness to perform work.

The consequences of breaching the obligation to remain sober may prove to be very grave for the employee. Consumption of alcohol during working time or reporting to work under the influence of alcohol may be considered a gross breach of fundamental employee duties within the meaning of Article 52 of the LC, justifying the immediate termination of the employment contract without notice. These behaviours have been highlighted also on the grounds of employees' liability for maintaining order, allowing the employer to impose on the employee a financial penalty in these circumstances. It should be added that holding the employee accountable does not guarantee that he will not suffer further negative consequences of his behaviour. It is indeed possible to terminate an employment contract owing to the same event for which a penalty has already been imposed, especially when the gravity of the offence is of such significance that the circumstances and consequences, even if only potential, of its commission justify the employer's belief that its continued employment of the employee is impossible (SC judgment of 18 February 2015, I PK 171/14, Lex No 1663395). The particularly reprehensible nature of such actions is also evidenced by the way in which alcohol abuse was regulated under the Act of 25 June 1999 on cash benefits from social insurance in the event of sickness and maternity (consolidated text: Journal of Laws of 2022, item 1732). In accordance with Article 16 of this Act (which also applies to sick pay by virtue of the reference in Article 92 of the LC), if the inability to work has been caused by alcohol abuse, sick pay is not due for the first 5 days of such inability.

In addition, an insured person loses the right to accident insurance benefits if, being intoxicated or under the influence of intoxicants or psychotropic substances, he or she has significantly contributed to causing an accident at work (Article 21 of the Act of 30 October 2002 on social insurance for accidents at work and occupational diseases, consolidated text: Journal of Laws of 2022, item 2189).

Undertaking professional or business activities in violation of the obligation to remain sober in a state after using alcohol, an intoxicant or any other similarly acting substance or agent also constitutes an offence under Article 70 § 2 of the Code of Petty Offences (Act of 20 May 1971, Code of Petty Offences, consolidated text: Journal of Laws of 2022, item 2151).

From the employer's perspective, an employee's breach of the duty of sobriety is not limited to the problem of the employee's temporary failure to perform work. Article 207 of the LC renders the employer responsible for the state of health and safety in the workplace. This provision obliges the employer to protect the life and health of employees by providing them with safe and hygienic working conditions with appropriate use of the achievements of science and technology. In doing so, the obligation to ensure health and safety in the workplace is unconditional, indivisible, real. This means that it is incumbent on the employer regardless of how the employee performs. The actions and omissions of others in this area do not relieve the employer of responsibility for the state of health and safety in the workplace. Nor can it be replaced by any other substitute performance. This obligation is qualified both as an obligation under the employment relationship and, importantly, as a duty towards the state (judgment of the WSA in Kraków of 7.01.2020, III SA/Kr 1008/19, LEX No 2773195.).

Pursuant to Article 304 of the LC, the employer, as the disposer of the workplace, is required to ensure safe and hygienic working conditions not only for employees, but also for natural persons performing work on a basis other than an employment relationship in the workplace or in the place designated by the employer, as well as persons conducting their own business activity in the workplace or in the place

designated by the employer (Wyka, 2020). In the event that work is carried out in a place to which third parties, not involved in the work process, have access, the employer is obliged to provide them with the necessary measures to protect their life and health (Prusinowski, 2022). However, an employee who breaches the obligation to remain sober at the workplace is a danger, not only to himself, but also to other employees or persons performing work on a basis other than an employment relationship, as well as third parties not participating in the work process. However, in such a situation, the responsibility for providing safe and hygienic working conditions and protecting their life and health lies with the employer. This responsibility is unconditional, which means that the employer may not exempt itself from it by invoking the employee's failure to fulfil his/her obligations (see e.g. judgment of the Court of Appeal in Lublin of 8 April 2020, III APa 4/20, Lex No 2978529).

Controlling the sobriety status of employees – new legal status

By the Act of 1 December 2022 amending the Act – Labour Code and certain other acts (Journal of Laws of 2023, item 240), new provisions were introduced into the Labour Code that regulate the control of employees' state of sobriety and the control of employees for the presence in their organisms of substances acting similarly to alcohol. In line with the introduced amendments, after Article 22^{1b} of the LC Article 22^{1c} was added, which clearly specifies the possibility for the employer to introduce sobriety tests for employees if it is necessary to ensure the protection of life and health of employees or other persons, or the protection of property. Further content of this provision provides, inter alia, an explicit indication that the said control may not violate the dignity and other personal rights of the employee. The amendment also indicates that the sobriety check includes testing by methods which do not require a laboratory test, using a device with a valid document confirming its calibration. Importantly, the group or groups of employees covered by sobriety tests, as well as the method of testing, including the type of equipment used and the time and frequency of testing, shall be defined in a collective agreement, work regulations or a notice if the employer is not covered by a collective agreement or is not obliged to establish work regulations (Article 22^{1c}, paragraph 10). The introduction of preventive checks on the sobriety status of employees extends the employer's information obligations. Employer is obliged to inform about the sobriety tests no later than 2 weeks prior to the commencement of the tests, and in the case of newly hired employees – prior to their admission to work.

Also of significance is Article 22^{1d} paragraph 1 of the LC, which assumes that the employer does not admit an employee to work whose sobriety test showed the presence of alcohol in his/her organism (a state resulting from the use of alcohol or a state of intoxication), but also an employee in relation to whom there is a justified suspicion that he/she came to work in a state resulting from the use of alcohol or in a state of intoxication within the meaning of Article 46 paragraph 2 or 3 of the Act on Upbringing in Sobriety and Counteracting Alcoholism (consolidated text: Journal of Laws of 2023, item 165)[1] or he/she consumed alcohol while at work. The legislator stipulated at the same time that the employer will provide the employee with information concerning the grounds for such suspicion, and the employee has the possibility of requesting verification of the employer's suspicions by submitting to a test conducted by a body appointed to safeguard public order. It follows that such a test will not be able to be carried out by the employer himself, but only by an authorized entity, unless the employee has previously been subject to preventive sobriety control (Kuba, 2022). If the test reveals no alcohol or alcohol-impaired state of the employee, the period of inadmissibility to work will be treated as a period of excused absence from work, for which the employee will retain the right to remuneration (paragraph 7 of this article).

The new legislation regulates the role of body appointed to protect public order in testing an employee's sobriety. These authorities have the right to carry out a test at the request of an employer or an employee who has not been admitted to work, but in the case of preventive control of an employee such a test will generally be repeated, following a test with the employer's device. The authority shall carry out the test using methods that do not require a laboratory test, but in the situations enumerated in the provision, including when an employee not admitted to work refuses to be tested using this method, the authority is obliged to commission a blood test by a professionally qualified person in this respect. A protocol shall be drawn up of the tests carried out or ordered by the competent authority.

The amendment also includes a number of provisions regulating the processing of data on the test and its result indicating a state after the use of alcohol or a state of intoxication and only when it is necessary to ensure the protection of life and health of employees or other persons or the protection of property. The new legislation provides for storing such data in the employee's personal file for a period not exceeding one year from the date of its collection, in the case of imposing a disciplinary penalty on an employee – until the penalty is deemed null and void, and in the situation where the information on the test constitutes evidence in proceedings – until the proceedings are legally concluded. Upon expiry of these periods, the information in question is to be destroyed. Information on the absence of alcohol in the employee's organism is not subject to storage. As follows from the explanatory memorandum to the draft amendment, storing such

information would be pointless, first and foremost because it is not associated with any negative consequences for the employee.

Particular attention should be paid to the Article 22[1e], which assumes the rules for checking the employee for the presence of substances acting similarly to alcohol, analogous to sobriety tests. References to the nomenclature used in the Act of 20 June 1997 – Road Traffic Law (consolidated text Journal of Laws of 2022, item 988 as amended) are evident here[2]. Also in this case, the employer does not authorize the employee to perform work if the control showed the presence of such a substance in the organism, nor the employee with regard to whom there is a justified suspicion that he/she reported for work in the state after using such a substance or took such a substance during work. Unlike the provisions devoted to the testing of an employee's sobriety, the blood test has been replaced by a blood or urine test. The (closed) catalogue of cases in which such a test is carried out is also slightly different. The supplementation of the Labour Code with provisions on testing employees for the presence of substances acting similarly to alcohol entails the extension of the catalogue of the so-called offences under Article 108 paragraph 2 of the LC to include behaviour consisting in turning up at work in the state after using such substances, or after their consumption at work.

In addition, the new provisions provide the authorization to define by the minister in charge of health, in consultation with the minister in charge of internal affairs and the minister in charge of labour, by way of an ordinance, such matters as: the conditions and methods of conducting, by the employer and by an authorized body appointed to protect public order, tests for the presence of alcohol in the organism of an employee and tests for the presence of substances acting similarly to alcohol in the organism of an employee, the manner of documenting these tests, conducted by an authorized body appointed to protect public order, the list of substances acting similarly to alcohol while taking into account the methodology of conducting such tests, the need to ensure the protection of life and health of employees or other persons or the protection of property, as well as the efficient conduct of the tests and the guarantee of the reliability of the results of the blood and urine tests, while respecting the dignity and other personal rights of the employee, as well as ensuring the application of the principles of: confidentiality, integrity, and storage limitation, resulting from the provisions of the GDPR.

The provisions on the control of the state of sobriety of employees, the control of employees for the presence of substances acting similarly to alcohol and the provisions of the implementing acts are appropriately applicable to employers organizing work performed by natural persons on a basis other than employment relationship and by self-employed natural persons. This is understandable given the aforementioned broad scope of the employer's obligation to ensure health and safety at work and to protect the health and life not only of employees, but also of other persons involved in the performance of work, but it may raise some doubts in terms of legislative correctness. This is because it introduces a significant restriction on the way in which non-labour contracts can be enforced through the provisions of the Labour Code.

Controlling the sobriety status of employees – previous legal status

For many years in force, the Labour Code did not regulate the issue of controlling the state of sobriety of employees. Until the entry into force of the legal regulations described above, the only legal provision relating to the control of an employee's state of sobriety was Article 17 of the Act of 26 October 1982 on Upbringing in Sobriety and Counteracting Alcoholism. According to its previous wording, the manager of the workplace or a person authorised by him or her was obliged not to allow an employee to work in the case of a justified suspicion that he or she has come to work in a state after using alcohol or has consumed alcohol during work. The provision also implied that a test of the employee's state of sobriety shall be carried out by a body appointed to protect public order at the request of the manager of the workplace, a person authorised by him or her, as well as at the request of the employee himself or herself. The procedure for taking blood, meanwhile, was to be carried out by a professionally qualified person.

The control provided for in Article 17 of the Act on Upbringing in Sobriety and Counteracting Alcoholism was individual and follow-up in nature. It made it possible to check the state of sobriety of a given employee only when a justified suspicion is raised that the employee has come to work in a state after using alcohol or consumed alcohol at work. It also created an obligation not to allow the employee to work when such a suspicion was raised (see Piatkowski, 1992). However, for many employers, preventive checks on employees's state of sobriety have become an attractive solution to ensure an appropriate level of protection of employees' life and health on the one hand, and to avoid or minimise the risk of incurring related liability for failing to meet health and safety obligations on the other. The rules and procedures for carrying out such checks were usually determined by internal corporate acts. However, such inspections began to raise serious doubts, if only owing to the obligation to respect the dignity and other personal rights of the employee as expressed in Article 11[1] of the LC (for more details see Szewczyk, 2011; Stępak-Miczek, 2015). Objections concerning the admissibility of this method of controlling employees gained strength when the Regulation came into force of the European Parliament and of the Council (EU) 2016/679 of

27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ EU.L. of 2016, No. 119, p. 1–88, hereinafter GDPR) and in relation to the amendment of the provisions of the Labour Code in the part concerning the employee's personal data (Articles 22^1, 22^{1a}, 22^{1b} of the LC), in particular in view of the way in which the issue of processing of special categories of data, including health data, was regulated in these provisions (see Pyszny, 2019).

A position on this issue was taken in 2019 by the Personal Data Protection Office, hereafter UODO (position available at: https://uodo.gov.pl/pl/138/1076). It was later endorsed by the Ministry of Family, Labour, and Social Policy (Explanations of the MFLSP on employee sobriety testing, 2019). A communication published on the official website of the UODO stated that, in the legal state at that time, employers were not allowed to carry out independent, preventive employee sobriety checks. According to the UODO, information on the state of intoxication constitutes health data within the meaning of Article 4 of the GDPR and is subject to specific rules of processing[3], however, this classification was of little significance in the analysed case. The UODO pointed out that the circumstances and rules under which an employee's sobriety test were specified in Article 17 of the Act on Upbringing in Sobriety and Counteracting Alcoholism, which made it possible to check an employee's state of sobriety only after a reasonable suspicion has been raised that he or she had turned up for work in a state after using alcohol or had consumed alcohol during work.

Amendments to the Labour Code in the light of past problems

The UODO's position, although controversial among representatives of labour law doctrine and employers, exposed the lack of complete regulation in this area, which was signaled much earlier in labour law studies. The legislator has left outside the sphere of regulation not only the issue of the admissibility of collective, preventive checks, but also the issue of checking employees for the presence in their organism of other substances acting similarly to alcohol.

The UODO's position has also provoked a discussion on whether the omission of preventive controls in the text of Article 17 of the Act on Upbringing in Sobriety and Counteracting Alcoholism meant that other types of controls, i.e. preventive controls were prohibited. The basis for such controls was seen, e.g. in Article 9 of the GDPR and the aforementioned Article 207 of the LC, but there was a lack of uniformity of views in this respect, and these ideas had both proponents and opponents in labour law doctrine (see: Bania, 2020; Rycak, 2019; Smolski, 2014; Żołyński, 2019, 2020).

Just how many different interpretations the former legal regulation led to is also evidenced by the judgment of 22 November 2018, in which the Supreme Court held that submitting to – what should be emphasised – preventive sobriety tests should be qualified as a basic duty of an employee, and failure to comply with this duty can constitute a reason for termination of the employment contract under the immediate procedure provided for in Article 52 of the LC (Supreme Court judgment of 22 November 2018, II PK 199/17, Lex No 2580542). However, it should be added that the Supreme Court referred the above considerations to the specific type of work performed by the employee. Similarly, in the judgment of 8 April 1998 (I PKN 27/98, OSNP 1999, No 7, item 240) the Supreme Court held that a supervisory employee who denies that he or she is in a state of alcoholic intoxication is under an obligation to undergo a procedure verifying his or her fitness to perform work, and in particular when the safe performance of work by other persons depends on his or her psychophysical condition. As in turn stated by the Supreme Court in its judgment of 24 May 1985 – it is true that an employee cannot be forced to undergo an inspection, but such a refusal may speak against the employee (I PRN 39/85, OSNC 1986, No 1, item 23).

Another weakness of the former regulation on the subject of checking the sobriety status of employees is the unclear role of body appointed to protect public order in carrying out such a test (for more details, see Kuba, 2014; Wujczyk, 2012). It seems that the rule expressed in Article 17 paragraph 3 of the Act on Upbringing in Sobriety and Counteracting Alcoholism was not a determinant of the admissibility of the employee's testing in this scope. This provision entitled the employer to demand that such a test be carried out by a body appointed to protect public order, but did not formulate any such obligation. However, the fact of who conducted the testing could affect the subsequent evidentiary value of the said tests in possible court proceedings. In a judgment of 4 December 2018, the Supreme Court clarified that the employer's own conduct of the employee's sobriety test (if the employee consented to it) amounted to confirmation of the employer's suspicion of the employee's state of intoxication and should prompt the employer to immediately notify the authorised body to conduct a formal test if the employee disputes the result of the test conducted with the employer's equipment. According to the Supreme Court, only the test conducted by a police officer had full evidentiary force, whereas the test conducted by the employer could be effectively challenged by the employee as unprofessional, i.e. unreliable (Supreme Court judgment of 4 December 2018, I PK 194/17, OSNP 2019, No 6, item 73).

Once again, it should be emphasised that the former regulation completely ignored the issue of testing an employee for the presence of drugs or other

psychoactive agents which, similarly to alcohol, affect the employee's physical and mental capacity to perform work. Such an employee is no less a danger to himself and to those around him in the workplace than an intoxicated employee, which was why the labour law doctrine recommended applying the legal provisions on sobriety testing in this case by analogy or finding the basis for such testing in Article 207 of the LC (Gładoch, 2010; Wujczyk, 2012).

The above doubts could not be eliminated by changing the interpretation of the law, without the initiative of the legislator, therefore undertaking legislative work in this area should be viewed as positive. The shape of the new legal regulations is largely dictated by the wording of the provisions on the processing of personal data, including in particular health data, provided for in the GDPR (Explanatory Memorandum to the draft Act amending the Act – Labour Code and certain other acts, https://legislacja.rcl.gov.pl/projekt/12354104/katalog/12835646#12835646).

First of all it should be noted that the poor regulation of employee sobriety testing had primarily led to a large disproportion between the obligations imposed on the employer to ensure the safety of employees (and not only) in the work process and the tools it had in this regard (Kucharski, 2021). The lack of a clear legal basis for the preventive control of the employees' state of sobriety, the doubts related to the conduct of the test itself, as well as the complete disregard of the risks related to the presence of drugs or other psychoactive substances in the employee's body, significantly hindered the proper implementation of the employer's obligations. It should be added that in the event that an employee causes damage to third parties in the performance of his or her employment duties, only the employer is obliged to repair the damage (Article 120 of the LC), which only reinforced the disproportion observed against the background of the legal situation at the time. The new legal solutions are aimed at enabling employers – in justified cases – to preventively check employees for the presence of alcohol or substances acting similarly to alcohol in their organism, so they seem to eliminate this disproportion. The question is whether the new provisions factually solve this problem?

The most objections are related to the way in which Articles 22^{1c} and 22^{1e} are formulated as provisions conditioning the admissibility of introducing checks on an employee's state of sobriety and checks on the presence in his/her organism of substances acting similarly to alcohol. These provisions assume that if it is necessary to ensure the protection of life and health of employees, the employer may introduce such checks. It seems that this should not come down to employer's right, but be his duty as the entity responsible for ensuring safety in the workplace. The phrase "may introduce" should therefore be replaced by "introduce". This is because leaving this decision in the sphere of the employer's power may lead to a situation in which, despite the fact that the control will be necessary to ensure the protection of life and health, the employer nevertheless decides not to introduce it, which contradicts the unconditional obligation to protect human life and health by ensuring safe and hygienic working conditions expressed in Article 207 of the LC.

The condition of necessity is equally vague and overly broadly formulated. It is unclear what criteria should guide the employer in deciding whether or not a control is necessary in his case. Assuming that any employee under the influence of alcohol or substances acting similarly to alcohol is a danger to himself, other employees and other persons present in the workplace, a control will always be necessary to ensure the protection of life and health, as an overriding value. For the same reasons, the reference of preventive sobriety or alcohol-impaired substances checks to selected groups of employees raises doubts. Can this provision be interpreted so broadly that such checks can be extended to a group of all employees employed by the employer, or should it be interpreted as meaning that, since the legislator provided that such inspections are subject to separate groups of employees, the entire staff cannot be covered by them?

The new regulation introduces an obligation not to allow to work an employee in respect of whom a preventive control showed the presence in his organism of alcohol in a concentration indicating a state after the use of alcohol or a state of intoxication or of substances acting similarly to alcohol, or, as was the case under Article 17 of the Act on Upbringing in Sobriety and Counteracting Alcoholism, in respect of whom there is a justified suspicion that the employee came to work in a state after the use of alcohol or in a state of intoxication, or consumed alcohol or similar substances during work. The way and place in which this provision is formulated do not make it clear whether the individual, follow-up control (i.e. carried out after a reasonable suspicion has been established) should also be assessed within the general convention of Articles 22^{1c} and 22^{1e}, or is it independent of this regulation? It follows from the justification to the act that the obligation not to allow an employee who is reasonably suspected to work applies to employees not covered by a sobriety check or a check for the presence of substances acting similarly to alcohol (both in the case where the employer has not introduced such controls at all and in relation to some employees who were not subject to such control). If the aim of the legislator was to regulate the issues related to preventive and prophylactic control while retaining the existing mechanism of individual and follow-up control, they should have made the equal position of both types of control clearer and distinguished between situations where the employer takes reasonable suspicion of the employee's state of sorbiety and actions taken as part of prevention.

The above doubts relate to the direction of change chosen by the legislator and the general convention he adopted in the way in which the issue of controlling the state of sobriety of employees is standardised in the Labour Code. This is related to the broader issue of the obligation to ensure safe and hygienic working conditions for employees. These considerations can be summed up by the following formulation: from the large disproportion between the statutory obligation to provide employees with safe and hygienic working conditions and the tools that the employer had in the sphere of controlling the state of sobriety of employees in the previous state of the law, the legislator aims at diminishing the importance of controlling the sobriety of employees in the implementation of this obligation, when such control can be considered unnecessary by the employer. It seems that, at least in some sectors, the legislator should impose an obligation on the employer to carry out such inspections, and not leave it to the employer's decision.

In addition, a number of other doubts and problems that may arise in the application of the new provisions in practice can be pointed out, which, due to the limited scope of the study, have not been analysed in detail here, and which require monitoring in the course of the application of the new provisions. These include, for example, the rules adopted by the legislator for the introduction and determination of the manner of control of employees, especially when trade unions are active at the employer. The question arises whether the lack of their acceptance of the introduction of preventive checks of employees in the workplace will prevent the covered employer from carrying out such checks, if it is necessary to protect the life and health of employees? In addition, the control of employees performing 'remote' work, i.e. telework or remote working popular in the era of the COVID-19 pandemic, still remains an unresolved problem. The legislator also still does not provide a clear regulation in the event that an employee wanting to avoid test, leaves the workplace, making it impossible to carry out the test. Many doubts will also be raised by the issue of controlling employees for the presence of substances acting similarly to alcohol in their organisms. Firstly, because of the reservations already raised in legal science in the field of driver testing as to the meaning of this concept (see: Ćwikilińska, Teresiński, Buszewicz, 2015; Huminiak, 2004; Tkaczyk-Rymanowska, 2021), and secondly, because it will require special preparation on the part of the employer.

Conclusions

An analysis of the former legal situation in the area of sobriety tests for employees leads to the conclusion that taking a legislative initiative in this area was a necessary and at the same time the only right solution. It is impossible to imagine the further development of relations on the labour market and ensuring the safety of participants in the work process without regulating at least such basic issues as testing an employee for the presence of substances in his or her body which, like alcohol, may affect the employee's physical and mental ability to perform work. What is important, however, is the way in which this will be regulated in the Labour Code.

This is an area where two important values collide: the public interest – protection of employees' lives, health and safety at work – and the interest of the individual – protection of his or her dignity and personal rights. Legal regulations should constitute a compromise between these values while taking into account the extrinsic rules in force in our legal system, including those concerning the protection of personal data. The way in which the issue of checking the state of sobriety of employees and checking for the presence in their organism of substances acting similarly to alcohol should also correspond to the obligation imposed on the employer to ensure safety in the workplace, which, apart from the obligation under the employment relationship, is also of a public nature. Legal regulations in this area should also make a clear distinction between preventive, collective control and follow-up, individual control and ensure that they are regulated on an equal level of meaning.

Notes/Przypisy

[1] A state resulting from the use of alcohol occurs when the content of alcohol in the organism amounts to or leads to:
1) concentration in blood from 0.2‰ to 0.5‰ of alcohol or
2) presence in exhaled air of 0.1mg to 0.25mg of alcohol in 1 dm3.
A state of intoxication occurs when the alcohol content in the organism amounts to or leads to:
1) concentration in blood above 0.5‰ of alcohol or
2) presence in exhaled air of more than 0.25 mg of alcohol in 1 dm3.

[2] Pursuant to paragraph 1 of the Regulation of the Minister of Health of 16 July 2014 on the list of substances acting similarly to alcohol and the conditions and method of conducting tests for their presence in the body (Journal of Laws, item 948) issued on the basis of Article 129j of the Act of 20 June 1997 – Road Traffic Law (consolidated text: Journal of Laws of 2022, item 988, as amended), substances acting similarly to alcohol are: 1) opioids; 2) amphetamine and its analogues; 3) cocaine; 4) tetrahydrocannabinols; 5) benzodiazepines.

[3] According to recital 35 of the GDPR, personal data concerning health should include all data concerning the data subject's health which reveal information about the past, present, or future physical or mental state of health of the data subject. Such data include, inter alia, information about the physiological state of a person. Therefore, information about the presence of alcohol in the body of an employee should be considered as data concerning health within the meaning of Article 4(15) of the GDPR.

References/Bibliografia

Bania, G. (2020). Kontrole trzeźwości pracowników jako narzędzie prewencji wypadkowej, *Ubezpieczenia Społeczne. Teoria i Praktyka*, (3). DOI:10.32088/0000_31

Czichy, K. (2009). Obowiązek trzeźwości i skutki jego naruszenia, *Praca i Zabezpieczenie Społeczne*, (8), 29–35.

Ćwiklińska, M., Teresiński, G., Buszewicz, G. (2015). Medyczno-sądowe oraz prawno-karne aspekty opiniowania i orzekania w przypadkach intoksykacji środkami odurzającymi i działającymi podobnie do etanolu, *Archiwum Medycyny Sądowej i Kryminologii*, (2), 77–89.

Gładoch M., (2010). Kontrola pracownika ze względu na stosowanie środków odurzających lub substancji psychotropowych. W: Z. Góral (Red.), *Kontrola pracownika możliwości techniczne i dylematy prawne*, Wolters Kluwer.

Huminiak, T. (2004). Stan „pod wpływem środków odurzających" i stan „po użyciu środka działającego podobnie do alkoholu" u kierującego pojazdem, *Paragraf na drodze*, (3), 5–16.

Kuba, M. (2022). W: K. W. Baran, *Kodeks pracy. Komentarz. Tom I. Art. 1–93*, Wolters Kluwer.

Kuba, M. (2014). *Prawne formy kontroli pracownika w miejscu pracy*, Lex/el.

Kucharski, O. (2021). Ochrona danych osobowych a bezpieczeństwo i higiena w prawie pracy, *Przegląd Prawa Publicznego*, (7–8).

Piątkowski, J. (1992). Odsunięcie od pracy za naruszenie obowiązku trzeźwości. *Acta Universitatis Nicolai Copernici. Prawo*, (32), 51–66.

Prusinowski, P. (2022). W: K. W. Baran (Red.) *Kodeks pracy. Komentarz. Tom II. Art. 94–304(5)*, Wolters Kluwer. Art. 304.

Pyszny, P. (2019). Badanie trzeźwości pracowników w świetle przepisów RODO i nowelizacji Kodeksu pracy, *Monitor Prawa Pracy*, (11), Legalis/el.

Rycak, M. (2019). Employee's obligation to submit to preventive tests for sobriety, *Studia z Zakresu Prawa Pracy i Polityki Społecznej*, *26*(4), 389–401. DOI:10.4467/25444654SPP.19.019.10909

Smolski, M. (2014). Kontrola pracowników w świetle unormowań wewnątrzzakładowych, *Studia Prawnoustrojowe*, (24), 177–178.

Stępak-Miczek, M. (2015). *Kontrola pracownika przez pracodawcę*, Legalis/el.

Szewczyk, H. (2011). Ochrona dóbr osobistych a podstawowe formy kontroli pracowników, *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, (3).

Tkaczyk-Rymanowska, K. (2021). Uwagi na temat „stanu odurzenia", „środka odurzającego" oraz „środka działającego podobnie do alkoholu" w ujęciu przepisów karnych i prawa wykroczeń, w świetle ustawy z 29 lipca 2005 r. o przeciwdziałaniu narkomanii, *Prawo i Więź* (35), 158–195.

Wujczyk, M. (2012). *Prawo pracownika do ochrony prywatności*, Lex.

Wyka, T. (2022). W: K. W. Baran (Red.), *Kodeks pracy. Komentarz. Tom II. Art. 94–304(5)*, Wolters Kluwer, art. 207.

Żołyński, J. (2018). Dopuszczalność kontroli przez pracodawcę stanu trzeźwości pracowników. Glosa do wyroku SN z dnia 4 grudnia 2018 r., I PK 194/17, *Orzecznictwo Sądów Polskich*, (3), poz. 25.

Żołyński J. (2019). Uprawnienie pracodawcy do kontroli trzeźwości pracowników, *Praca i Zabezpieczenie Społeczne* (7), 34–38. DOI: 10.33226/0032-6186.2019.7.5