

Protection of employees–other immediate family members exercising parenthood rights in the light of the amendment of the Polish Labour Code of 16 May 2019

Ochrona pracowników–innych członków najbliższej rodziny, korzystających z uprawnień rodzicielskich, w świetle nowelizacji kodeksu pracy z 16 maja 2019 r.

Abstract

The article presents protective rights afforded to employees–other immediate family members by the Act of 16 May 2019 amending the Act — Labour Code and certain other acts. At the beginning, it was reminded that the term "employee–other immediate family member" was introduced in the Labour Code by the Act of 24 July 2015 amending the Act — Labour Code and certain other acts. Due to the amendment of 24 July 2015, employees–other immediate family members were included in the class of persons entitled to maternal or parental leave. The following parts of the article discuss specifically — as presently afforded to employees–other immediate family members — the right to pay for the entire period of unemployment applicable in case of taking up employment as a result of reinstatement. The article explains the crucial relation between the new protective rights under Article 47 LC, Article 57 para. 2 LC and the amendment to Article 177 para. 5 LC. It also points to the positive impact of the reforms made by the legislator in the amended Articles: 50 para. 5 LC and 163 para. 3 LC. Attention was also drawn to the amendment to Article 477² para. 2 of the Code of Civil Procedure, introduced by the Act of 4 July 2019 amending the Act — Code of Civil Procedure and certain other acts, in relation to the court's power to impose on an employer the obligation of further employment of an employee until valid conclusion of judicial proceedings. The final part of the article contains considerations on the weakest aspects of the reform introduced by the legislator in the amendment of 16 May 2019. It was emphasized that the legislator's use of the term "employee–other immediate family member" significantly impairs the positive effect of the commented reform of the Labour Code.

Keywords

employee–other immediate family member, employee protection, protective rights, parental rights, pay upon reinstatement

Streszczenie

W artykule przedstawiono uprawnienia ochronne przyznane pracownikom–innym członkom najbliższej rodziny w ustawie z 16 maja 2019 r. o zmianie ustawy — Kodeks pracy oraz niektórych innych ustaw. We wstępie artykułu przypomniano, że pojęcie „pracownik–inny członek najbliższej rodziny” zostało wprowadzone do kodeksu pracy za sprawą ustawy z 24 lipca 2015 r. o zmianie ustawy — Kodeks pracy oraz niektórych innych ustaw. Dzięki nowelizacji z 24 lipca 2015 r. pracownicy–inni członkowie najbliższej rodziny zostali włączeni do kręgu osób uprawnionych do urlopu macierzyńskiego oraz urlopu rodzicielskiego. W kolejnych częściach artykułu szczegółowo omówiono — przyznane obecnie pracownikom–innym członkom najbliższej rodziny — uprawnienie do wynagrodzenia za cały czas pozostawania bez pracy, należne w razie podjęcia pracy w wyniku przywrócenia do pracy. Wyjaśniono istotny związek zachodzący pomiędzy nowymi uprawnieniami ochronnymi z art. 47 k.p. i art. 57 § 2 k.p. a nowelizacją art. 177 § 5 k.p. Wskazano też na pozytywne znaczenie zmian dokonanych przez ustawodawcę w znowelizowanych art.: 50 § 5 k.p. oraz 163 § 3 k.p. Zwrócono również uwagę na nowelizację art. 477² § 2 kodeksu postępowania cywilnego, dokonaną ustawą z 4 lipca 2019 r. o zmianie ustawy — Kodeks postępowania cywilnego oraz niektórych innych ustaw, w zakresie kompetencji sądu do nałożenia na pracodawcę obowiązku dalszego zatrudnienia pracownika do czasu prawomocnego zakończenia postępowania. W końcowej części artykułu zawarto rozważania na temat najsłabszych aspektów przeprowadzonej przez ustawodawcę nowelizacji z 16 maja 2019 r. Podkreślono, iż posługiwanie się przez ustawodawcę pojęciem „pracownik–inny członek najbliższej rodziny” znacząco osłabia pozytywny efekt komentowanej nowelizacji kodeksu pracy.

Słowa kluczowe

pracownik–inny członek najbliższej rodziny, ochrona pracownika, uprawnienia ochronne, uprawnienia rodzicielskie, wynagrodzenie po przywróceniu do pracy

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Introduction

Under the Act of 16 May 2019 amending the Act — Labour Code and certain other acts (Journal of Laws of 2019, item 1043, hereinafter: amendment of 16 May 2019), new provisions were introduced with the intention to protect employees-other immediate family members, as mentioned in Article 175¹(3) of the Labour Code (Act of 26 June 1974 — Labour Code, Journal of Laws of 1974, No. 24, item 141, as amended., hereinafter: LC), exercising parenthood rights. Introduction of protective rights by the amendment of 16 May 2019 involved a number of provisions of the Labour Code, namely: Article 47 LC.; Article 50 para. 5 LC; Article 57 para. 2 LC; Article 163 para. 3 LC and Article 177 para. 5 LC. The amendment of 16 May 2019 — regarding the subject matter of this study — came into force on 7 September 2019. In the justification of the draft act amending the Act — Labour Code and certain other acts (hereinafter: justification of the amendment of 16 May 2019)¹, it was pointed out that: "(...) In the light of introducing the possibility of taking maternity leave or parental leave also by employees-other immediate family members, it is legitimate to afford special protection to the said persons against termination of the employment relationship and endow them with rights analogous to those vested in female employees or employees-fathers raising a child who take advantage of such leaves. (...) The introduced (...) changes will equalize the situation of employees-other immediate family members taking a maternity leave or parental leave with the situation of employees-fathers raising a child" (justification of the amendment of 16 May 2019, pp. 7–8). It is worth remembering that the expansion of the group of persons entitled to maternity leave or parental leave by employees-other immediate family members took place under the Act of 24 July 2015 amending the Act — Labour Code and certain other acts (Journal of Laws of 2015, item 1268, as amended, hereinafter: amendment of 24 July 2015). This is the amendment of 24 July 2015 that added Article 175¹ to chapter eight of the Labour Code, which norm contains legal definitions of four terms and, among others, also the concept of "employee-other immediate family member" (Article 175¹ item 3 LC). According to the definition adopted in that provision, employee-other immediate family member should be understood as an employee other than employee-father raising a child, being an immediate family member as specified in Article 29(5) of the Act of 25 June 1999 on financial benefits from social insurance in case of illness or maternity (Journal of Laws of 2019, item 645, hereinafter: Benefit Act). As a result of the amendment of 24 July 2015, the legislator granted to employees-other immediate family members the right to maternity leave in situations when:

1. the mother of a child, being an employee or insured person — i.e. person other than employee

covered by social insurance in case of illness or maternity, as specified in the Act of 13 October 1998 on the social security system (Journal of Laws of 1998, No. 137, item 887, as amended) — holds a decision on the inability to live independently and, respectively, having used after the birth at least 8 weeks of maternity leave, resigned from the remaining part of such leave or resigned from the receipt of maternity benefit having received such benefit for a period of at least 8 months following the birth (Article 180 para. 6 item 1 LC.; Article 180 para. 7 LC);

2. the mother of a child, being an employee or insured person, stays in hospital or other medical facility of a medical entity conducting medical activities and providing medical services on inpatient and 24h basis for health reasons precluding her personal care of the child, and had used after the birth at least 8 weeks of maternal leave before interrupting the maternity leave for the period of stay in hospital or medical facility, or stopped receiving maternity benefit having done so for a period of at least 8 weeks after the birth (Article 180 para. 10 item 1 LC.; Article 180 para. 11 LC);

3. the mother of a child — employee died during her maternity leave or the insured mother of a child died at the time of receiving maternity benefit for a period corresponding to the duration of such leave (Article 180 para. 12 LC);

4. the mother of a child — employee abandoned the child during the maternity leave or the insured mother of a child abandoned the child at the time of receiving maternity benefit for a period corresponding to the duration of such leave, provided that, prior to the abandonment of the child, the mother-employee had used after the birth at least 8 weeks of maternity leave or the insured mother had received maternity leave for a period of at least 8 weeks after the birth (Article 180 para. 13 LC)².

In the amendment of 24 July 2015, the legislator also provided for a situation in which the mother of a child is not covered by social insurance in case of illness or maternity or holds no title to be covered by such insurance and yet the employee-father or employee-other immediate family member acquires the right to a part of maternity leave. However, this relates only to situations of death of a child's mother, abandonment of the child by the mother or impossibility to exercise personal care of the child by the mother holding a decision on the inability to live independently (Czerniak-Swędzioł, 2016, p. 36).

The purpose of this article is to present the protective rights granted by the amendment of 16 May 2019 to employees-other immediate family members, as mentioned in Article 175¹(3) LC, and to try and assess practical significance of the new provisions. In particular, it is essential to answer the question if the protective purpose intended by the legislator, as explained in the justification of the amendment of 16 May 2019, has in fact been achieved.

Rights of employees-other immediate family members in case of unjustified or unlawful termination of the employment contract by the employer

By the amendment of 16 May 2019, the legislator covered, among others, Article 47 LC, governing the question of salary owed to an employee after reintegration. It is known that salary for the entire period of being out of work had been previously payable only to employees nearing the retirement age, as specified in Article 39 LC, female employees during pregnancy or maternity leave, employees-fathers raising a child in the period of using maternity leave. Moreover, the right to such salary covered situations in which termination of the employment contract was restricted under special legal provisions. Currently, due to the amendment of 16 May 2019, the right to salary for the entire period of being out of work was granted also to employees-other immediate family members. Undoubtedly, this is an essential right since outside the range of employees covered by the special protection from termination, as exhaustively listed in Article 47 LC — among which the legislator has now introduced also employees-other immediate family members — employees covered by the general protective regime are entitled to salary only for a period of two unemployed months. And where the notice period is 3 months, salary is owed for a period of one month of being out of work. In the same way, the right to salary for the entire period of being out of work has not been reserved for each and every employee since — as highlighted in literature — dismissed employees are expected to actively pursue a new source of income (Mitrus, 2018, p. 263). In the Supreme Court's case-law, an opinion was expressed that the "period of being out of work" is a timespan when work was not rendered to the employer who had unlawfully dismissed an employee (judgment of the Supreme Court of 10 March 2010, II PK 265/09, *Legalis*), and the employee who, after such unlawful dismissal, claims salary for the period of being out of work may have an additional job with another employer and this does not result in his forfeiture of the right to salary (judgment of the Supreme Court of 27 February 2007, II PK 211/06, "Monitor Prawa Pracy", 8/2007, p. 392). However, at the same time, both in the doctrine and case-law, one may encounter the opinion that a dismissed employee should take on employment corresponding to his abilities and qualifications. A passive attitude in this regard, with a simultaneous claim for reintegration only at the position previously held does not deserve social approval, and interruption of the search for a job with another employer should not be a burden for the employer who terminated the employment contract with such an employee. In consequence, employees should not be passive until the conclusion of often protracted court proceedings. On the other hand, they should make all possible efforts to obtain a new job (Muszalski, 2019; judgment of the Supreme Court of

26 October 1971, III PRN 88/71; judgment of the Supreme Court of 16 May 1972, I PR 132/72; judgment of the Supreme Court of 30 October 1973, I PR 420/73, *Legalis*).

As a comment to the amended Article 47 LC, it must be emphasized that the right to salary for the entire period of being out of work, granted to employees-other immediate family members, would not fulfil its function if the discussed amendment had not been coupled by simultaneous amendment to Article 177 para. 5 LC. Namely, in the latter provision — as a result of the amendment of 16 May 2019 — the legislator decided that Article 177 para. 1, 2 and 4 LC shall apply accordingly not only to fathers-employees raising a child but also to employees-other immediate family members during their use of maternity leave. In effect, due to the amendment to Article 177 para. 5 LC, employees-other immediate family members were granted special protection of sustainability of the employment relationship, namely that an employer may neither terminate nor dissolve the employment contract when such employee is on maternity leave, unless there are reasons justifying termination of the contract without notice for reasons attributable to the employee and the company trade union organization representing the employee has consented to the termination of contract. The prohibition of termination and dissolution relates to all types of employment contracts, except contracts for a trial period no longer than 1 month (Sobczyk, 2018, p. 742). As a result, the special protection of sustainability of employment relationships does not cover situations in which an employee-other immediate family member is employed for a trial period which is not longer than 1 month. The special protection of sustainable employment is excluded in case of the employer's bankruptcy or liquidation. In such situations — according to Article 177 para. 4 in conjunction with para. 5 LC — the employee may terminate the employment contract upon notice; however, the employer is obliged to negotiate the terms of dissolving the employment contract with the company trade union organization representing the employee, unless the employee is not represented by any company trade union organization or no such organization operates in the company. In such cases, it is not necessary for the employer to negotiate the term of dissolving the employment contract (Sobczyk, 2018, p. 743).

Only in conjunction with the modification of Article 177 para. 5 LC does the amendment to Article 47 LC make a consistent instrument protecting employees-other immediate family members. The amended provision of Article 177 para. 5 LC undoubtedly reinforces the application of Article 47 LC. This is the case as even though, under Article 45 para. 2 LC, the labour court does not have to allow the employee's claim for declaring termination ineffective or reintegration if the court finds that allowance of such claim is either impossible or inadvisable, the provision of Article 45 para. 2 LC does not apply to employees mentioned in

Articles 39 and 177 LC, and the amended Article 177 para. 5 LC excludes the application of Article 45 para. 2 LC also in relation to employees-other immediate family members. In effect, such employees will be covered by even fuller protection and if they seek, before the labour court, a decision declaring ineffectiveness of termination of their employment contracts or, where the contract has already been dissolved, reintegration on previous terms — the court will not be in a position to dismiss the employee's claim with reference to the fact that allowance of such claim would be impossible or inadvisable. As a result, Article 47 LC will apply much more often, and this will be favourable to employees-other immediate family members. Naturally, the protection under Article 45 para. 3 LC does not apply to situations when it is impossible to allow an employee's claim for reintegration for reasons of bankruptcy or liquidation of the employer, however, this most obviously refers not only to employees-other immediate family members.

The introduction of protective rights for employees-other immediate family members, effected by the amendment of 16 May 2019, covered also Article 50(5) LC. By amending that provision, the legislator decided that employees-other immediate family members will have, when on maternity leave, a claim for declaring termination ineffective, and if the contract has already dissolved, for the employee's reintegration on previous terms or for the award of compensation. This relates to situations in which a fixed-term employment contract has been defectively terminated. Defects of termination of a fixed-term employment contract consist in violation of the legal provisions on termination of such contracts. This is the case because, unlike in reference to employment contracts for an indefinite term, defects may not refer to unjustified termination, which follows from the general lack of the requirement to indicate the reason justifying termination of a fixed-term contract (Góral, 2018, p. 407). With regard to employees-other immediate family members in the period of their use of maternity leave, unlawful termination of a fixed-term employment contract will consist in termination of a contract which may not be terminated. This is the case since, as indicated above, under the amendment of Article 177 para. 5 LC, which entered into force on 7 September 2019, employees-other immediate family members acquired a special protection against termination or dissolution of the employment contract throughout the entire period of being on maternity leave. Consequently, the prohibition to terminate introduced in Article 177 para. 5 LC in conjunction with Article 177 para. 1 LC relates also to fixed term employment contracts concluded with employees-other immediate family members. On the other hand, in case of unlawful termination of an employment contract concluded for a trial period, the employee may only seek compensation without any exception whatsoever (Góral, 2018, p. 407; resolution of the Supreme Court of 17 December 1985, III PZP 48/85, OSNC 1986/7-8, item 215). However, it should be added

that this is of limited importance to employees-other immediate family members because — as emphasized above — the prohibition of terminating fixed-term contracts, introduced under Article 177 para. 5 LC in conjunction with Article 177 para. 1 LC does not relate only to contracts for a trial period which is no longer than 1 month.

As a result of the amendment of 16 May 2019, the legislator granted to employees-other immediate family members the right which, under Article 50 para. 5 LC, had thus far referred only to female employees during pregnancy or maternity leave, to employees-fathers raising a child when on maternity leave and to employees-trade unionist in the period of protection of their employment relationships under provisions of the Trade Union Act. The protective rights afforded to employees-other immediate family members under Article 50 para. 5 LC are also a reinforcement of the protection under Article 45 para. 3 LC, and indirectly also under Article 47 LC. As a side note, it is also worth mentioning that identical protective rights under the amended Article 50 para. 5 LC were granted also to employees nearing the retirement age, as specified in Article 39 LC.

Rights of an employee-other immediate family member in case of unlawful termination of the employment contract by the employer without notice and new leave entitlements

As under the amended Article 47 LC, employees-other immediate family members were given the right to salary for the entire period of being out of work — when the court concludes that the termination by the employer of the employment contract for an indefinite term was unjustified or unlawful and the employee is reintegrated — also in the amended Article 57 para. 2 LC such employees were given identical rights where the court concludes that termination by the employer of the employment contract without notice was unlawful and reintegrates the employee. However, the amendment introduced by the legislator to Article 57 para. 2 LC would not be complete if it had not been accompanied with the amendment of Article 177 para. 5 LC. At this point, the considerations made above, in reference to the amended Article 47 LC, on the special protection of sustainability of employment relationships of employees-other immediate family members, introduced in the amended Article 177 para. 5 LC remain fully valid. This is the case as the provision of Article 56 para. 2 LC refers to Article 45 para. 2 and 3 LC. However, due to the amendment of Article 177 para. 5 LC, the restrictions under Article 45 para. 2 LC do not apply to employees-other immediate family members because they were grouped among persons exempt from that regime (Article 45 para. 3 LC). The only restriction refers, understandably, to situations when allowance of the employee's claim for reintegration is impossible because of the employer's bankruptcy or liquidation.

Due to the amendment of 16 May 2019, employees-other immediate family members also acquired a new leave entitlement. Namely, the modified Article 163 para. 3 LC stipulates currently that the employer must grant annual leave directly after maternity leave, not only at the request of a female worker or employee-father raising a child but also upon request of an employee-other immediate family member, as specified in Article 175¹ item 3 LC, who takes advantage of a maternity leave. As a result, if an employee-other immediate family member on maternity leave requests the employer to grant him annual leave directly after the maternity leave, the employer — under Article 163 para. 3 LC in its current version — shall be obliged to comply with such request.

The legislator must grant the leave regardless of the leave planning schedule (judgment of the Supreme Court of 19 November 2003, I PK 18/03, LEX No. 532131) or individual arrangements. If the employee does not request that the leave be split, the employer should grant the entire leave. However, the employer is not obliged to grant leave to a privileged employee — that is also to employees-other immediate family members — if in a given situation it is inadmissible to take leave. As an example, one may point to a request being made by an employee unable to work due to illness, which precludes such employee's use of the leave according to its purpose (Pisarczyk, 2017, p. 993; judgment of the Supreme Court of 24 February 2015, II PK 84/14, Legalis).

The analysed entitlement, which should be assessed positively, is of essential significance primarily from the perspective of securing the child's interests. In the doctrine, increasingly often attention is drawn to the fact that the provisions of the Labour Code on parenthood protection, in their substantial part, relate also to the rights of the child. This is the case since protection of the needs of an employee's family covers, in the first place, protection of the child's needs. Employment law takes into account, to a significant degree, social interests as well as the life and health of the child, imposing appropriate obligations not only on the child's parents (guardians) but also on the employer (Czerniak-Swędzioł, 2016, p. 25; Latos-Milkowska, 2008, p. 8 et seq).

Impact of the amendment of Article 477² para. 2 of the Code of Civil Procedure on the protective rights — under Article 47 LC and under Article 57 para. 2 LC — granted to employees-other immediate family members

As already emphasized above, salary for the period of being out of work is payable only to employees who resumed work as a result of reintegration. This refers both to the right to salary for a period of being out of work as provided in Article 47 LC and to salary owed to the employee under Article 57 para. 2 LC. In the doctrine and case-law, it is indicated that resumption of work by a reintegrated employee is a condition *sine qua non* for the receipt of salary. At the same time, it is emphasized

that this relates not only to actual commencement of work but it will be also sufficient to declare readiness to work although the work has not been resumed for reasons attributable to the employer, e.g. non-admission of the employee to work (Mitrus, 2018, p. 264; judgment of the Supreme Court of 25 May 2010, I PK 213/09, Legalis).³ On the other hand, Article 786 para. 2 of the Code of Civil Procedure (Act of 17 November 1964 — Code of Civil Procedure, Journal of Laws of 1964 No. 43, item 296, as amended, hereinafter: CCP) provides that if the obligation to pay the salary awarded in a decision reintegrating an employee or agreed in a settlement depends on the resumption of work by such employee, the enforcement clause shall be attached with regard to the part of the decision or settlement covering the salary once the court ascertains that the employee has resumed work.

At this point, it is necessary to draw attention to the amendment of Article 477² para. 2 CCP introduced by the Act of 4 July 2019 amending the Act — Code of Civil Procedure and certain other acts (Journal of Laws of 2019 item 1469, hereinafter: CCP amendment of 4 July 2019). Namely, Article 477² para. 2 CCP, in its previous version, provided that when finding a termination of an employment contract ineffective, the court, at an employee's request, may, in the judgment, impose on the employer the obligation of the employee's further engagement until legally valid resolution of the case. As a result of the CCP amendment of 4 July 2019, the legislator expanded the court's competences to impose on the employer an obligation to further engage the employee, deciding that such power should be vested in the court also in situations of reintegrating employees.⁴ In the justification of the draft Act amending the Act — Code of Civil Procedure and certain other acts (hereinafter: justification of the CCP amendment of 4 July 2019), it was emphasized that: "practical experience shows that hardly any process for finding ineffective termination of an employment contract is concluded within a timeframe allowing to apply the institution under Article 477² para. 2. In order to give real substance to this institution, the preconditions to its application should be expanded by reintegration of employees (draft Article 477² para. 2)."⁵ In consequence, the legislator admitted in the cited fragment of the justification of the CCP amendment of 4 July 2019 that the discussed institution was of little practical significance, which now may change.

As a comment to the amended provision of Article 477² para. 2 CCP, it must be highlighted that its impact on the application of Article 47 LC and Article 57 para. 2 LC will be important since resumption of work by the employee and receipt of salary for the period of being out of work may take place already prior to the legally valid conclusion of court proceedings. As a consequence, the period of the employee staying out of work will be shortened. On the other hand, however, it must be noted that imposition by the court on the employer of an obligation of further engagement of the employee until

the legally valid conclusion of the proceedings has — as previously — been left to the court's discretion and such decision may be made in case of allowing the action only at the employee's (plaintiff's) request. Therefore, legitimacy of the request made by the employee will always be examined by the court in the circumstances of a given case, which is an optimal solution. It must be remembered that compliance with the employee's request gives rise to far reaching consequences, especially under Article 477² para. 2 CCP in its amended version, when the employment contract has already been dissolved. Sometimes, the employee may face a difficult situation. For example, the employer may be forced to keep engaging an employee whom he no longer trusts while it still has not been finally decided who is right in the pending court proceedings, either himself or the employee. Another example is imposition by the court of the obligation of further engagement of an employee who, after the delivery of judgment by the first instance court, is approaching retirement age. More examples can be given, but the conclusion is one, namely, that the court should always closely examine the circumstances of a given case and balance the interests of both parties to the proceedings. The amendment of Article 477² para. 2 CCP, as introduced by the legislator, is a change for the better, which may in principle have a positive impact on the situation of employees; however, it seems legitimate to take into account also the employer's interests when justified by the circumstances of a specific case.

Final considerations and conclusions

The author has saved for last considerations on the term "employee-other immediate family member." Although a closer analysis of the term used by the legislator should appear at the beginning of this study, it is deliberately carried out only just now. The reason for the above is the fact that such closer look at the meaning of the term "employee-other immediate family member" thwarts the positive effect of the introduction by the legislator of the protective rights commented in the above considerations. The legislator's use of the term "employee-other immediate family member" in the understanding of Article 175¹ item 3 LC" is definitely the weakest point in the entire protective regime — introduced by the amendment of 16 May 2019 — discussed in this article.

Moving on to a more detailed analysis, it should be reminded that, according to the legal definition of Article 175¹ item 3 LC, the concept of employee-other immediate family member should be understood as: "(...) an employee other than employee-father raising a child who is an immediate family member, as specified in Article 29(5) of the Act of 25 June 1999 on financial benefits from social insurance in case of illness or maternity (...)." As a result, the provision of Article 175¹ item 3 LC refers to Article 29(5) of the Benefit Act, reading as follows: "In case of resignation by the insured mother of a child holding a decision on the inability to live independently from the receipt of maternity benefit and upon her receipt of that benefit for a period of at

least 8 weeks after the birth, the maternity benefit shall be payable to the insured father or an insured-other immediate family member who has acquired the right to maternity leave, leave on the terms of maternity leave or parental leave or interrupted gainful activity to personally take care of the child." In light of the above, the provision of Article 29(5) of the Benefit Act — to which the legislator refers — does not contain any legal definition of the term "employee-other immediate family member" but only uses the term "insured-other immediate family member." Therefore, it remains unclear what group of persons may qualify as other immediate family members.

Providing the definition of employee-other immediate family member, as expressed in Article 175¹(3) LC, the legislator made an error in defining known as *idem per idem* (Ziemiński, 1999, p. 52). Bearing in mind the reference to Art. 29(5) of the Benefit Act, it may be concluded that we are dealing with an indirect vicious circle (Ziemiński, 1999, p. 52–53). The amendment of 16 May 2019 was undoubtedly a great opportunity to correct the said error; however, the legislator remained passive in this respect. Such attitude of the legislator is all the more surprising because, from the time of the amendment of 24 July 2015, when the term "employee-other immediate family member" had been introduced in the Polish Labour Code, critical comments appeared in the doctrine with regard to the discussed problem. Namely, A. Sobczyk noted that: "A fundamental interpretative problem relates to the (...) expression used, "other immediate family member," since neither the LC nor even Article 29(5) of the Benefit Act, to which the commented provision refers, defines that term. Additionally, Article 29(5) of the Benefit Act, when mentioning other immediate family member, refers back to the provisions of the LC, which additionally impairs the reading and understanding of that provision. (...) Other authors are of the opinion that (...) the definition, in general, is tautological and its literal interpretation does not allow us to determine the group of persons qualifying as "immediate family members." Moreover, it is unknown if the term refers to an immediate family member of the child or immediate family member of either parent (...). The discussed statutory framework must be assessed negatively, especially that the provisions in question affect public law questions, such as acquisition of entitlement to leave relating to parenthood or acquisition of the right to benefits paid from public funds, which is why extensive interpretation or interpretation *per analogiam* should be inadmissible. (...) the wording of the commented provision should be changed (...)" (Sobczyk, 2018).

Also J. Czerniak-Swędzioł emphasized that: "The problem (...) is that provisions of that Act [Benefit Act — Author's insertion] do not define the concept of immediate family member, do not contain any catalogue of persons covered by that concept and, on top of that, refer back to norms of the Labour Code. The legislator does not make it easy for us to understand the provision

and, above all, refers back to non-existent rules (completely empty reference). This, in turn, provokes the reflection that the legislator's use of so ambiguous a term without providing its definition for the purposes of the new regime may, in practice, bring many interpretative doubts. (...). Therefore, I point to the need of immediate introduction in the Labour Code of a legal definition of the concept of immediate family member. Any pursuit of the definition in the Civil Code or by analogy to other insurance provisions is a risky procedure. (...) Also, extensive interpretation is not appropriate in the present case since it may give rise to significant abuse by potentially entitled parties" (Czerniak-Swędzioł, 2016, p.28 and 37).

One should fully agree with the objections quoted above, as expressed in the doctrine. Moreover, it can be read in the justification of the amendment of 16 May 2019 itself that: "An additional argument for the introduction of the reforms provided for in the proposed act, anchored in the constitution, is the need for legal provisions to comply with the requirement of legal definiteness. This requirement is all the more applicable when the legislative regime relates to the sphere of rights of the individual. The principle of legal definiteness, whose content has been specified in the Constitutional Tribunal's case-law, requires that a legal norm be clear, unambiguous and precise and, as such, enforceable. Analysis of legal provisions covered by the objective scope of the proposed Act points to the possibility of different interpretation of its provisions. Since those provisions directly define employee rights, it is legitimate to amend them in order to comply with the requirements

of the principle of legal definiteness" (justification of the amendment of 16 May 2019, p. 2).

Despite the position presented above, the legislator did not specify, in the amendment of 16 May 2019, the term "employee-other immediate family member", which should be assessed negatively. The lack of any clear definition of the commented term leads to a situation in which the parenthood rights introduced by the amendment of 24 July 2015 and the legal protection granted by the amendment of 16 May 2019 may, remain unused by persons who might actually take advantage of such rights. On the other hand, one may not exclude abuse mentioned by the previously cited J. Czerniak-Swędzioł. The legislator's idea, as expressed in the justification of the amendment of 16 May 2019, may be reduced to the statement that it is legitimate to cover employees-other immediate family members with the special protection from termination of their legal relationships and to give them rights analogical to ones held by female employees and employees-fathers raising a child who take advantage of maternity leave or parental leave (justification of the amendment of 16 May 2019, p. 7). And although that idea seems correct and the granting of the protective rights discussed in this study should be assessed positively, the absence of clear criteria allowing the narrowing down of the class of employees who obtained the parenthood rights, additionally reinforced by protective provisions, essentially undermines the positive effect of the commented amendment.

Notes/Przypisy

¹ See the full text of the justification to the amendment of 16 May 2019, available at: <https://www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=1653>

² For more on parental rights in the light of the amendment of 24 July 2015, see: Mitrus, 2016, p. 86; Mędrala, 2016, p. 65; Bosak, 2016, p. 13; Koczur, 2016, p. 38; Przybyłowicz, 2016, p. 120; Sekulski, 2016, p. 134; Serafin, 2016, p. 157; Torbus, 2016, p. 199; Wieleba, 2016, p. 252; Walczak, 2016, p. 228.

³ L. Mitrus (2018, p. 264) reminds that the claim for salary for a period of being out of work — under Article 47 LC — is a claim separate and independent from ones under Article 45 LC. However, in judicial practice, it is admissible to award in one judgment reintegration on previous terms under Article 45 para. 1 LC and compensation for being out of work under Article 47 LC, which is however, associated with the requirement of previous resumption of work after being reintegrated. Award of such, "conditional" salary for a period of being out of work requires that the reintegrated employee should declare readiness to perform work. Such obligation materializes only upon validation of the judgment reintegrating the employee.

⁴ Article 477² para. 2 CCP was amended so as to read: "When finding termination of an employment contract ineffective or reintegrating an employee, the court may, at the employees request, impose on the employer, in the judgment, the obligation of further engagement of the employee until the final conclusion of proceedings".

⁵ See full text of the justification of the CCP amendment of 4 July 2019, available at: <https://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=3137>

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