

# Consequences resulted from establishing the written form *ad validitatem* of the individual labor contract

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## **Abstract**

Recently, with the amendments brought to the Labor Code by the Law no. 40/2011, the written form of the individual labor contract became a condition of validity (*ad validitatem*). The actual and imperative dispositions of art. 16 of the Labor Code establishes the written form of the individual labor contract as a condition of validity in the Romanian labor right. This form is imposed for any type of individual labor contract in as far as the text pointed does not operate any distinction. The non-observance of written form when concluding the individual labor contract is sanctioned with absolute invalidity of the convention, sanction that can be covered by the parties by the subsequent fulfillment of this condition. The parties have the possibility to determine the invalidity occurred, but to also establish its effect according to the law. In case the parties do not agree upon the invalidity of the contract, this invalidity can be determined by the decision of the competent court. The fact of determining, respectively the declaration of invalidity produces effect to the future only. Whereas the non-observance of written form affects the entire contract means a total invalidity, which determines the termination by law of the contract according to art. 56 paragraph 1 letter e of the Labor Code if not validated by the parties. Art. 57 paragraph 5 of the Labor Code does not regulate in detail the effects of invalidity, it points only that “the person who worked pursuant to an invalid individual labor contract has the right for remuneration according to the method of fulfilling the labor tasks”, thus it does not operate retroactively. The regulation of the individual labor contract in this manner attenuates the impact of this imperative requirement.

**Key words:** form, written, as a condition of validity, invalidity

## **1. Introductory considerations**

For the legal and valid conclusion of an individual labor contract, some more conditions have to be fulfilled. Some of these are the same as concluding any kind of contract: capacity, object, consent and cause. Recently, with the amendments brought to the Labor Code by the Law no. 40/2011<sup>2</sup>, the written form of the individual labor contract became a condition of validity.

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<sup>2</sup> Published in the Official Gazette of Romania, Part I, no. 225 of March 31, 2011 amending and supplementing Law no. 53/2003.

Against the previous regulations of the Labor Code<sup>3</sup> the provisions of art. 16 paragraph 2 represented the essential text based on which the opinion in the legal field was formulated and according to which „in all cases, regardless of the type of individual labor contract, its form establishes just a condition of validity”<sup>4</sup>.

These provisions pointed that „in the case of an individual labor contract was not concluded in written form, it is presumed it has been concluded for an undetermined period, and the parties can make the proof of the contractual provisions and performances by any other means of evidence”.

The form required only for the proof of legal documents refers to that condition imposed by law or parties, which consists in elaborating a document that would prove the legal document. In the Romanian law system, the written form as a condition of validity consists in elaborating a document in written form<sup>5</sup>.

This form is justified by the importance of some legal documents for which the legislator notices the parties upon the necessity to register the precise parties’ will so that to eliminate the ambiguity.

The sanction for non-observing the written form required as a condition of validity does not incur the invalidity of the legal document, but mainly incurs the impossibility of proving the legal document – *negotium juris* – with another means of evidence.

Thus, the written form required as a condition of validity is mandatory.

As for the labor right, because of correlation of art. 57 paragraph 1 with art. 16 paragraph 2 of the Labor Code, it has been reached to the conclusion that actually the non-observance of the written form requirement for each single contract, exercises *ex lege* another legal consequences than the invalidity. This consequence is expressly mentioned in the Labor Code for the contract on determined period, for at least that with partial labor time, and implicitly for that with labor performed at home. Thus, according to art. 16 paragraph 2 of the Labor Code, the sanction that occurs in the case of non-observing the written form of the individual labor contract for a determined period does not point any of the invalidity consequences, on the contrary, the contract is considered concluded for an undetermined period<sup>6</sup>.

In the context of the legal regulations recently appeared, namely Law no. 40/2011, the form of the individual labor contract suffered significant amendments.

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<sup>3</sup> Law no. 53/2003, published in the Official Gazette of Romania, Part I, no. 72 of February 5<sup>th</sup>, 2003, amended and completed by Law no. 331/2009.

<sup>4</sup> Ion Traian Ștefănescu, *Tratat teoretic și practic de drept al muncii*, Universul Juridic Publishing House, Bucharest, 2010, p. 252.

<sup>5</sup> Gheorghe Beleiu, *Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil*, Universul Juridic Publishing House, Bucharest, 2003, p. 170.

<sup>6</sup> Ion Traian Ștefănescu, *work cited*, p. 252.

From this perspective, the Labor Code currently comprises the following legal dispositions:

- Art. 16 paragraph 1: “Individual labor contract in concluded (...) in written form (...). The obligation of concluding the individual labor contract in written form becomes the employer’s responsibility. The written form is mandatory for the valid conclusion of the contract”;
- Art. 80 paragraph 2: „Individual labor contract for a determined period can be concluded in written form only with the express mention of the duration for which it is concluded”;
- Art. 102 paragraph 2: „In case when for an individual labor contract with partial time nu the elements provided in paragraph 1 are not mentioned, the contract is considered concluded for a full-time period”;
- Art. 106: „Individual labor contract at home is concluded in written form only”;
- Art. 57 paragraph 1: „Non-observance of any of these legal conditions required for the valid conclusion of the individual labor contract incurs its invalidity”.

The actual dispositions of art. 16 reported for eliminating paragraph 2 of the same article from the old regulations establishes the written form as a condition of validity for the individual labor contract in the Romanian labor right.

The same form imposed for any type of individual labor contract, respectively for an undetermined period, determined period, work at home, whereas the text pointed does not operate any distinction.

By the form required for the validity of some legal documents, one can understand an essential and special condition of validity consisted in the necessity of fulfilling the formalities established by the law or parties, which in their absence the legal documents could not be elaborated in a valid way.

The written form as a condition of validity imposes the observance of some requirements, such as:

- The entire contents of the legal document – both the essential clauses and the ones not essential – must have the form provided by the law or by the parties’ convention;
- The legal documents that are interdependent with the one having a certain form, must also cover the form required for its validity even though if taken separately, do not impose as a condition of validity to the fulfillment of the same condition.

For those situations in which the written form is imposed as a condition of validity *ad validitatem*, this presents the following characters:

- represents an essential and constitutive elements for the legal documents;
- is incompatible with the tacit manifestation of will;
- is exclusive.

From these characteristics comes out that the non-observance of the written form required for the validity of a legal document leads to its absolute invalidity. Thus, as it was point in the civil law<sup>7</sup>, the sanction for the absolute invalidity occurs.

Consequently, in the case when a labor contract is concluded and any of the conditions provided by law for its validity has not been observed, the contract shall be considered null and void.

## **2. Correlations between the invalidity character in civil law and labor law**

In civil law, the invalidity character is the sanction that brings no effect to the legal documents in case of non-observance of legal norms edicted for its valid conclusion.

If in civil law the existence of invalidity does not make impossible the validity of the legal documents, in the labor law the irremediably invalidity represents a genuine principle provided by art. 57 paragraph 3 of the Labor Code.

Therefore, the non-observance of the written form established *ad validitatem* when concluding the individual labor contract is sanctioned with absolute invalidity according to art. 16 paragraph 1 corroborated with art. 57 paragraph 1 Labor Code, sanction that can be successfully covered by the parties by the further fulfillment of this condition.

This legal possibility that became rule in the labor right, was established by the legislator to protect the employees and the labor rights as well.

Another solution specific to labor right consists in the possibilities of the parties to notice the invalidity occurred, but to also establish its effects according to the law (art. 57 paragraph 6). The parties' consent is necessary and enough for capitalizing the invalidity in an amicable way as opposed to the civil law, the field in which invalidity is judicially capitalized.

As long as the provisions of art. 57 paragraph 6 Labor Code do not make any distinction between the method of invalidity occurred, we believe that the non-observance of the written form *ad validitatem* can be determined by the parties, these parties also establishing the effects.

In case the parties do not agree upon the invalidity of the individual labor contract, the sanction cannot be operated, a situation in which the invalidity can be determined by the decision of a competent court.

In regard to the common law, in this case the civil law, in which the absolute invalidity can be invoked anytime, and the relative invalidity in certain terms, in the labor law, art. 283 letter d from the Labor Code establishes: "determining the invalidity of an individual labor contract can be required by parties throughout the duration of the contract". Thus, under the aspect of the terms

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<sup>7</sup> Virgil Economu, *Nulitatea actului juridic civil*, by Traian Ionaşcu ş.a., "Civil Law Treaty. General part, vol. I", Academy Publishing House, Bucharest, 1989, p. 326.

in which it can be invoked, there is not distinction between the absolute and relative invalidity<sup>8</sup>.

Hence, the absolute invalidity determined by the non-observance of the written form of the contract can be anytime invoked but only as long as the contract is not terminated (since it is in force).

The rule when it comes to invalidity of a contract in civil law, in labor law, in the case of an individual labor contract the invalidity has no retroactively effect. Art. 57 paragraph 2 of the Labor Code expressly establishes the basic principle that governs the legal field of invalidity, namely “determining the invalidity of the individual labor contract produces effects to the future”.

In this regard, even the Constitutional Court pronounced its decision no. 378/2004<sup>9</sup>, rejecting the exception of unconstitutionality of art. 57 paragraph 2 of the Labor Code and art. 283 paragraph 1 letter d, underlining that “there is no relevance whatsoever if the invalidity is absolute or relative since under no circumstance the performances of the parties can be canceled (work performance, wages payment, other rights and duties....)” during the development of the individual labor contract (for instance, absolute invalidity for the non-observance of written form).

### **3. The effects of invalidity in the case of non-observing the written form of the individual labor contract**

In this case, determining, and respectively declaring the invalidity of an individual labor contract produces effects to the future only (*ex nunc*), and not to the past (*ex tunc*) since the individual labor contract is not a consecutive services contract, thus keeping the characteristics of these contracts to make an exception from the retroactively effects principle of the legal document invalidity.

Reimbursing connected to the services provided is objectively impossible.

The effects are produced from the moment the parties give their free consent or, as the case may be, from the moment the decree remains final.

Since the non-observance of the written form affects the entire individual labor contract, we are facing a total invalidity, which not validated by the parties, determines the termination by law of the contract according to art. 56 paragraph 1 letter e of the Labor Code.

Art. 57 paragraph 5 of the Labor Code does not regulate in detail the effects of invalidity, it only points that “the person performing the work pursuant to an invalid individual labor contract has no right for remuneration according to fulfilling his/her work tasks”.

Consequently, the payment cannot be affected by this sanction. It results that this person shall be entitled to receive even the pay rise pertaining to employees for the night shifts, additional work, the work performed in special

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<sup>8</sup> Ion Traian Ștefănescu, *work cited*, p. 292.

<sup>9</sup> Published in the Official Gazette of Romania, Part I, no. 936 from October 13<sup>th</sup>, 2004.

conditions, benefits in kind or money regulated by the mobility clause, etc., provided that he/she performed the activities in these conditions.

Regarding the rights, in the legal field has been expressed the opinion according to which “in the case in which the right to payment is acknowledged, even if partially, the status of the employee shall be accepted as established by the labor legislation (and the social security) with all its effects: for instance, compensating for the leave not taken, the payment of contingent help in the state social insurance system, etc”<sup>10</sup>.

Also, the person who worked pursuant to an invalid labor contract has the right for length in service for the period prior to the final character of the decree through which the invalidity of the contract was determined.

#### **4. Responsibility carried by the non-observance of the written form *ad validitatem* of the individual labor contract**

The obligation to conclude an individual labor contract in written form falls on the employer, in this regard also being the provisions of art. 16 paragraph 1 of the Labor Code. The non-observance of it incurs the employer's contraventional liability according to art. 276 paragraph 1 letter e<sup>1</sup> of the Labor Code, according to which „performing the work by a person without concluding an individual labor contract is sanctioned with a penalty from 500 to 1.000 lei”.

Moreover, prior to starting the activity, the employer is obliged to hand over the employee a copy of the individual labor contract, otherwise he commits the contravention provided by art. 276 paragraph 1 letter o of the Labor Code, a fact punished with a penalty from 1500 to 2000 lei.

#### **5. Settling the conflicts**

The material competence of settling the applications through which the invalidity of the individual labor contract is requested, belongs to the competent court to settle the conflicts of rights according to art. 68 paragraph 1 letter b and art. 71 of the Law no. 168/1999 on settling conflicts related to labor. Thus, the first competence is that of the court of first instance according to art. 2 point 1 letter c of the Code of Civil Procedure, the means of attack being settled by the court of appeals (art. 3 Code of Civil Procedure).

The same court is competent to settle the employee's application for recovery of damages pursuant to the dispositions of art. 283 paragraph 1 letter c and art. 284 paragraph 1 of the Labor Code.

It should also be mentioned the aspect according to which a judge and two legal assistants shall first settle the causes on the labor conflicts and social insurance (art. III, point 8 of the Law no. 202/2010 on some steps for accelerating the settling of processes).

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<sup>10</sup> Ion Traian Ștefănescu, *work cited*, p. 294.

The jurisdiction of settling such applications falls on the competent court in whose jurisdiction the complainant resides or, as the case be, has his registered office.

The application through which the invalidity character is requested can be introduced throughout the existence of the contract (art. 283 paragraph 1 letter d of the Labor Code), and the application for compensating for damaged can be introduced in 3 years from the right starts (art. 283 paragraph 1 letter c of the Labor Code), respectively from the date when the invalidity determined to that contract produces effects<sup>11</sup>.

Both types of applications are exempted from judicial stamp fee pursuant to art. 285 corroborated with art. 281-283 of the Labor Code.

### Conclusions

Establishing the written form *ad validitatem* of the individual labor contract does not represent an optimal solution adapted to the flexibility that characterizes the labor right, but its rationale was to control illegal employment.

However, the express regulation of the individual labor contract invalidity in Labor Code with the characteristics determined by the specific of judicial labor reports, attenuates the impact of this imperative requirement.

From another point of view though, the recent legislative amendment brought to the individual labor contract aligns pursuant to the symmetry principle of the legal documents, with the entire pack of norms in the field and which establishes the written form *ad validitatem* as for instance the theory of resignation or the procedure of dismissal destined to protect the employee.

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<sup>11</sup> Alexandru Athanasiu, Magda Volonciu, Luminița Dima, Oana Cazan, *Labor Code. Commentaries on each articles*, C. H. Beck Publishing House, Bucharest, 2011, p. 316.