

Enforcement individual labor contracts and undeclared work

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Abstract

Failure to conclude individual employment contract as provided in the applicable legal rules in the field of legal work brings into question the concept of "undeclared work" – one of the important issues facing the Romanian society.

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1. Introductory issues

A) The Labour Code² defines the individual work of art. 10 such: "(...) *is the contract under which a natural person designated employee undertakes to perform work for and under the authority of an employer, natural or legal person, for remuneration called wages*".

In essence, the individual employment contract is characterized in that one party, which is always a natural person undertakes to submit its workforce for the benefit of the other party who assumes in turn, obligations to create appropriate conditions for work performed and pay to it³.

In legal literature⁴ it was revealed that not expressly mentioned employer's obligation to pay salary (insufficiently relevant reference to work performed for remuneration called wage).

In our opinion, the individual employment contract can be defined as the convention by which a person, called employee undertakes to perform work with continuity in time, and under the authority of an employer, natural or legal person, for remuneration called salary, respecting the laws, collective agreement applicable rules and regulations.

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² Given that previous legislation Labour Code of 2003, there was no legal definition of the individual employment contract – but only highlight its contents – specialized doctrine and recovered serve to explain this concept.

³ See, in this regard, S. Ghimpu, *Dreptul muncii*, Didactic and Pedagogical Publishing House, Bucharest, 1985, p. 5.

⁴ To be seen A. Țiclea, *Acte normative noi – Codul muncii*, „Revista Română de Dreptul Muncii”, no. 1/2003, pp. 8-9; I.T. Ștefănescu, *Tratat teoretic și practic de drept al muncii*, 3rd edition, revised and enlarged, Universul Juridic, Bucharest, 2014, p. 227.

In French literature⁵, individual employment contract is considered the convention whereby a person undertakes to provide another activity under which is placed in remuneration.

In legal doctrine German⁶, individual employment contract is defined as the contract for the exchange of private law, the employer undertakes to pay a salary, and the employee, under the employer to perform a work usually dependent.

An individual employment contract is the legal instrument of legal employment generator, which operates under the Contracting Parties exchange mutual benefits⁷.

Like any other contract, the individual employment contract shall be identified by certain traits that characterize a whole and, respectively, by certain characteristics aimed at certain stages of his.

B) The International Labour Organization (O.I.M.) adopted, in 2006, Recommendation. 198, stating, in summary, the features of an employment relationship⁸. Thus, the work performed within an employment relationship must meet certain requirements, namely:

- be done according to the instructions and under the control of another person; Involve the integration that do in a business organization;
- to be performed exclusively or primarily on behalf of another person;
- be met personally by the worker;
- be carried out according to a schedule determined in a specific place or person accepted by recipient labor;
- have a duration of time (default) and present a certain continuity;
- assume that the worker to be available to other persons;
- involve making available to its provision by the beneficiary, equipment, materials, energy, as appropriate.

In its Recommendation no. 198/2006, are listed the following aspects⁹:

- the periodic remuneration worker;
- that remuneration to the sole or main source of income;
- payment in kind is made with resources (for life), housing, transport or others;
- recognition of rights for at providing work, to weekly rest and annual leave;
- financing professional worker movements by the person receiving the work;
- the absence of financial risk for the worker.

⁵ To be seen D. Gatamel, *Le droit du travail en France*, Edition Lefevre, Paris, 1998, p. 351; J. Péliissier, A. Supiot, A. Jeammaud, *Droit du travail*, 21 édition, Dalloz, Paris, 2002, p. 188.

⁶ To be seen G. Schaub, U. Koch, R. Linck, H. Vogelsang, *Arbeitsrechts – Handbuch*, 12 Auflage, Verlag CH Beck, München, 2007, p. 197.

⁷ To be seen O. Ionescu, *Codul civil și contractul de muncă*, Curierul Judiciar S.A., Bucharest, 1938, p. 4.

⁸ It should be noted that for the first time these features have been summarized in a document O.I.M.

⁹ See, in this regard, I.T. Ștefănescu, *op. cit.*, p. 223.

Member States are recommended to consider the possibility of defining legislative or other specific features about the existence of an employment relationship. In the national policy – which must pursue economic growth, employment and decent work – states should ensure combat relations disguised employment, reliance on contractual arrangements that hides legal status real party and prevent the implementation of social protection measures¹⁰.

Member States are also recommended and establish a legal presumption of the existence of an employment relationship exists whenever one or more indicators characteristic of such a relationship.

C) In the Decision no. 574/2011¹¹, the Supreme Court, Î.C.C.J., showed that – to qualify as a contract of employment – should be brought together three elements, namely:

- provision of contract labor as a primary goal;
- remuneration for work;
- the existence of a relationship of subordination.

The employment contract must place the worker under the direction, supervision and authority of his employer.

In its judgment of 13 November 1996 the Court of Cassation French, Department of Social determined that relation of subordination is characterized by the performance of a work under the authority of an employer who has the authority to give orders and directives, to review the work performed and to sanction violations committed by the employee.

In the absence of subordination ratio contractual relations objectifies not agreed by the parties in an employment relationship, but remain only in the sphere of civil law. Instead, employees are part of the employment report, which is governed either by the Labour Code or special laws that regulate the situation of certain staff.

2. Issues on "undeclared work"

Failure to conclude individual employment contract under the conditions set out above brings into question the concept of "*undeclared work*" – one of the important problems in labor relations.

Internally, in 2010 and by 2012 produced legal effects the Government Decision no. 1024/2010 approving the National Strategy on reducing the incidence of undeclared work for 2010-2012 and the National Action Plan for implementing the National Strategy on reducing the incidence of undeclared work for 2010-2012¹².

In accordance with the provisions of this Strategy, the concept of "*undeclared work*" (also known as "labor black") is the activity performed by an employee for and under the authority of an employer – natural or legal person –

¹⁰ *Idem* p. 224.

¹¹ Published in the "Official Gazette of Romania", part I, no. 368 of May 26, 2011.

¹² Published in the "Official Gazette of Romania", part I, no. 740 of 5 November 2010.

without the legal provisions effect on the conclusion, execution, modification, suspension and termination of individual employment contract.

The most common forms in which it manifests work are: understanding between employer and employee following which the latter agrees to perform work without signing an individual contract of employment which deprives the rights and obligations under the law; failure to conclude individual employment contract for probation; use by individuals of a domestic staff to carry out works and services in households without a contract individual employment; use illegal labor or seasonal day laborers.

Work is provided formal disguised under a civil contract, although in reality, the legal work is performed under an individual contract of employment.

Independent or not there written form of individual employment contract, however – the facts – similarity hypothesis concluding the convention with legal compliance.

According to art. 57 para. 1 of the Labour Code, failure to comply with any of the legal conditions necessary for the valid conclusion of the individual employment contract void it. But nullity individual employment contract effective for the future – may be covered by subsequent fulfillment of the conditions imposed by law (art. 57 par. 2 and 3 of the Labour Code).

The guidelines outlined in the Strategy mentioned can be further applied for image reducing undeclared work – goal achieved by: encouraging the parties to conclude an individual employment contract – governed by specific legal rules – to ensure the protection of employees through the usual means of action including the use of coercive measures, stimulating employment, reducing taxes, allowances reform in cooperation with the social partners.

Undeclared work has negative effects in the short term, especially in the long term, both for individuals and for society, and for the state budget, there is an interdependent relationship between contributions and taxes and access to social security benefits and other social protection measures.

The payment of these legal obligations leads, on the one hand, the lack of revenue to the state budget, affecting also the social security systems, and secondly – and most importantly – that people who perform undeclared work not may benefit from any of the forms of social protection provided by law.

Whereas undeclared work involving a job uncertain prospects in the short term with no access to professional development, with wages lower than those on the labor market without social protection, the negative effects for those providing undeclared activity is also manifested in precarious socio-economic position compared to employees hired legally.

Negative impact of undeclared work is reflected in the economy by distorting competition.

Thus, employers who use undeclared labor have fewer financial obligations and therefore compete unfairly with employers who use all kinds of resources and making real efforts to comply with legal obligations incumbent on them.

Gravity social and economic consequences it produces undeclared work generates the following risk (mentioned in the Strategy, however, encountered today): the person who performs the work has security of the payment of work performed, payment being made based on the goodwill of the employer and in reality, is postponed for days, sometimes even months (in this case, tax evasion is committed by the person providing the work and the employer); the person who performs the work without having concluded an individual employment contract lacks social protection (do not benefit from social security, health insurance, unemployment insurance, the accidents at work and occupational diseases, as well as those from budget consolidated; not payable vouchers, do not enjoy the legal protection of women and children, not collective exercise of constitutional rights – the right to associate in trade unions and negotiate collective agreement – the right to bank loans); employer was not permitted by law to empower worker it for possible damages caused by it; also it lacks disciplinary prerogative; social funds and the state budget are injured by evading payment of social contributions and taxes.

The categories of persons found that working without legal forms are: people with low levels of education; people without professional qualifications or low-skilled; unemployed, who do not want to lose their benefits and social benefits; young people, who often lack the necessary experience and do not realize the importance of contribution to social security funds; people without income or low income; people who want to supplement their income by practicing "labor gray", which was defined in the Strategy as that form of activity performance the employee receives a portion of salary rights without on their manifest state fiscal policy; retirees; foreigners; children, provision for the consequences of activities outside the framework can have serious consequences on physical and mental development later.

Undeclared work can occur only with the involvement of both parties, namely employers and their employees, based on unfair practices that diminish the sense of responsibility necessary in a society where a significant proportion of resources is designed social protection.

3. Conclusions

In Romania, as in European Union countries, undeclared work – by its nature – it is difficult to determine accurately the size of this phenomenon can only be estimated.

It requires that all forms of combat undeclared work to fall in employment policies, because this action will contribute to the joint efforts of the state of implementation of other strategies in the field of government.

The main cause of the perpetuation of this phenomenon is the immediate financial advantage obtained both employer and employee generated by evasion of taxes and social contributions.

Causes identified as undeclared work generating situations are different: both the high level of taxes and contributions; mentality of employers, through all possible means aimed at maximizing profits, and the mindset of employees seeking to supplement their incomes, which are located mostly at subsistence; ignorance of legal provisions which are associated with the failure to acknowledge the full consequences arising from failure to conclude the individual employment contract; the low number of jobs employers bidders; lack of legislative harmonization of forms of employment flexibility and employee protection embodied in the employer's excessive restrictions on how the progress and termination of legal employment.

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