

On call (zero-hour) contractual arrangements: a new form of employment. Elements of compared law

PhD student **Mihaela-Emilia MARICA**¹

Abstract

Considering the evolution of atypical employment forms and their diversity, the elements of novelty brought about by atypical employment forms lie not only in their proliferation at an extremely fast pace, in most EU member states, but also in the fact that the non-standard employment forms known so far have been joined by very many new versions and subcategories, which allows a sub-categorization of these forms as atypical and very atypical. Currently, these new types of employment are no longer marginally used on the European labor markets, as their number has increased very strongly, the trend becoming a true phenomenon. As an exhaustive presentation of these works arrangements is beyond the scope of the present paper, we shall hereby address mainly the on call employment contract, in order to highlight its benefits for the labor market, as well as the major negative implications of implementing it. This is a relevant pursuit, since the Romanian labor legislation has not yet issued any stipulations to regulate this new type of work arrangement.

Keywords: *on call contract; atypical work; new forms of work; flexible work.*

JEL Classification: K31

1. General considerations

Considering the evolution of atypical employment forms and their diversity, the elements of novelty brought about by atypical employment forms lie not only in their proliferation at an extremely fast pace, in most EU member states, but also in the fact that the non-standard employment forms known so far have been joined by very many new versions and subcategories, which allows a sub-categorization of these forms as *atypical* and *very atypical*². Currently, these new types of employment are no longer marginally used on the European labor markets, as their number has increased very strongly, the trend becoming a true phenomenon³.

¹ Mihaela-Emilia Marica – Bucharest University of Economic Studies, Romania, avocatmihaelamarica@yahoo.com.

² The term first appeared in the vocabulary of Eurofound in 2010 (The European Foundation for the Improvement of Living and Working Conditions), Eurofound Report, *Very atypical forms of work*, http://www.eurofound.europa.eu/publications/htmlfiles/ef1_0091.htm, accessed 12 January 2016.

³ Extensive research conducted by the European Observatory of Working Life into *Flexible forms of work; very atypical contractual arrangements*, has revealed that the occurrence of these highly atypical contractual arrangements across labor markets, differs among EU member states. In this respect, there are three categories of states: 1) States where these new forms of employment are already widespread, and also acknowledged by the legislation. This category includes, for instance,

From a conceptual standpoint, the designation *new forms of employment* must be defined in terms of the new relationships between employers and employees, of the working hours, of the time and place of work, of the use of IT resources, or a mix of all these characteristics. Moreover, the high proportion of the new work arrangements out of the total employment, has led to a structural change in the labor markets, and has resulted in the emergence of a new type of workers⁴, in many respects different from the profile of standard workers, who conduct their work under traditional employment contracts. Economic, political and social progress, as well as the technical and IT advancements, have been repeatedly mentioned in specialized literature as significant contributing factors in the emergence of atypical employment and its subcategories on today's labor markets.

Atypical employment contracts concluded under new juridical regimes (that is, those completely new types of work arrangements known as *very atypical*) are slightly different from the already well-known atypical categories of work arrangements. The atypical work category includes non-standard arrangements, which are covered by the legislation of most EU member states and have been addressed by numerous public debates, respectively fixed-term employment⁵, part-time employment⁶, and temporary employment, while the category of very atypical employment forms includes work arrangements derived from the above-mentioned ones, which have proliferated across Europe, since 2000. In the case of atypical work arrangements, which depart from the standard type only to a certain extent, European legislation formally acknowledges a certain degree of protection granted to the employees whose work is based on such contracts; however, for the very atypical

Germany, the Netherlands, Austria, the United Kingdom; 2) States which have recently introduced major changes in their legislation in order to encourage as many forms of flexible employment as possible. We note the case of Italy which took the most significant steps in this direction in 2003; 3) States where the type of employment dominant on the labor market is still the standard one, such as Bulgaria, the Czech Republic, Estonia, etc. for further details, see: <https://www.eurofound.europa.eu/observatories/eurwork/comparative-information/flexible-forms-of-work-very-atypical-contractual-arrangements>, accessed 22 February 2018.

⁴ According to some authors, this category of workers is "extremely heterogeneous, including persons with different interests and aims, and evincing different degrees of precariousness". This precariousness is manifest under various aspects: the economic one (low, unstable income compared to standard workers); low social protection; fewer opportunities for training and climbing the career ladder; also, it can have a negative emotional impact. See R. Dimitriu, *Dreptul muncii. Anxietăți ale prezentului*, Rentrop & Straton Publishing House, 2016, p. 127.

⁵ Eurostat data indicate that the strongest growth in atypical employment took place between 1980 – 1990, and the fixed-term employment reached the highest percentage in Spain, with around 30% of the labor force employed under fixed-term contractual arrangements – almost twice as much as any other European country, as a consequence of the political measures which originally encouraged fixed-term employment by legislation, and later restricted the conditions for concluding such contracts. See D. Hevestone, *National Context and Atypical Employment*, 2010, „International Sociology”, vol. 25, pp. 319-321.

⁶ The Netherlands, whose legislation aims to encourage and promote part-time employment, have the greatest number of such contractual arrangements. It is followed by Austria and Germany. At the opposite end of the spectrum, there are Greece, Portugal, and Spain (for further details, see J. Allmendinger, L. Hipp, S. Stuth, *Atypical Employment in Europe 1996 - 2011*, Berlin: WZB. Discussion Paper P 2013-003, p. 10).

work arrangements, much more different from standard employment, the precariousness of the newly-emerged category of employees can reach extreme levels.

On the other hand, the completely new work arrangements are preferred types of employment contracts on labor markets, as they meet the employer's interests and needs of restructuring their businesses, with significantly positive consequences reflected in the reduction of costs and expenses.

As we have described above the general context of today's new types of employment contracts and work arrangements on the European labor market, in the following pages we shall discuss only one of the new forms of employment which have proliferated lately in other states. As an exhaustive presentation of these works arrangements is beyond the scope of the present paper, we shall hereby address mainly the *on call* employment contract, in order to highlight its benefits for the labor market, as well as the major negative implications of implementing it. This is a relevant pursuit, since the Romanian labor legislation has not yet issued any stipulations to regulate this new type of work arrangement.

2. Characteristics of *on call* contractual arrangements

On call (zero-hour) contractual arrangements are very widespread across the market labors of the United Kingdom⁷, Austria, Estonia, the Czech Republic, Malta and Norway⁸. The essential characteristic of these atypical work arrangements lies in the fact that the juridical relationship of the parties does not stipulate a minimum number of working hours, and in general no minimum wage is specified, either. The employers who ask workers to perform their tasks and assignments under such employment terms, must do so on a notice issued in advance⁹; how long in advance one should be noticed is stipulated in an individual employment contract, a collective employment contract, or by law. In other words, daily presence of the worker at the workplace is no longer absolutely necessary, and the employer decides on the need for hiring such an employee, when the necessity arises. Usually, the worker is called outside the regular working hours, and a possible refusal is acceptable only for valid reasons, and under the terms stipulated in the contract. Also, beside the characteristic elements of such employment contract, *on call* work arrangements are peculiar with

⁷ According to a survey carried out by a Human Resources experts organization, in the UK there are over one million persons working under zero-hour contracts (<http://www.costelgilca.ro/stiri/document/5372/in-ultimii-ani-in-europa-au-inflorit-contractele-de-munca-atipice.html>, accessed 13 January 2016).

⁸ In Austria, almost 5% of the labor force is made up of *on call* workers; in contrast, in Estonia and the Czech Republic, this percentage is 2.6%. In Malta and Norway, the proportion of such atypical forms of employment is around 1% of the total labor force (<https://www.eurofound.europa.eu/observatories/eurwork/comparative-information/flexible-forms-of-work-very-atypical-contractual-arrangements>, accessed 25 February 2018).

⁹ For example, the German legislation stipulates that the employer must submit a request to perform work in this form, at least 4 days before the intervention and must mention the number of work hours to be done *on call*.

regard to the balance between usefulness and precariousness for both parties involved in the employer-employee juridical relation. In the following pages, we shall present our opinion on these matters.

3. Benefits and usefulness of on-call contractual arrangements for the labor market

Concerning the usefulness of this atypical work arrangement for the labor markets, its most positive and beneficial aspect is the same as with most atypical types of employment. Generally, *on call* work is frequently performed in fields such as medical emergencies, emergency interventions, rescue actions, etc., - that is in response to circumstances of necessity¹⁰, which do not presuppose any need for a full-time employee.

To many companies, this work arrangement provides a high degree of flexibility allowing them to meet unexpected needs created by the market, as is the case with market economies. To other companies, it offers optimal management of their human resources, in the situation of such unpredictable necessities arising in the production process, when additional staff is required but it is not convenient to create permanent full-time positions. Under such circumstances, *on call* contractual arrangements can prove beneficial for the employers by enabling them to have a worker available when necessary, and be protected from the uncertainties of the labor market¹¹.

Given the different perceptions of employers and employees on the effects generated by this flexible work arrangement, we note that the social partners have divergent positions regarding it. As far as labor union leaders are concerned, they constantly voice their doubts about the development of employment types that involve such occasional work. They call the attention of administrative authorities on the fact that the overflexibilization of labor markets brings about major difficulties in the working and hiring conditions for this vulnerable category of workers. In their turn, employers' organizations and their representatives constantly seek to adjust to the economic fluctuations generated by the market, and these flexible contractual arrangements provide them with important tools to ensure this adjustment¹².

4. Disadvantages from the standpoint of the workers

Regarding the negative implications for the employees, it is well known that they face significant challenges and disadvantages, as a result of the perpetuation of

¹⁰ S.A. Ferguson et al., *On call work: to sleep or not to sleep? It depends*, in „Chronobiology International – The Journal of Biological and Medical Rhythm Research”, vol. 33, no. 6/2016, p. 678.

¹¹ For further details, see R. Dimitriu, *op. cit.*, pp. 131-132.

¹² <https://www.eurofound.europa.eu/news/news-articles/working-conditions-labour-market/new-types-of-casualisation-still-put-workers-at-a-disadvantage>, accessed 3 March 2018.

on call employment on the labor markets. As there can be no clear monitoring of their working hours (their activity is performed on demand, at the request of the employer¹³), this reality has a negative impact on the degree of flexibility of the time management of this category of employees, that is, on the way they can plan their free time. In addition, significant negative implications are generated on their rest hours because of the unpredictable work schedule of *on call* workers, as the emergencies that request their presence can occur at any time of the day or the night¹⁴. In the practice of legislative systems regulating this type of activity, it is either possible that *on call* contractual arrangements stipulate a minimum number of the hours which the *on call* worker has to spend at the workplace, or they do not mention any minimum working time and in this case, the contract concluded is known as “zero- hour contract” – a species of the *on call* contract¹⁵.

For instance, the zero-hour contract is very much used in the Netherlands and the United Kingdom. The contents of this contractual arrangement does not stipulate a minimum time which the worker is obliged to spend at the workplace, and does not guarantee a minimum number of working hours per day, week or month. However, in setting a maximum number of hours which the *on call* worker has to spend daily at the workplace, the norm is the 8 hours a day which are stipulated by standard employment contracts. It stands to reason that *on call* workers will have a shorter duration of their working day than the standard 8 hours a day¹⁶.

The minimum duration of daily working time stipulated for *on call* workers, and the manner of organizing this time, differ from country to country. The vulnerability of these workers is a result of the legislation that applies to their category. In the Netherlands, *on call* employment presupposes an original juridical arrangement. In principle, this involves two types of *on call* contracts: a preliminary one, which in itself is not actually binding, and another employment contract which stipulates the postponing of the work to be done.

Regarding the first contract, the preliminary agreement can be subsequently turned into a temporary work agreement, if the worker does answer the employer’s

¹³ See I.T. Ștefănescu, *Tratat teoretic și practic de drept al muncii*, fourth edition, revised and added, Universul Juridic Publishing House, p. 609.

¹⁴ For a comprehensive analysis of the impact of *on call* work on the employees’ rest, see S.A. Ferguson, *op. cit.*, p. 678.

¹⁵ The zero hour contract also has its variants. In Ireland, for instance, the labor market has recently launched the “if and when” concept. In the case of this newly introduced concept, the worker has no obligation to answer the employer’s request. There is actually no contractual obligation, involving on the one hand a demand for work, and on the other hand a supply of work. This is a framework agreement including an assessment of the abilities of the worker who the employer can turn to if that is needed. Those who conclude such contractual arrangements are willing to work for the employer, on demand, but have no obligation in this sense. The peculiarity of this type of work lies in the fact that under the subordination relationship involved by an employment contract, the worker can accept the demand of the employer or not. For further details, see R. Dimitriu, *op. cit.*, pp. 134-135.

¹⁶ For instance, the legislative system of Latvia sets a maximum number of interventions, rather than a maximum number of hours, respectively once a month, without requiring the agreement of the worker, and a minimum number of interventions (once a week) with the worker’s agreement beforehand. For further details, see R. Dimitriu, *op. cit.*, p. 132.

request for work; the *on call* worker is also allowed to reject this request, if there is a good reason to do so.

In the second case, given the existence of an employment contract, the *on call* worker has to answer the requests coming from the employer, as a contractual obligation.

Equating an *on call* contractual agreement with an employment contract, has important consequences on the protection provided by labor legislation, for this special category of workers, because they can be applied the norms concerning protection against firing¹⁷.

Faced with the vulnerability of *on call* workers, caused by the lack of predictability of the number of hours worked, a vulnerability present under this legislative system too¹⁸, and with the unclear nature of the legislation on which this type of work is based, efforts to lower the vulnerability have culminated in passing the Act on Flexibility and Security, in 1999. As a result of the changes it brought about, the law now presumes the existence of an employment contract, if the worker has done weekly work over the last three consecutive months, or at least 20 hours a month, for the same period of time.

Also, if the employer is unable to prove it otherwise, the court presumes the existence of an employment contract¹⁹. In the United Kingdom, until May 2015, the special contents of *on call* contracts was the object of repeated conflicts in the realm of employment relationships. Given the principle of mutuality of obligation, the practice of including in such contracts exclusivity clauses, which prevented the zero-hour worker from working for another employer, too - even when the first employer was unable to provide any work for the available *on call* worker, and made no request for an intervention – has been deemed abusive. Such legislative environment, which actually restricts the employee's right to work, only intensifies the uncertainty and insecurity of income for the respective workers. However, we must bear in mind that this uncertainty is always characteristic to zero-hour work, because the employee is not guaranteed a minimum number of working hours, and thus can never anticipate the amount of money to be earned. This is why in 2015, the exclusivity clause contained in zero-hour contracts became inopposable, given the specific character of this type of contractual arrangement²⁰. Under certain circumstances, exclusivity (understood as a clause restricting the activity of an *on-call* worker to the benefit of only one employer) can be justified for competitive and business reasons – such as the case where a zero-hour worker might possess confidential data or information concerning the first employer; however, except for such situations, the usefulness of the exclusivity clause cannot be fully justified for this type of contract. Indeed, in a competition situation, the interests of the first employers could be threatened, if the

¹⁷ C. Rayer, K. Hakvoort, *Standard and non-standard work in the Netherlands*, in J. Buelens, J. Pearson (eds), *Standard work: an anachronism?*, Ed. Intersentia, pp. 187-188.

¹⁸ Because there is no minimum of maximum number of working hours stipulated in the contract.

¹⁹ C. Rayer, K. Hakvoort, *op. cit.*, pp. 187-188.

²⁰ See International Labour Organization, *Non standard employment around the world: Understanding challenges, shaping prospects*, 2016, p. 29, (http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_534326.pdf, accessed 24 July 2018).

zero-hour worker chooses to work also for the employer's competitor and the employer, simultaneously. However, taking into account the specific character of this type of work, that does not guarantee a number of working hours or a minimum wage for this vulnerable category of workers, the clause of exclusivity included in such contracts becomes problematic as it restricts the flexibility of *on call* workers and can produce disproportionate negative effects, which are more significant than the degree of protection which this clause offers to employers against their competitors²¹.

Also regarding the way in which other legislative systems treat *on call* contractual arrangements, we note that there are states whose legislation does not address them, although they are concluded in practice. Such is the case of Switzerland, where these contracts pertaining to one of the specific categories of atypical work arrangements are not yet regulated by legislation but only by jurisprudence. According to the Swiss courts' practices, this type of work is allowed but the employer cannot reduce the number of working hours suddenly and has to pay the *on call* worker a greater amount than the minimum wage²². Consequently, although this legislative system has jurisprudential regulations concerning *on call* contractual arrangements, the workers do not receive an employment contract proper, as it is covered by labor legislation, with the protection and benefits it entails, even if the social relationship between the parties concluding such a contract is in fact an employment relationship. Also, the legislative system of Sweden does not include stipulations to cover this very atypical form of work, although it is actually widespread. Other states too, for instance UK, face great practical difficulties with regard to *on call* work, because of insufficient norms and regulations, and also because of the ambiguity of the normative terminology. Thus, the law fails to define the zero-hour contract, which creates difficulties as employers do not have to comply with a legal obligation of guaranteeing a number of working hours to the respective category of workers²³.

Negative aspects of *on call* contractual arrangement are also expressed in the manner of paying these workers. Generally, *on call* workers are paid for the number of hours of intervention, or they can be offered a minimum wage for the period they are available. The legislative system of Slovakia²⁴ has particular stipulations for both the number of hours to be worked on call, and for their remuneration. Employers can provide maximum 8 hours of work per week, and maximum 100 hours of work per calendar year. The legislation allows employers to agree with the *on call* workers on

²¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/267634/bis-13-1275-zero-hours-employment-contracts-FINAL.pdf, accessed 3 April 2018.

²² W. Portmann, *The concept of Employee: The Position in Switzerland*, in B. Waas, G. Heerma van Voss (eds), *Restatement of Labour Law in Europe. The Concept of Employee*, Vol. 1, Hart Publishing, p. 706.

²³ <https://www.eurofound.europa.eu/observatories/eurwork/comparative-information/flexible-forms-of-work-very-atypical-contractual-arrangements>, accessed 4 April 2018.

²⁴ <https://www.eurofound.europa.eu/observatories/eurwork/comparative-information/national-contributions/slovakia/slovakia-flexible-forms-of-work-very-atypical-contractual-arrangements>, accessed 30 March 2018.

derogations from these stipulations in the matter, by setting a greater number of hours of work but only under terms explicitly defined by law²⁵.

Specialized literature²⁶ has insisted on the importance of corroborating the legislative stipulations on this class of employment contracts, with the stipulations of Directive 2003-88-EC concerning the organization of working time, and with the other European norms applicable to employment relationships²⁷. It is a correct opinion, since in most legal systems this relatively new concept in the realm of labor law is of interest. Consequently, what must be taken into account is the current legislative context and the general regulations in this matter, but especially the protection provided by labor legislation to employees. Of course, openness towards the new contractual concepts becomes increasingly necessary, because they have proliferated over the last few years on the European labor markets; if we intend to increase the level of satisfaction among those who work under such contracts, the proposals for amends, changes and adjustments in the legislation should address precisely the potential problems entailed by this work practice.

5. Conclusions

As show the elements of compared law, the working and hiring conditions of *on call* workers differ from one legislative system to another. However, there are certain common denominators, showing that the model analyzed here has a number of disadvantages which are more significant than the advantages offered to workers. Perhaps the greatest disadvantage of this work arrangement is that it increases job instability and especially the instability of workers' income, because of the non-permanent activity conducted by *on call* workers. The fact that the employer is not obliged to provide the employee with work continually, but only when necessity arises, intensifies the instability of these jobs.

Under these circumstances, one can easily understand why, despite the important increase in flexibility which this atypical contractual arrangement offers to employers, the zero-hour contract is a highly precarious kind of work. *On call* employment does not provide access to stable jobs, and the workers' remuneration depends on the number of hours performed, which means that if such a worker has to do work for several customers on the same day, the time taken to travel from one customer to another cannot be quantified and calculated as working time²⁸. But their

²⁵ According to Art 96, the Labor Code of Slovakia.

²⁶ R. Dimitriu, *op.cit.*, p. 134.

²⁷ On discussing whether European labor law norms are applicable to on call workers, in the case C-357 Raulin, the European Union's Court of Justice ruled that it is not the amount of work performed that is decisive to identify a person as an employee, but the fact that Mrs. Raulin answered the employer's request to come to work. More precisely, Mrs. Raulin had worked only 60 hours under an 8-month contract, and the national (Netherland) court refused to acknowledge her as an employee and thus denied her the protection offered by labor law. See R. Dimitriu, *op. cit.*, p. 134.

²⁸ <https://www.eurofound.europa.eu/news/news-articles/working-conditions-labour-market/new-types-of-casualisation-still-put-workers-at-a-disadvantage>, accessed 2 March 2018.

capacity as employees, which is acknowledged by the labor legislation of some states, calls for legal responsibility towards this vulnerable category of workers.

Based on the elements of compared law, **we deem that Romanian legislation should allow *on call* contractual arrangements by domestic labor law. Accordingly, payment of the minimum wage for the period of availability to *on call* workers could become a legal obligation for the companies that choose to implement *on call* work schedules.** Ensuring a minimum wage would offer good protection to this category of workers, and would allow a minimal guarantee of their income.

For the same reasons, the explicit stipulation in the normative text of the possibility for *on call* workers to work for several employers simultaneously, would complete the set of protective measures targeting this vulnerable class of employees. Although most legislative systems that implement this work arrangement, do not set a minimum number of working hours for *on call* workers, we deem it appropriate that Romanian law should stipulate for individual *on call* contracts a minimum time which such workers have to spend at the workplace, for instance 4 hours a week, while they also intervene at any time on the employer's demand, in keeping with the contractual terms of employment.

Bibliography

- C. Rayer, K. Hakvoort, *Standard and non-standard work in the Netherlands*, in J. Buelens, J. Pearson (eds), *Standard work: an anachronism?*, Ed. Intersentia, pp. 187-188.
- D. Hevestone, *National Context and Atypical Employment*, 2010, „International Sociology”, vol. 25, pp. 315-347.
- I.T. Ștefănescu, *Tratat teoretic și practic de drept al muncii*, fourth edition, revised and added, Universul Juridic Publishing House.
- J. Allmendinger, L. Hipp, S. Stuth, *Atypical Employment in Europe 1996 - 2011*, Berlin: WZB. Discussion Paper P 2013-003.
- R. Dimitriu, *Dreptul muncii. Anxietăți ale prezentului*, Rentrop &Straton Publishing House, 2016.
- S.A. Ferguson et al., *On call work: to sleep or not to sleep? It depends*, in „Chronobiology International – The Journal of Biological and Medical Rhythm Research”, vol. 33, no. 6/2016.
- W. Portmann, *The concept of Employee: The Position in Switzerland*, in B. Waas, G. Heerma van Voss (eds), *Restatement of Labour Law in Europe. The Concept of Employee*, Vol. 1, Hart Publishing, 2017.