

# THE LEGAL REGIME OF DAY LABORERS<sup>1</sup>

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## Abstract

*The present paper analyzes the legal regime of the day labourer, the juridical relation between the day labourer and the beneficiary according to Law no. 52/2011 concerning the execution of certain activities with casual nature held by the day labourers. After a period of three years characterized by an unclear and oscillating vision of the legislator on the day labourers, Law No. 52/2011 on the exercise of occasional activities carried out by day labourers has suffered a recent alteration, brought by Law No. 18/2014. Before its entry into force, Law No. 18/2011 was once again altered by the Government Emergency Ordinance No. 36/2014. The road crossed by the legislator was also reflected in the legal doctrine. There were contradictory opinions about the contract that stayed at the basis of the relation between the day labourer and the beneficiary, such as: it was considered either a civil contract, either a labour contract of specific character. After the second change operated, the initial concept of labour relation was reintroduced. The last extended the sphere of the identical or similar regulations to the ones embodied in the Labour Code and in the labour legislation, in its whole. The legal regime applicable to day labourers, according to Law No. 52/2011 with the further alterations and completions – as special law – will consist of the regulations of the labour law if they do not contravene to the peculiarity of this contract.*

*In relation to the mention that the relationship between the day labourer and the beneficiary is established by means of an agreement between the parties, without the written conclusion of an individual employment contract, as well as in relation to the concrete legal regime applicable, according to a point of view recently expressed and which we share, the contract between the day labourer and the beneficiary is qualified as an imperfect individual employment contract.*

**Keywords:** *day labourer, beneficiary, casual work, individual employment contract.*

A. After a period of three years characterized by an unclear and oscillating vision of the legislator on the day labourers<sup>2</sup>, Law No. 52/2011 on the exercise of occasional activities carried out by day labourers has suffered a recent alteration, brought by Law

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<sup>2</sup> Initially, Law No.52/2011 on the exercise of occasional activities carried out by day laborers expressly provided the existence of certain labor relationships between the beneficiary and the day laborer; later, by means of Law No. 277/2013 for the alteration and completion of Law No. 52/2011 this provision to the existence of a labor relationship was removed.

No. 18/2014 for the alteration and completion of Law No. 52/2011 on the exercise of occasional activities carried out by day labourers, as well as for the alteration of Article 8 paragraph 1 of Law No. 416/2011 on the minimum wage<sup>3</sup>. Before its entry into force, Law No.18/2011 was once again altered by the Government Emergency Ordinance No. 36/2014<sup>4</sup>.

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In the comments regarding this normative act, in a first opinion, it was believed that the day labourer performs the work on ground of a civil service contract by means of which a natural person – the day labourer, is compelled, in exchange of a remuneration, to perform unskilled work having an occasional character, for a maximum period of 90 days, in favour of a legal person considered the beneficiary. Therefore, the contract between the day labourer and beneficiary does not meet the characteristics of an individual employment contract so that the reference law applicable to the legal relationship is the civil law, not the labour law<sup>5</sup>.

In another opinion, it was said that Law No. 52/2011 regulates a “labour relationship whose source does not require a written individual employment contract, by means of derogation from the rule imposed by Article 16 paragraph 1 of the labour Code”<sup>6</sup>. In the same respect, it was believed that the relationship between the day labourer and the beneficiary meets the particular characteristics of the individual employment contract, interpretation also given in the decision of the Court of Justice of the European Union<sup>7</sup>.

Currently, the regulation of day labourers is, in its essential lines, the following:

*α. The day labourer and beneficiary.*

The day labourer is the Romanian or foreign citizen, or stateless natural person, that has his domicile or, according to the case, residence, in Romania, enjoys working

<sup>3</sup> Published in the “Official Monitor of Romania”, part I, No. 192 of 19 of March 2014.

<sup>4</sup> Published in the “Official Monitor of Romania”, part I, No. 431 of 12 of June 2014.

<sup>5</sup> B. Vartolomei, *Considerații referitoare la Legea nr. 52/2011 privind exercitarea unor activități cu caracter ocazional desfășurate de zilier* [Considerations on the Law No.52/2011 on the exercise of occasional activities by day laborers], in *Dreptul* No. 7/2011, p. 55 and following; R. Dimitriu, *Perspective privind obiectul dreptului muncii și delimitarea acestuia de alte ramuri de drept* [Perspectives regarding the object of the labor law and its delimitation from other branches of law], in “Dreptul” No. 3/2014, pp. 111-112; A. Țiclea, *Tratat de dreptul muncii. Legislație. Doctrină. Jurisprudență* [Treatise of labor law. Legislation. Doctrine. Jurisprudence], 7<sup>th</sup> edition, revised and compeltet, Universul juridic, pp. 20-21.

<sup>6</sup> O. Ținca, *Comentarii referitoare la Legea nr. 52/2011 privind exercitarea unor activități cu caracter ocazional de către zilieri* [Comments regarding the Law No. 52/2011 on the exercise of occasional activities by day laborers], in “Dreptul” No. 9/2011, pp. 61-80; Ș. Beligrădeanu, *Cu privire la posibilitatea încadrării legale în muncă, în prezent, în temeiul statornicirilor în vigoare, prin întocmirea unei convenții civile de prestări de servicii în locul încheierii unui contract individual de muncă* [With regard to the possibility of legal employment, currently, on grounds of the enforced regulation, by means of drawing up a civil service convention instead of an individual employment contract], in “Dreptul” No. 12/2013, p. 249.

<sup>7</sup> Ș. Beligrădeanu, *Cu privire la posibilitatea încadrării legale în muncă, în prezent, în temeiul statornicirilor în vigoare, prin întocmirea unei convenții civile de prestări de servicii în locul încheierii unui contract individual de muncă* [With regard to the possibility of legal employment, currently, on grounds of the enforced regulation, by means of drawing up a civil service convention instead of an individual employment contract], in “Dreptul” No. 12/2013, p. 249.

capacity and performs unskilled occasional activities for a beneficiary in exchange of a remuneration. In order to perform the activities, the day labourer must be at least 16 years old; exceptionally, the underage between 15 and 16 can perform activities as day labourers, only if these are appropriate with their physical development and proved aptitudes and if, by doing so, their right to physical, mental, spiritual, moral and social development and right to education is not breached and if their state of health is not endangered (Article 3 paragraphs 2-4 of the Law).

The beneficiary of works may be the legal person, the authorized natural person, individual enterprise and family enterprise for which the day labourer carries out the work. The following cannot have the quality of beneficiaries of the work of day labourers:

- The natural person for the employment of domestic stuff;
- The public institution, except for the municipal-services managed by the local councils, such as: greenhouses, green spaces, zoos; units under the Ministry of Youth and Sports for the fields: hotels and other lodging facilities, activities of sports centres, activities of clubs; institutes, research-development agricultural centres and resorts subordinated to the Academy of Agricultural and Forestry Sciences "Gheorghe Ionescu-Șișești", as well as the State Institute for Variety Testing under the Ministry of Agriculture and Rural Development for the fields: agriculture, hunting and related service activities, except for animal breeders within the half-free, traditional and transhumance and forestry system, for logging only (Article 1 paragraph 3 of the Law).

β. *The agreement between the day labourer and the beneficiary*

The day labourer carries out his activity on grounds of an agreement with the other party, the beneficiary, agreement that gives birth to a labour legal relationship, without the written conclusion of an individual employment contract (Article 3 paragraph 1 of the Law). The activity the day labourer has to perform has an occasional character. By occasional we understand the activity that is being performed casually, sporadically or accidentally, that does not have a permanent character.

The fields in which day labourers can perform unskilled and occasional activities are the following: agriculture, hunting and related service activities, except for animal breeders within the half-free, traditional and transhumance and forestry system, for logging only; fisheries and aquaculture; collection, treatment and disposal of hazardous waste; materials recovery; wholesale of agricultural raw materials and live animals; organization of exhibitions, fairs and congresses; advertising; activities of artistic interpretations - performances, management activities of the show rooms; research and development activities on social sciences and humanities; activities in greenhouses, green spaces, parks and zoos; hotels and other lodging facilities; activities of sports centres; activities of sports clubs. We notice the fact that these fields are correlated with the Classification of Activities from the National Economy (CANE), extending their area.

The day labourer can only carry out an unskilled activity in the fields established by the law. The length of the occasional activity is regulated by Article 4 paragraphs 1, 2 and 4 of Law No. 52/2011, according to which: the duration of work is of minimum

one day, corresponding to 8 working hours; the daily duration of work performance cannot surpass 12 hours, and for the underage between 15 and 18, 6 hours per day, but not more than 30 hours per week. For the same beneficiary, the activity of the day labourer cannot be performed for a period longer than 90 days cumulated during a calendar year. As it was also underlined in the doctrine<sup>8</sup>, the period of 90 days can be unique or can be interrupted, but during a calendar year it cannot surpass 90 days. We stress out that the maximum period of 90 days regards the work carried out for the same beneficiary, and not the situation in which the day labourer works for more beneficiaries. The underage day labourers cannot carry out night shifts.

For the activity performed, the day labourer receives remuneration, set in the parties' agreement, and this cannot be inferior to the value/hour of the minimum wage settled by law<sup>9</sup>.

χ. *The rights and obligations of the parties.*

The day labourer has the following rights:

- To receive remuneration for the activity performed;
- To benefit from the protection equipments and the necessary means to carry out his activity.

The obligations of the day labourer are:

- To perform the work;
- To observe the rules regarding the activity he performs, rules communicated in the instruction carried out by the beneficiary.

The beneficiary has the following rights:

- To set the activities that are about to be performed by the day labourer, the place of the performance and its duration;
- To exercise the control over the manner in which the day labourers fulfil their duties.

The obligations of the beneficiary are:

- To set up a Registry record of day labourers and keep it at his headquarters or/and at workstations, to make notes in the registry before the beginning of the activity of the day labourer; to present the Registry to the competent bodies of control; to submit monthly, no later than the 5th of each month, to the territorial labour inspectorate from the place of his headquarters, an extract from the Registry;
- To inform the day labourer on the activity he has to carry out, the risks and danger he is exposed to, his rights and obligations;
- To pay the day labourer the remuneration at the end of each working day or at the end of the week or period of work, with the written agreement of the day labourer and beneficiary, the proof of the payment of the remuneration is

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<sup>8</sup> B. Vartolomei, *Considerații referitoare la Legea nr. 52/2011 privind exercitarea unor activități cu caracter ocazional desfășurate de zilier* [Considerations on the Law No.52/2011 on the exercise of occasional activities by day laborers], *loc. cit.*, p. 57.

<sup>9</sup> Within the initial regulation, the amount of the gross remuneration for one hour could not be of less than 2 lei/hour or more than 10 lei/hour.

done by signing the Registry; the new legislative alteration created the possibility of paying the day labourers by electronic means of payment;

- To pay the income tax due for the work done by day labour; the amount of the tax is the general one of 16%, calculated on the gross remuneration and paid according to the Tax Code;

- To observe the obligations set by law in the field of labour safety and health.

To these obligations the one embodied in Article 4 paragraph 5 of Law is also added, and according to it, one cannot hire day labourers to perform activities to a third party's benefit.

The alterations brought to Law No.52/2011 regard also the establishment of the beneficiary's obligations in the field of labour safety and health, as follows:

- To ensure the labour safety and health of day labourers;

- To ensure the instruction of the day labourer prior to the beginning of the activity and/or when the working place changes;

- To ask the day labourers to assume their liability, by means of signature, that their state of health allows them to carry out the activities assigned by the beneficiary;

- To provide the day labourers with the adequate working equipments;

- To ensure, free of charges, the individual equipments of protection adequate to the activity performed by the day labourers;

- To communicate at once to the territorial labour inspectorate any event in which day labourers were involved;

- To register the work accidents suffered by day labourers during the activities;

- In the event when the day labourer is hurt/dies, the beneficiary must cover the expenses necessary for the medical care/funerals, if the fault belongs to the beneficiary.

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#### δ. *Legal liability.*

Law No. 52/2011 sanctions as contraventions a series of acts performed by the beneficiary (Article 12). One sanction that holds the attention is the one provided by Article 12 paragraph 1 letter c, which consists of the prohibition to use day labourers during the entire period of existence of the beneficiary if he does not pay the due income taxes. The contravention is established and the sanction set by the National Agency for Tax Administration.

The territorial labour inspectorates have attributions of control of the activity performed by the day labourer, and the labour inspectors have the competence to establish the facts that represent contraventions according to the law, and to impose a sanction.

The disputes between the beneficiary and the day labourer, which are not amicably settled, are brought before the competent court of first instance in whose jurisdiction the day labourer carries out his activity.

B. From the analysis of the legal regime of day labourers, embodied within Law No. 52/2011, as it was altered and completed, we notice that it meets a series of

characteristics of the individual labour relationship of the employee; however, certain aspects still remain unregulated, for example: rules regarding the termination of the contract, the incidence of the clauses of the applicable labour collective agreement.

By means of the recent alteration of Law No. 52/2011 it is provided that the labour relationship between the day labourer and the beneficiary is established through the parties' agreement, without the written conclusion of an individual employment contract. Therefore, the source of the labour legal relationship that is born between the day labourer and the beneficiary is, in our opinion, an individual employment contract, which is not subject to the written form of conclusion. The agreement between the day labourer and the beneficiary is an individual employment contract, having the following characteristics:

- Nominate, regulated as such by Law No. 52/2011;
- Consensual, concluded by means of the sole meeting of minds of the parties;
- Bilateral, sinalagmatic, the obligations being correlative;
- Commutative, the obligations of the parties being known at the moment of the conclusion;
- Onerous;
- Of successive performance, for a determined period of time;
- Involves two parties, the day labourer who is always a natural person and the beneficiary;
- Involves the day labourer's obligation to do (to work);
- The day labourer is placed under the beneficiary's authority.

The legal regime of the work of the day labourer is, mainly, the one regulated by the labour legislation. Even if it is a derogatory legal regime, in fact, this legal relationship borrows a series of rules from the matter of the individual employment contract, such as: the age for the performance of seasonal activities, the daily duration of the working hours, the special regime of the young persons under 18, the establishment of the remuneration in relation to the minimum income, the applicability of the rules of labour safety and health.

There are also derogatory norms from the regime of reference law, namely: the contract between the day labourer and beneficiary does not have an *intuitu personae* character and is concluded *solo consensus*; the parties have particular titles; the beneficiary cannot be a natural person; the payment for the work does not represent an income but a remuneration; the activity carried out as day labourer does not confer the one in question the right to insurance in the public system; for the gains resulted from the activity performed as day labourer neither the day labourer nor the beneficiary has to pay social contribution; the competence of settling the disputes between the day labourer and the beneficiary belongs to the court of first instance in whose jurisdiction the day labourer performs his activity.

In conclusion, the last alterations brought to Law No. 52/2011 on the exercise of occasional activities carried out by day labourers, extended the sphere of the identical or similar regulations to the ones embodied in the Labour Code and in the labour legislation, in its whole. The legal regime applicable to day labourers, according to Law No. 52/2011 with the further alterations and completions – as special law – will

consist of the regulations of the labour law if they do not contravene to the peculiarity of this contract.

In relation to the mention that the relationship between the day labourer and the beneficiary is established by means of an agreement between the parties, without the written conclusion of an individual employment contract, as well as in relation to the concrete legal regime applicable, according to a point of view recently expressed and which we share, the contract between the day laborer and the beneficiary is qualified as an imperfect individual employment contract<sup>10</sup>.

In support of this qualification we can also find the jurisprudence of the Court of Justice of the European Union (decision *Alborn Catering BV*<sup>11</sup> and decision *Land Tirol*<sup>12</sup>, passed in an interlocutory proceeding – article 267 paragraph 2 of the Treaty on the Functioning of the European Union) which stated that: the existence of an employment contract or a labour relationship must be ascertained according to the national law, not being necessary to exist in all cases a contractual connection with the transferor in order for the workers to benefit from the protection granted by Directive 2001/23 and that the non-inclusion of the occasional labourers in the category of the workers in relation to which the framework-agreement on the fixed-term employment integrated in the Directive No.1990/70/EC is applicable, would be a discrimination. Therefore, the 4<sup>th</sup> clause of the afore-mentioned Directive also applies to the fixed-term contract between the day labourer and the beneficiary<sup>13</sup>.

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<sup>10</sup> I.T. Ștefănescu, *Contractul individual de muncă al zilierilor* [The individual employment contract of day laborers], in „Revista română de dreptul muncii” No. 4/2014, p. 19.

<sup>11</sup> Passed on 21 of October, in case C- 242/09.

<sup>12</sup> The decision CJEU of 22 of April, passed in case C-486/08 having as object a claim for an interlocutory decision with regard to the meaning of the 4<sup>th</sup> clause of the framework-agreement on the fixed-term employment.

<sup>13</sup> O. Ținca, *Considerații referitoare la contractul individual de muncă și la raportul de muncă în dreptul Uniunii Europene* [Considerations on the individual employment contract and the labor relationship in the European Union law], in “Dreptul” No. 10/2013, pp. 123-124; I.T. Ștefănescu, *Contractul individual de muncă al zilierilor* [The individual employment contract of day laborers], *loc.cit.*, p. 20.