ORDINANCE NO. 53/2017 FROM AUGUST 4TH, 2017. COMBATING UNLAWFUL LABOR, MODIFICATIONS OF IMPACT OF THE ROMANIAN LABOR CODE UNDER THE EMERGENCY

I. MICLE

Ioan MICLE
Faculty of Legal Science
“Aurel Vlaicu” University of Arad, Romania
*Correspondence: Ioan Micle, Complexul Universitar Micalaca, stree Elena Dragoi, Arad, Romania
E-mail: aijjs@univagora.ro

ABSTRACT

By Law no. 40 / 2011 de modification of art. 16 par. (1) of the Labor Code has been radically changed as to the legal nature of the form of the individual labor contract. This has been changed from a test condition of the contract (ad probationem) to a validity (ad valitatem) Amendments to the Labor Code, by Emergency Ordinance No. 53/2017 of 4 August 2017, have as main purpose the fight against undeclared work, including during the duration of the employment contract

KEYWORDS: individual labor contract, contract nullity, employment relationship, illegal work, contravention sanction and criminal offense.

INTRODUCTION

The aim of legalizing undeclared work was to limit the unfavorable work - "black" - thus providing the employee with guarantees that, for his work, he would benefit from all the rights that are recognized by law in that capacity. In connection with this legislative amendment, the jurisprudence of the Constitutional Court stated that "the written conclusion of the employment contract is justified by the fight against employers' practices by which, taking advantage of the fact that the written form of the employment contract was merely a probumenal instrument, were evading taxes and duties owed to the state budget or the state social security budget due to the effect of the conclusion of the employment contract. Such conduct is also negatively reflected in the social protection plan of the employee who does not have a contribution period for periods not worked by the employer to the competent authorities, nor for health or social insurance."

I. THE NULLITY OF THE INDIVIDUAL LABOR CONTRACT, ON THE GROUNDS OF NON-OBSERVANCE OF THE WRITTEN FORM.

In accordance with Art. 16 par. (1) C. Work, republished, the individual labor contract is concluded in written form, in Romanian, based on the consent of the parties. The obligation to conclude the individual contract of employment in written form rests with the employer, irrespective of its legal status, whether it is a legal person, an authorized natural person or a natural person with full exercise capacity.

The written form represents one of the most important amendments to the Labor Code through Law no. 40/2011, becoming a condition of validity (ad validity) of the individual

1Published in the Official Gazette of Romania no. 644 of August 7th, 2017
labor contract, in the absence of which the contract can not be validly issued. For imposing
the compulsory written form of the individual labor contract and removing any possibilities
for circumvention of this mandatory provision, Law no. 40/2011 removes the following
relative legal assumptions:
The employment report can only be validly issued by concluding the individual contract of
employment in written form. The verbal agreement between the parties or the manifestation
of their tacit will on the existence of an individual labor contract is sanctioned with absolute
nullity.
The legal sanction that intervenes in the case of non-observance of the mandatory written
form of the individual labor contract is not expressly provided by the Labor Code, but it
results from all the provisions of the Labor Code, republished. Thus art. 16 par. (1) impose the
mandatory written form of the contract, and art. 57 par. (1) establishes that the non-
observance of any legal conditions necessary for the valid conclusion of the individual labor
contract results in its absolute nullity.3
The absolute nullity of the individual labor contract on the grounds of non-compliance with
the written form ad validity may be invoked at any time by any interested person and can not
be subsequently covered by the confirmation of the employment relationship by its parties.
In the case of absolute invalidity motivated by the non-observance of the written form of the
individual labor contract, the provision of art. 57 par. (3) C. Work, republished, which allows
the invalidity of the individual labor contract to be covered by subsequent fulfillment of the
conditions imposed by the law. The explanation is that, in the absence of written form, there
is no individual labor contract whose vices can be covered later.
Prior to the adoption of Law no. 40/2011, the employee who did not have an individual
written employment contract could prove the existence of the contract and the benefits
provided by any means of proof. Once the employee provided this evidence, the court
established the existence of contractual relations and ordered the employer to pay the wage
and social security rights corresponding to the work performed by the employee.
Under the amendments to the Labor Code through Law no. mandatory in written form, ad
validity condition. The justification for this rule is given by the application of the principle of
symmetry of legal acts.
Law no. 40/2011 criminalizes the admission of more than 5 people, irrespective of their
citizenship, without the conclusion of individual employment contracts. At the same time, it
was criticized for the admission of a person in a situation of illegal stay in Romania, although
the employer knows that she is a victim of trafficking in human beings.
The criminal sanction of unlawful labor was not a premiere in Romanian labor law. Law no.
130/1999 regarding certain measures for the protection of the employed persons criminalize
the repeated use of the work without legal forms. However, this normative act was repealed
shortly before the entry into force of Law no. 40/2011.
In fulfilling the duties established by Law no. 108/1999 on the establishment and organization
of the Labor Inspection, the labor inspectors control all aspects related to the employment and
termination of the activity of the persons performing any activity under an individual labor
contract.
The identification at one employer's level of more than 5 persons carrying out non-legal
activity or, as the case may be, the identification of a person in a situation of illegal residence
in Romania who performs an activity without having an individual employment contract
determines the notification of the research bodies criminal.
Active subject of the offense:

---

3A.Ticlea The Labor Code Commented Ed A Has Revised and Added You, Publishing House UniversuJuridic,
Bucharest 2014
According to the previous regulation of the offense of receiving unlawful work, under Law no. 130/1999, the active subject was identified either in the person of the director, the administrator, the legal representative or another person empowered by the employer - legal person, or in the person of the employer - natural person. In all cases, the offense could only be committed by a natural person.

Law no. 40/2011 no longer identifies persons who can be held criminally liable in the case of non-legal work. Moreover, the additional punishments stipulated by this normative act are applicable especially to legal persons. As a consequence, we have to accept that at present, the active subject of criminal liability can be not only the employer - a natural person and the natural person empowered by the employer - a legal person, but the employer itself - a legal person. The principal punishment applicable to the employer - legal person is the criminal fine, plus one or more additional punishments from those provided under art. 265 par. (4) C. Work, republished.

Criminal participation is possible in the case of these crimes, especially in the form of co-author.

The passive subject of the offense:
In the case of the offense provided by art. 264 par. (3) C. of the work, republished, the quality of the passive subject is the persons identified by the labor inspectors, who work under the subordination of an employer, without having concluded individual labor contracts. These are at least 6 people identified under the above conditions.

In the case of the offense provided by art. 265 par. (2) C. Work, republished, the status of a passive subject is the person in a situation of illegal residence in Romania who is a victim of illegal trafficking in persons who performs a professional activity without having concluded an individual employment contract. The employer must know in this case the appearance that the alien or stateless person is a victim of trafficking in human beings.

The objective side of the offense:
In the case of the offense provided by art. 264 par. (3) C. of the work, republished, the material element of the objective side is made by identifying, for the same controlling action, by one employer, more than 5 persons who carry out professional activity without having concluded individual labor contracts. In the framework of the previous regulation of this crime by Law no. 130/1999, the material element consists in the repeated use of persons for carrying out paid activities, without complying with the legal provisions regarding the conclusion of the individual labor contract. Under the conditions established by Law no. 40/2011, repeated identification at the level of an employer of persons who perform non-legal activity can only be sanctioned from a contravention point of view, as long as the number of identified persons is below the criminal penalty (up to 5 persons). As the employer hires up to 5 or more than five people without an employment contract, its liability is different.

According to art. 260 paragraph (1) lit. e) of Law no. 53/2003 - Labor Code, republished in the Official Gazette no. 345/2011, as subsequently amended and supplemented, constitutes a contravention and sanction the admission to employment of up to 5 persons, without the conclusion of an individual labor contract, according to art. 120 and 240 days-fine, when the law provides for the alternative fine to imprisonment for a maximum of two years;180 and 300 days-fine, when the law provides for the alternative fine punishment with more than 2 years' imprisonment.

If the offense committed has sought to obtain a patrimonial benefit, and the punishment provided by law is only a fine or the court opts for the application of this penalty, the special limits of the days of the fine may be increased by a third.

We see the rigidity of the current regulation, which does not allow the application of the ablation system to establish the right of the offender to pay half of the minimum fine established by the normative act within 48 hours after receiving the report.

In the exercise of the control activity, the labor inspectors identified numerous situations in which the employers used more than 5 persons, without concluding an individual labor
contract, thus falling under Art. 264 of the Law no. 53/2003 - Labor Code, and employing the employers' criminal liability.

Analyzing the way of solving these criminal cases, in almost all cases, the criminal investigating body and the court pronounced solutions not to initiate criminal prosecution or acquittal, as the case may be, considering the lack of social danger of the deed. Thus, the impact of setting up the crime of having more than 5 people without an individual employment contract as an offense was not the one expected, which has led to a deprivation of regulatory effects and discrimination between employers and sanctioned offenders within the maximum limit of the fine regulated by the provisions of art. 260 paragraph (1) lit. e), respectively up to 100,000 lei for 5 persons identified without a labor contract, and employers in the situation regulated by art. 264 par. (4) who, following the analysis of the criminal offense, are sanctioned with a possible administrative fine, the amount of which is extremely low (500-1 000 lei).

The penal sanctions applied have been ineffective, in the vast majority of cases the investigation of the criminal file generates consequences contrary to the intention to regulate, and the costs occasioned by the trial of the criminal file remained with the state, generating the reduction of the revenues to the state budget of the amounts from the contravention fines applied for undeclared work, since the offender was not encouraged to pay the fine for the fine, namely to pay half of the fine imposed within a period of 48 hours.

**II. COMBATING UNDECLARED WORK**

Amendments to the Labor Code, by Emergency Ordinance no. 53/2017 of August 4, 2017, have the main purpose of combating undeclared work, including during the duration of the employment contract. This regulation creates the possibility of verifying in real time the form of employment of the persons who carry out activity at the controlled work place, through the immediate confrontation of the data existing in the documents with those submitted in the general register of the employees' records.

Undeclared work is a phenomenon of increased gravity facing society, with negative consequences on both the worker and the state budget manifested in different forms, both by not declaring to the authorities the entire activity of the employee and by the partial declaration of its activity. The Romanian legislation until the amendments were enacted by the Emergency Ordinance no. 53/2017 did not provide a definition of undeclared work, with the Labor Code penalizing only the fact of receiving a person's work without writing the individual labor contract before starting work, and not other forms of undeclared work.

In this context, it was necessary to adapt the national legislation to the new challenges faced by the authorities in their efforts to prevent and combat this phenomenon, including by regulating situations that constitute undeclared work, regulation without which these facts can not be sanctioned.

Thus, in order to streamline the control activity to combat undeclared work, as well as to define more clearly the sanctioning regime of undeclared work in Law no. 53/2003 - The Labor Code, by amending the sanctioning regime of this act, in order to eliminate the limit of 5 persons, currently established by the Labor Code, for the framing of the act as contravention.

The recent amendments to the Labor Code, by the Emergency Ordinance no. 53/2017 of August 4, 2017, have the main purpose of combating undeclared work, including during the duration of the employment contract. The following key changes have been made to the Labor Code over the factual situations that can be circumscribed to the concept of undeclared work:
- receiving a person's work without the conclusion of the individual work contract in written form on the previous day
- receiving a person's work without transferring the employment report to the general register of employees at the latest on the day before the start of the activity;
- getting an employee to work while he/she has a suspended individual work contract;
- the employment of an employee outside the working hours established under the individual part-time work contracts.

Another amendment establishes that the admission to work of a person illegally in Romania knowing that she is a victim of trafficking in human beings is a crime and is punished by imprisonment from 3 months to 2 years or by a fine. Tightening the contravention regime applicable to undeclared work by establishing a fixed amount of the fine of 20000 lei for each person identified as pretending the undeclared work for the first three possible situations mentioned above and 10000 lei for receiving an employee outside the program fixed in individual part-time employment contracts.

At the same time, it may be ordered in some cases the complementary sanction to cease the activity of the organized work place under control, based on a procedure to be developed. In order to encourage the offender to pay the fine of the fine, it was possible to pay half of the fine within 48 hours from the date of communication of the sanctioning protocol. On the other hand, criminalization was criminalized as an offense of the employer's deed, who received more than 5 people to work without concluding an individual labor contract, starting from the fact that, in most cases, such cases were pronounced classification (not respecting the objective envisaged by the legislator by criminalizing the facts in question). Also, as I have shown above, undeclared work may also exist in the context of the lack of an individual written employment contract.

The recent amendments to the Labor Code have brought to our attention the employers' obligations;
- the copy of the individual labor contract must be kept, by the employer, at the workplace (and not only at the employer's premises) for the employees who work in that place
- the additional acts on the individual labor contracts must be concluded before the implementation of the changes (except where they result from the law or from the applicable collective labor contract)
- the start and end hours of the work program must be highlighted.

Adopting the above-mentioned measures in such a short time affects employers who have fulfilled their duties in a timely and timely manner and who did not have the time to adapt their conduct in line with the new regulations. We refer in particular to the requirement for a system to highlight the start and end time for each individual employee.

The old regulation also required the employer to keep records of hours worked, but the regulation was general.

According to the new regulation, this evidence will have to be kept daily and include the start and end hours of the activity. Specifically, each employer will have to decide internally on how to organize this record, depending on the specifics of its activity, as well as its resources (card access systems, physical registers or electronics etc.).

I appreciate that it will be difficult for employers, as they will have to analyze, decide and implement the new issues, taking into account the significant sanctions to which they may be exposed through non-compliance. The employer has the obligation to keep a copy of the individual labor contract and the records of the working time provided by each employee on a daily basis, with an indication of the starting and ending hours of the work program.

CONCLUSION

We appreciate that the amendments to the Labor Code, by the Emergency Ordinance no. 53/2017 comes to the benefit of the employee who, in the case of black work, has the majority
of the benefits of an individual employment contract, the main drawback being that he will have a lower pension.

The undeclared work was introduced in the late 1990s by the European Commission and defined as "all remunerated activities that are mainly legal but are hidden from the state in the sense that they are not declared to public authorities even if their declaration is required by the system". Generally speaking, we talk about two main forms of non-legal work: - the employee provides, consciously or not, work without the conclusion or absence of an individual employment contract, whether it be a period of time day work, of an activity of limited or unlimited duration - we are dealing with "black work" in which no taxes and social contributions are paid at all, the employee not being able to enjoy the benefits of an employment contract legal; - the employee has an individual employment contract, but either he / she is declared a lower salary than he / she is receives in fact (often the minimum guaranteed salary is declared), the difference being directly received ("salary in the envelope"), or the salary is declared fair, but the employee often performs additional work above his / her working norm, the part of the salary corresponding to it is also "enveloped" - this is "gray.

BIBLIOGRAPHY

2. Law no. 53/2003 - `` Labor Code, republished in the Official Gazette of Romania, Part I, no. 345 of May 18, 2011, with subsequent amendments and completions;
3. Law no. 40/2011 for amending and completing the Law no. 53/2003 - Labor Code Published in the Official Gazette no. 0225 of 31 March 2011;
4. Emergency Ordinance no. 53/2017 of 4 August 2017 Published in the Official Gazette no. 644 of August 7, 2017;