EMPLOYMENT CONTRACT CONCERNING AGENCY LABOUR

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Summary

The article examines the legal nature of agency labor. Proposals are made for its inclusion into the draft Labour Code of Ukraine.

Key words: labor contract, agency labor, labor leasing.

Аннотация

В статье исследуется правовая природа договора о заемном труде. Вносятся предложения по его законодательному закреплению в проекте Трудового кодекса Украины.

Ключевые слова: трудовой договор, заемный труд, лизинг труда.

Statement of the problem. In today's world of labour employment contract remains the main legal form of wage labor and the basis of origination of employment relationships. Due to the deeper differentiation of workers and employers, the spread of atypical forms of employment, new types of labor contracts appeared that require adequate legal regulation. These include an employment contract on agency labour that requires special scientific research.

Topicality of the research is caused by insufficient study of theoretical and practical issues of legal regulation of the employment contract of agency work in modern science of labour law and the need to develop clear guidelines concerning the content of relevant legal norms in the draft Labour Code of Ukraine.

Problems of labor agreement have always been the focus of scholars– representatives of the Soviet school of labor law (F.M. Leviant, R.Z.Livshits,A.Yu.Pasherstnyk,O.S.Pashkov, P.R. Stavyskyy, A.I. Stavtseva, K.P. Urzhynskyy, O.S. Hohriakova etc.). In the post-Soviet period the employment contract theory was explored by domestic scientists: N.B. Bolotina, V.S. Venediktov, L.P. Garashchenko, G.S. Goncharova, O.V. Danyluk, V.V. Zhernakov, M.I. Inshyn, P.D. Pylypenko, S.M. Prylypko, V.I. Prokopenko, O.I. Protsevskyy, B.A. Rymar, S.O. Silchenko, G.I. Chanysheva, N.M. Khutoryan, O.A. Yakovlev, A.N. Yaroshenko and others.

The **purpose** of this article is to clarify the legal nature of the contract on agency labour, making suggestions for its legislative implementation.

Agency labour belongs to non-traditional, flexible forms of employment. The emergence of agency labour can be traced back to the 20-ies of the previous century, when US businessmen provided companies with office workers to meet the needs of the new economy, based on services.

Agency labour is the work, performed by an employee of a certain qualification, that is hired and granted by a private employment agency to a third party – "User" – to do work for the latter. An important point is that the contractual employment relationship usually exists only between the «borrowed», agency employee, and the employment agency, but the employee works, following the instructions of the User. The latter partially acts as the employer and exercises powers, that are delegated to him by the employment agency.

The use of agency labour may be useful not only for private employment agencies and the users, but also to the employees. Since the agency worker usually has little experience, he reasonably believes that training in the process and the opportunity to get a permanent job offset initially relatively low salaries, offered by employment agencies. Users are turning to agency labour for such reasons, as the need for replacement of absent staff, performance of rare works, that require specific skills, the need for labor force in seasonal periods.

In most Western European countries the activity of private employment agencies is quite common. For example, in the Netherlands at the beginning of 2000 over 5% of all workers were employed in agency jobs, obtained through private employment agencies. Latter provided 12% of all jobs in the country, which is a significant market segment. In 15 countries – members of the European Union 15 million people were working as agency employees. Leasing firms employ up to 7 million workers a year. In France, the growth rate of hiring staff through leasing in recent years is 13 times higher than the growth rate of work force that the employer hires directly. In the US, outstaffing services (personnel leasing) are provided by more than 2 thousand companies, so-called PEO (Proffesional Employer Organizations), on the staff of which are more than 2.5 million Americans [2, p. 8].

The Italian term «lavoro interinale», British „outsourcing", „outstaffing", the French „travait interimain" is rather difficult to translate literally into Ukrainian, although there was also our term „лізингова праця". In the modern world such organization of work is carried out under the following schemes: outsourcing, out-staffing, staff leasing.

Outsourcing is the involvement of employees of outside (extraneous) organizations in performance of certain types of work, that are not profile to a particular organization. In other words, performance of some „ancillary" work functions is taken out from the boundaries of a company, e.g., cleaning, repairs, marketing and so on. The legal form of this type of use of foreign labor is conclusion of a contract of provision of services for a fee between the organization– service provider and the organization– service receiver.

This organization-service provider specializes in provision of some kind of services. The workers are employed by the organization-service provider and perform work of a specific profession, serving customers of his employer.

Staff Leasing is the case when the contract of paid rendering of services is concluded between the employment agency and the organization, that actually uses the work of "leased" employees. Employment agency performs no specialized activity of providing service. It hires workers on demand of the organization-user solely for work in this organization for a specified period of time. The workers are employed by the recruitment agency that formally serves as the employer, but in fact performs no other activity but employment, staff leasing etc. Thus, the employment agency serves as a «front» employer, while there is a real employer that: a) made a request to the agency of personnel for the selection of specialists of certain professions; b) organizes and uses the work of the employees in his interests; c) establishes an internal labor schedule, mandatory for compliance by all, including "leased" employees; d) pays for the work of leased employees [3, p. 24].

With personnel leasing the actual employer of receives a number of advantages: he is not bound by a legal relationship with the employee; he is entitled to stop the use of „leased personnel" after the expiration of the contract term of provision of services for a fee without any guarantees for workers; formally entering into a civil contract, and actually engaging in labor relations, he saves on labor costs.

Employees who are in a formal employment relationship with employement agencies are unable to engage in collective bargaining and in the management of the organization in which they actually work, despite the fact that their employment is usually permanent, they conclude fixed-term employment contracts; they are excluded from social benefits, provided to the employees of an organization that uses their work; their wages can be (and are usually set) less than those of employees, performing similar work and who are the on the staff of the organization [4, p. 21].

The last form – outstaffing – is even more cynical. The company takes out some of their employees from the staff and transmits them to a private employment agency. The agency formally executes the functions of the employer concerning them, but in fact they continue to work in the original company.

There is also an unsolved problem of providing the employees of an organization-service provider with safe working conditions. Respective responsibilities are laid only upon the employer, but in case of agency labor work is performed in an organization, with which an employee is not bound by labor relations. The employer in this situation actually is unable to manage occupational safety and the organization, receiving the service, is not the employer.

Thus, relations of labor leasing are different from ordinary employment relations both according to the subject composition and the content.

Authors of the concept of legal regulation of labor leasing in Russian Federation, trying to clarify the specifics of agency work, on the one hand, argue that due to the peculiarities of relationships of provision of labor leasing the formal employer of the agency worker, i.e. the leasing agency, tranfers part of its powers of employer to the company-user. The latter, in turn, assumes these powers and responsibilities, but evidently does not become the employer of the agency worker.

The ground of transfer by leasing agency to the firm of a certain amount of user rights and responsibilities regarding agency employee is a civil contract of paid rendering of services, concluded between them. Enterprise – the user acts as a supplementary participant of a relationship between the agency worker and the leasing agency. On the other hand, they also believe that the relationship of the agency employee and the company – user even though were generated though a civil law contract between the agency and the user, have certain characteristics of labor relations and are governed by labor laws, but with certain peculiarities [5, p. 54].

According to some jurists (E.A. Ershova, A. Nurtdinova), this definition of the essence of labor leasing seems not convincing. By its legal nature the staff leasing agreement is much closer to the lease contract, which is characterized by the transfer of property into use. However, unlike the lease, the leasing of staff transfers the worker into use. Thus, the subject of the contract is actually the employment activity of workers [6, p. 27]

Today labor leasing is a phenomenon unknown to Ukrainian legislation. And, according to many authors, leasing of work does not fit into the framework of labor law, and in case of insuffiency or complete absence of regulation of this labour the level of protection of workers will decline. Agency work will move to the «gray segment» of the labor market.

Over the last decade in most Western European countries the legislation developed legal mechanisms, regulating work leasing through private employment agencies. In France, Germany, Italy, Spain, Denmark, the United Kingdom, Belgium, Luxembourg, Finland, Norway, Switzerland, Sweden, Netherlands, Japan agency labor became the subject of legal regulation.

Regulation of agency labor has different forms, such as the licensing of work of employment agencies, setting the maximum period of time, during which a person may be employed on the basis of agency work, etc.

In Germany, for example, the law requires that the contract between the agency and the employee should be signed in writing mandatorily, covering the conditions of payment for labor and social rights; even in the absence of tasks the employee shall be paid a fee. Legislation of Austria, Belgium, France and some other European states sets, that agencies of agency labor are required to guarantee the employee the same conditions for a specific workplace, as to the „permanent workers" [7, p. 28] .

An important question for legal regulation is whether to provide special level of protection to the employee because the employment relationships are unstable. There are different approaches to this problem. In Germany agency employees were granted the following minimum level of protection: the employee must be properly informed about all the conditions of work and should sign a written agreement, which should go through a procedure of special approval [8, p. 1] . In some countries there is an option when with the agency employee a permanent employment contract is concluded, that obviously, is not always in the interests of the agency worker, who could plan to work only for a short period.

Determination of the employer in agency labour is also very important, since the functions of the employer, as already noted, are partially carried out by the employment agency and partiallly by the user. In most Western European countries employment agencies are treated as employers of agency workers with all the consequences.

The social justification of considering employment agencies as employers lies in the fact that otherwise agencies would not be able to avoid obligations of the employer and would be acting as a kind of sales agents without worrying about working conditions of employees. Low level of social protection, provided to the agency employee, and the lack of status of the employer would have allowed the employment agencies to avoid financial payments to social funds. That is why the employment agencies should act as employers in case of agency labour.

In the employment relationship report, adopted by the International Labour Organisation on the 91th session in 2003, it was noted that the so-called tripartite labor relations, in which the labor or services of the employee are provided to the third party (the user), require further study, since they may be the result of absence of protection to the detriment of employees. In such cases, the main issue is determining who the employer is, what rights the worker has and who is responsible for their implementation. Therefore there is a need for mechanisms, that clarify the relationship between the various parties in order to allocate responsibility among them. Some form of tripartite labor relations, concerning the provision of work or services through temporary employment agencies, is covered in the ILO Convention №181 on Private Employment Agencies of 1997 and the Recommendation №188, which it complements.

In the literature different views are expressed on the legal nature of the contract with agency workers. R.A. Maidanyk notes that agency labour relations have two components: the selection of temporary staff (outstaffing, outsourting, temporary staffing) and staff leasing. Legal implementation of such relationships is made by the contract of paid provision of services between the organization– service provider and the organization-service receiver.

By its legal nature this legal structure is an example of combination of labor and civil legal relations on recruitment of workers by private employment agencies to provide their labor to third parties as a legal form of economic relations of „physical capital lease".

The scientist believes, that at the present stage the most adequate legal regulation of service contract is seen within a civil contract with the elements of the employment contract. For this purpose a trilateral civil contract should be concluded, which can be regulated by the norms of labor law, ensuring rights and legitimate interests of workers.

Under these conditions the question of confirming the employee's consent to the transfer by the agency-tenant to the user of some part of rights and duties of the employer concerning the employee is answered. The conclusion of separate agreements between the employee and the user is not required.

The legislation regulates four groups of relations, arising during the leasing of labor: between workers and leasing agencies; between workers and enterprises-users; between agencies and employers-users; between the leasing agency and the state.

From the acts adopted, it follows that the relationship between the employee and the leasing agency, between an employee and a user are governed by labor legislation and social security legislation; the relationship between the leasing agency and the enterprise-user – mainly by civil legislation; the relationship between the leasing agency and state authorities – by administrative legislation.

Thus, the relations between the worker and the leasing agency, between an employee and a user – is the scope of activity of labor legislation. The employment contract, concluded between the employee and the leasing agency, includes provisions on performance of different kinds of work in the firms, that are the clients of the agency.

As I.J. Kiselev notes, new laws initiated the formation of a very peculiar hybrid relationship in the triangle "leasing agency – the employee – the company", which is governed by norms of labor, civil, administrative and social security law. In another study the scientist proves the inevitable onset in the sphere of labor relations of hybrid contracts, that will be governed by the rules of employment and other fields of law (civil, administrative, family). It is suggested that different norms and institutes of labor law will have a different scope of activity, depending on the type of labor contracts they will regulate.

As the object of regulation by labor law agency labour deserves special attention of legal science. Agency labour is clearly different from subcontracting, where a subcontractor supplies workers not delegating powers to those for whom the work is performed. It is not possible to reduce agency labour to the civil contract of lease, as the person (employee) is not a thing that can be rented. These relations are also not confined to the provision of service for a fee, because the subject of agency labour is actually the labor activity of workers. Agency labor should be seen as a special kind of employment relationship – this approach is chosen by most EU countries.

To the main features of a „traditional" employment relationship belong: one employer, indefinite employment contract and protection from dismissal.

This employment relationship differs from agency labor, when the employee is hired by the agency, and then with the use of a civil law contract is sent to perform tasks in favor of the company-user. Functions of the employer in agency labour are performed by two subjects (employment agency and the user), the contract usually has temporary character and the procedure of dismissal is simplified in comparison with the ordinary employment contract.

Conclusions. For the employee the agency employment relationship stipulates a kind of duality: on the one hand, he enters into an employment contract with the employment agency, and on the other – he actually works wherever he was directed to perform the task. It is the user who provides the employee with instructions and controls the employee's work, despite the fact that he is not legally his empoyee under an employment contract. The user also partially exercises the powers of the employer regarding the employee, in particular, is entrusted with the obligation to protect the life and health of the worker.

With agency labor occurs a number of specific problems in the field of labor and social relations that cause quite reasonable concern with the researchers. Workers, employed in private employment agencies, have to accept not only the low wages, but also to the lack of permanent work, inadequate social support, the need to often integrate into a new team of employees. Regulation of labor and other relationships, that arise concerning agency labour, is called to smooth the negative consequences for workers, while maintaining the flexibility, needed for the user.

Private employment agencies provide their services in Ukraine as well. These employment services are provided for a fee without any restrictions on the types of professions and levels of such fees, statistical reporting on the work of such agencies is absent, oversight by a competent authority of their activities is not established. There are violations of the law by private employment agencies, as evidenced by audited inspections of Kyiv City Employment Center, according to the results of which materials were submitted to the law enforcement bodies.

Of course, for creation of a legal construction of agency labour it is not enough to adopt one special law. It is neccessary to include relevant rules in a number of fundamental legal acts and, first of all, into the current Code of Laws on Labour, the Law of Ukraine „On Employment".

It would be right to implement the relevant relationships into the new Labour Code of Ukraine, Tax Code of Ukraine and into the current Code of Ukraine on administrative offenses.

The most acceptable in terms of legal regulation of agency labor is a comprehensive legislative act that would contain norms of labor, civil and administrative legislation. This will ensure the unity of legal regulation, avoid potential intersectoral conflicts. The said legislative act will allow approbation of new types of civil law leasing contracts between private employment agencies and enterprises-users. In the future paragraph 6 "Leasing" of Chapter 58 "Hiring (rent)" of the Civil Code of Ukraine should be amended with the norms that determine the peculiarities of the lease (hiring) of employees (provision of agency labour).

A similar situation should emerge concerning a relatively new type of employment contract concluded between private employment agencies the employer) and the agency employee. Features of the mentioned agreement should be reflected in the new Labour Code of Ukraine in the fourth book "Peculiarities of regulation of labor relations involving certain categories of workers and employers."

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