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Considerations on National and Union Regulations of Work through a Temporary Employment Agent

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Abstract: The necessity to adapt the organizational structure of economic operators to the competitive European market requirements has imposed measures that have also influenced labor relations. The permanent and full-time employment relationship has been largely replaced by other types of more flexible labor relationships: temporary employment, part-time work, working from home and temporary assignment through an employment agency. All these types of work relationships are characterized by a decrease of guarantees for the employee and by a reduction of trade union power. Thus, they are considered atypical work relationships. The need to make the flexibility of labor relationships compatible with the protection of employees" rights has been a challenge that must be faced by social policies and also by labor law. In this context, the use of a temporary employment agent has been a tool for flexible working relationships both with the economic operators and within the labor market as a whole. The importance and role of this type of working relationship has, therefore, acquired significant legal, economic and social dimensions, which this study intends to analyze. In a European economy hit by the jobs crisis, reliance on work through a temporary employment agent can be a way to reduce unemployment. This happens only if the temporary workers benefit from legal protection and equal treatment as permanent employees.

Keywords: labor relations; atypical work; flexibility; legal dimensions

1. Introduction

Over the last decades of the twentieth century, developed capitalist countries have undergone a process of production structures transformation and of economic operators' organization. This process was driven by technological innovation and the need to compete in a world increasingly globalized. In this traditional model of economic operators they establish direct relationships with their employees through labor contracts, usually concluded as permanent and full time. This model has undergone adaptation measures, which lie in changing the structure of the economic operator, change that modifies labor relations within the organization. The permanent and full-time relationship has been largely replaced by other types of labor relations, which are more flexible, including work through a temporary employment agent. This type of work benefits from international and also national regulations and acquires important facets in a labor market characterized by instability and short term economic projects.

What is still to be analyzed is the extent to which the legal regulations meet the current social and economic needs. It is necessary to identify not only the advantages and disadvantages of work through a temporary employment agent but also legal loopholes, so that law can be adapted continuously.

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2. The Romanian Labor Code and Work through a Temporary Employment Agent

The current Romanian Labor Code has regulated for the first time work through a temporary employment agent (Ştefănescu & Beligrădeanu, 2003, p. 5), (Athanasiu & Dima, 2005, pp. 72-76), (Ţiclea, 2006, pp. 522-529), (Ştefănescu, 2007, pp. 415-421). According to art. 88 of this law, work through a temporary employment agent is the work of a temporary employee, who has signed a temporary contract with a temporary employment agency and is available to the user to work temporarily under the supervision and management of this user. According to art. 88 para. 5 of the Labor Code, temporary work shall mean the period during which the temporary employee is available to the user to work temporarily under their supervision and direction, for the execution of specific tasks of a temporary nature.

Work through a temporary employment agent involves the existence of legal relationships between three distinct persons (Athanasiu & Dima, 2005, p. 273):

- the temporary employee - the person assigned to an employer, a temporary employment agent, available to a user during the necessary period for the precise and temporary tasks to be performed;
- the temporary employment agent – a legal person authorized by the Ministry of Labor, of Social Protection and of the Elderly, who provides the user with qualified and/ or unqualified workers, whom it hires and pays for this purpose;
- the user – a natural or legal person that the temporary employment agent shall provide with a temporary employee for the performance of certain specific and temporary tasks.

The employment contract is concluded between the temporary employment agent and the temporary employee (Art. 94, Labor Code). Between the temporary employment agent and the user a contract of provision is concluded (art. 91, para.1). Between the temporary employment agent and the temporary employee an individual employment contract of limited duration is concluded for an assignment. Assignments shall be established for a period that does not exceed 24 months. Assignment duration may be extended for successive periods added to the initial period, as long as it does not result in exceeding a period of 36 months.

The temporary employment contract must contain information concerning the conditions under which the employee will perform his mission, the mission duration, the identity and location of the user, the amount and remuneration means of the work provided by temporary employee. In the temporary contracts a probationary period may be set in accordance with art. 97 of the Labor Code. This period may last between two and thirty working days, depending on the total duration of the mission and the hierarchical level of the duties performed by the temporary employee. A temporary employee is entitled to a salary for each mission and its level is negotiated directly with the temporary work agent, without being less than the guaranteed minimum gross wage payment.

The contract of employment concluded between a temporary employment agent and a temporary employee is terminated usually at the expiry of the mission or missions for which it was concluded. The temporary employment agent, like any other employer, may dismiss the temporary employee, but only as provided by law, as in the case of their own employees. The temporary employee may resign at any time, as long as he acts in compliance with the provisions related to being given notice.

No contract is concluded between the temporary employee and the user, as the legal relations between them are established by law and are governed by the principle of non-discrimination (Athanasiu & Dima, 2005, p. 277). Temporary employees have access to all the services and facilities provided by

the user, in the same conditions as other employees thereof (art. 92, para. 1). The user is responsible for providing the temporary employees proper working conditions.

Between the temporary employment agent and the user a contract of availability is concluded, the contract being not governed by labor law, although this law sets some of the contents of this contract. The availability contract must include: task duration, job characteristics, especially the required qualification, the place of task performance and the work program, the actual working conditions, personal protection and work equipment that the temporary employee has to use, any other services and facilities for the temporary employee. Other components of the contract are the commission value that the temporary employment agent benefits from, as well as the remuneration to which the employee is entitled, the circumstances under which the user can refuse a temporary employee made available by a temporary work agency. The Romanian legislator shall establish, in accordance with the relevant EU law, that any clause which prohibits the employment of a temporary employee by the user after the mission is completed is invalid.

2.1. Compatibility of the Romanian Legislation with the International and Union Legislation regarding Temporary Employment

In Romania, a country which has not ratified any of the ILO conventions on private work placement agencies, the only external legislative landmarks are represented by Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on work through a temporary work agency (OJEU, 2008) and Directive 96/71/EC of the European Parliament and Council Directive on the posting of workers in the provision of services (OJEC, 1997), implemented by Law 344/2006 concerning the posting of workers in the transnational provision of services (Official Gazette, 2006).

The labor market in Romania has adapted according to the new tools for labor relations flexibility, at present being a number of temporary agents whose activity is particularly intense. Legal entities and individual users who require the services of temporary work agencies in Romania are usually ranging from large to medium operators who need specialists in certain areas, on the one hand, and, on the other hand, the situations in which they must replace holders of suspended employment contracts are quite common. By analyzing the Romanian Labor Code the fact that it is consistent with EU legislation is revealed. By Law 40/2011 essential changes are made to the legal institution of work through a temporary employment agency, in order to increase the flexibility of labor relations.

3. Regulations of the European Union on Work through a Temporary Employment Agency

In countries of the former European Economic Community, both mediation activity in the labor market and recruitment and temporarily assignment of employees to other companies in order to meet short term labor needs were, for a long time, activities generally prohibited. That was because, legally, it was considered that they were using practices that were against the fundamental rights of employees (Basuc, Nenu et al., 2005, pp. 103-132).

However, by the late sixties, many countries in the European Economic Community, although they had ratified Convention 96/1949 of the International Labor Organization regarding private work placement agencies, they had also regulated the temporary employment agent activity. It was understood that this activity, when conducted in a controlled manner, did not cause any damage and had positive effects, because it allowed channeling a large part of the job offers, which, because of specialization or the need to obtain an immediate response could not be adequately addressed by the

employment services of traditional public employment. In this regard, the weak point was not represented by the temporary employment agent business, but by lack of regulation and control that favored the occurrence of the illegal employment of subjects who did not provide even the most basic guarantees of labor rights and social protection for employees.

From the perspective of institutions and EU law, the free movement of workers and the principle of free competition, the emergence of temporary employment agencies appears to be legitimate. In this context, the Court of Justice of European Communities has determined that public employment offices to which the law of a Member State assigns the management of services of general economic interest should be subject to competition rules under Art. 90 para. 2 of the Treaty, as long as it is not demonstrated that their application is not compatible with the mission performance (ECJ, Case Sacchi, C-155/73, para. 15).

Later, the Court of Justice decided to include work through a temporary employment agency in the notion of freedom to provide services (ECJ, Case Webb, C-279/80). The Court established (ECJ, Case Job Centre Coop., C-55/96, para. 21, 22, 31, 32, 35) that competition law considers "firm" "any entity, public or private, engaged in an economic activity, regardless of the legal status of that entity and the mode of financing" and the "activity aimed at placing workers is an economic activity", which has not always been, nor shall it be exercised by public enterprises. Thus, "when those offices do not fulfill conditions to meet the demand that exists in the labor market for all kinds of activities" giving the state exclusive rights to exploit the service would involve an abuse of its dominant position, opposed to the rules of the Treaty governing competition, because the service is limited to the detriment of users. Therefore, national laws which prohibit any activity of mediation or interposition between employment supply and demand that is not exercised by public employment offices, attempt at art. 86 and Art. 90 para. 1 of the Treaty (ECJ, Case Job Centre Coop., C-55/96, para. 35, 38.). This situation generates State responsibility which is favorable, keeping the respective legislation, when the abusive behavior may affect trade between Member States, without the need for the damage caused to trade to have actually occurred, a potentially abusive situation being enough (ECJ, Case Job Centre Coop., C-55/96, para. 36).

Following the description established by ILO Convention 181/997, the temporary employment agent provides services consisting of the contracting of employees to make them available to a third person, natural or legal (business user) which establishes the duties of the employee and supervises their work. The Court of Justice has stated that the only employer of the employee assigned for the mission is the temporary employment agent that concludes the employment contract with the employees and makes them available to the user. The temporary employment agent has a direct relationship with the employee during the entire assignment, arising mainly from the fact that the agent pays the proper wages, the social contributions, penalizing the failure of performing their activity (ECJ, Case Job Centre Coop., C-55/96, para. 36).

Currently, the EU temporary employment agency work is regulated by Directive 2008/104/EC of the European Parliament and of the Council on temporary employment agency work. The legal basis of the Directive resides in the principles recognized in art. 31 of the Community Charter of Fundamental Rights of Workers (Popescu, 2006, pp. 279-280), which establish the right of any employee to working conditions which respect their health, safety and dignity, to limitation of maximum working time, the daily and weekly rest, as well as paid annual leave.

The Explanatory Memorandum of the Directive contains a justification of the need for this regulation by increasing the number of individual employment relations through temporary employment agency at the same time with the increase of the risks that these employees are subject to, hazards that could

cause accidents at work or occupational diseases. The adoption of this Directive has become a necessity after the Brussels European Council in December 2007 when they agreed common principles of flexi security were agreed upon, principles "that provide a balance between flexibility and security in the labor market and helps both employees and employers to seize the opportunities globalization offers".

The Directive covers the principle of equal treatment under which employees must be treated during the mission at least as favorable as the comparable employee of the user. Also, to combat precarious work in the case of the temporary employee, the Directive establishes the obligation to inform assigned employees on existing vacancies within the user firm, in order to facilitate their classification. In addition, the obligation is established for Member States to take measures so that the invalid clauses prohibiting the conclusion of an employment contract between a business user and a temporary employee, after completing the mission, are sanctioned by nullity.

With the regulation of access to vocational training, the Directive attaches great munificence in action for Member States so that, in accordance with national traditions and practice, either by collective bargaining or by adopting the necessary measures, access to training for employees assigned by the temporary employment agent to the user company is improved. In terms of collective representation, the Directive requires that assigned employees shall be taken into account, with in the temporary employment agency, to determine the threshold that must be considered when collective employee representation bodies are created. Finally, the Directive requires that the user company shall inform the legal representatives of the employees on the use of temporary assignment of employees within the company, when information on the employment situation is transmitted to the respective representatives.

4. Short Presentation of the Disadvantages and Advantages of Labor Relations within the Contract Concluded with a Temporary Employment Agency

The specific form of labor relations which involve the temporary employment agent cause the appearance of certain specific problems, which consist of its lack of social acceptance, namely:

- precariousness in employment. Assigned employees do not have stability at work, because every mission in a user company requires a new employment contract;
- unfavorable conditions of safety and health at work. Safety and health conditions of assigned employees are lower than in the case of other employees who have other types of contracts. Assigned employees are more likely to face physical risks (awkward postures, vibration and noise), and must face more intense work and a higher work rate than employees with indefinite contracts or those with fixed -term contracts;
- lower wages. Remuneration of temporary workers can in principle be lower in relation to the user company's own employees. From the existing data it has been shown that compensation of transferred employees tends to be lower than in the case of the user company employees;
- fewer training opportunities. Assigned employee participation in continuing professional education is much lower than in the case of employees with permanent contracts and even compared to those with fixed-term contracts.
- difficulty to form a collective representation. One of the causes is the loss of collective identity of the assigned employee because it is an employee of a company whose business is the transfer of workforce and whose employees are not part of a physical unit. The user

company is not the favorable environment to form this community, because the assigned staff is not part of the staff of that company.

- increased chances for the temporary employee to become a permanent employee of the user. The user often considers the temporary employment agency as a personnel selection agency, hiring a worker who, at first, is not bound by the contract, with whom a contract of indefinite duration is concluded, once they become more familiar and the original contract is terminated.

5. Conclusions

The success of the temporary assignment of employees through temporary employment agents is due to the flexibility it brings to labor management, their contribution being very important in the case of economic operators prone to shortage and high turnover of staff, to the increase of activity and of hiring and firing costs. Temporary workers are, however, vulnerable to risk of loss of employment, and in terms of rights to form and join a union; they are employees of an employer, but being employed in another team than of their own employees.

In this context, assignment of employees through temporary employment agents is considered positive factor for the overall growth of jobs. However, it is estimated that there will not be an enduring engine for creating jobs if cannot attract the employees, if it does not provide quality jobs and if it does not improve "social acceptance". Therefore, the objective of the Directive is to make flexibility and security, job creation and quality of employment compatible. In the analysis that will be done before December 5, 2013, according to art. 12 of the Directive, it will be decided to what extent the current EU regulation meets the economic, social and legal needs of the labor market, given that, in the five years since the adoption of the Directive, Member States have undergone a process of deep recession, with devastating consequences for jobs, the number of those who are not involved in a work relationship being the highest in the last 20 years.

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