Jurnalul de Studii Juridice

Year XII, No. 1-2, June 2017, pp. 49-54

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DOI: <https://doi.org/10.18662/jls/4>

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WORKING HOURS OF DOCTORS IN THE CONTEXT OF LAW NO. 153/2017 REGARDING PERSONNEL PAID FROM PUBLIC FUNDS - THE MAIN CONTROVERSIAL ISSUES-

Ana ȘTEFĂNESCU*

Abstract:

Although under the legislation related to the public health sector units has been occurred a significant change concerning the working hours for doctors by including on-call hours, as the case may be, within it, still the legislation, in particular the new law of salaries for the personnel paid from public funds, is misunderstood and it may give rise to abuses in practice starting with January 1st, 2018 from the perspective of normal working time and overtime but also from that considering the right to plurality of functions.

We intend under this short material to help in the interpretation of the problematic provisions -essentially from the perspective of their formulation - in a manner as simple and useful to solve current social conflicts, but also as scientific as possible.

Keywords:

doctors, normal working time, overtime, on-call hours, plurality of functions

1. Evolution of working time regulations for doctors

Order of Ministry of Health no. 1375/2016¹ brings on January 1st, 2017 a very important and main amendment to the definition of working time by including, as the case may be, on-call hours within it; thus, *Regulation of 1 July 2004 concerning working hours, organizing and carrying out on-call hours in public units from the health sector* (approved by Order of Ministry of Health no 870/2004²) is in line with art. 111 of Labor Code³, art. 2 point 1 of Directive

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¹ Published in the Romanian Official Gazette, Part I, no. 988 on December 8th, 2016.

² Published in the Romanian Official Gazette, Part I, no. 988 on December 8th, 2016.

³ Law no. 53/2003-Labor Code (republished in the Official Gazette of Romania, part I, no. 345 of 18 May 2011, subsequently amended).

2003/88/CE and with the caselaw of E.U.C.J (see for details A. Țiclea, (2016), : 581, note 2).

Referring to an individual contract of employment concluded for main function for full time workload, Regulation lays down for doctors the following:

- As a rule, a normal reduced daily working time that does not include on-call hours can be distributed evenly or unevenly - 7 hours respectively 6 hours on average, provided they enroll in the rule for reduced weekly normal working time in average of 35 or 30 hours.

To be noted that it is to be imposed the interdiction to not exceed the duration of daily working time provided it is considered as monthly normal working time [art. 1 para. (6): "for doctors, exceeding the daily duration of the working time is to be considered activity performed within the monthly duration of the normal working time"].

Reduced normal monthly working hours is of 147 hours (if we take the hypothesis of a number of 21 working days with 7 hours per day);

- As an exception, for example, a normal daily working time for doctors working in departments or compartments with beds, which includes also on-call hours, an average of 7 hours in continuous or divided schedule according to art. 4 of Regulation using the formula:
 - a) 6 hours/per day +18 guarding hours per month or as the case may be,
 - b) 5 hours/per day + 38 guarding hours per months.

Considering an average of 21 working days per month in both hypotheses it can be reached 144 hours per month, respectively 143 hours a month, subscribed to the reduced normal monthly working time (specifically) of 147 hours per month.

Nevertheless it can be noted that both in the case of rule as well of exception it is observed, *all in all*, the prohibition in art. 1 para (6) of the Regulation and the "variable"-the on-call hours entering in the composition of working time does not affect the time corresponding to a monthly full time workload.

Without going into details as regards other forms of organisation of working hours, including shifts (differentiated according to specificity of the

activity) it can be pointed out that the prohibition to which we have referred remains a „consistency”.

2. Correlation between Regulation, Framework Law No. 153/2017 and Labour code

It is known that what exceeds a full time workload for a reduced normal weekly or monthly working time, for example, of 35 hours, i.e. 147 hours, means overtime.

As overtime can be brought into discussion in relation to a (single) contract, being applicable common law in the matter [of article 120 paragraph (2) of the Labour Code], the question arises of the nature of on-call hours referred to in art. 42 of the Regulation which is carried out in accordance with the latter, outside the main working schedule workload (i.e. on-call hours exceeding the ones referred to in article 4), on the basis of a part-time individual contract of employment.

On-call hours exceeding the ones corresponding to the main workload, could be known by whatever reason of the legislator, in the notion of "overtime"?

The major problem arises in the "light" of dispositions of paragraph (2) and paragraphs (3) under art. 5. from Chapter II of the Annex no. II of *Framework law* no. 153/2017 which has to be analyzed from the perspective of the principle of working freedom [in two aspects -**1.** of preventing the right law (fundamental) at work/plurality of functions and **2.** prohibition of forced labour]:

- "On-call hours carried out by doctor within the standard legal working and the normal working time of the basic function in the limit of 48 hours per week, which is the maximum length of working time, including overtime, shall mean the mandatory on-call hours" [para. (2)].
- "For on-call hours carried out beyond the duration stipulated under paragraph 1 in order to ensure continuity of health care, doctors will conclude with public health unit a part-time individual contract of employment (...) " [paragraph 3].

In this report, two abusive interpretations are expected in practice, but we cannot agree with them and present just a few basic arguments:

- That the on-call hours over the basic rule would go beyond those 48-hour working per week, because:
 - Main workload is for example of 35 hours per week and not of 48 hours per week, and nothing more,

- Their execution cannot be mandatory, so that is not the meaning of the phrase in paragraph (2) „mandatory on-call hours"-as the conclusion of a corresponding individual contract of employment corresponding to para. (3) cannot be fulfilled by force but only on the basis of mutual consent of the parties, any interpretation to the contrary being not only absurd and unacceptable but also illegal;
 - That the on-call hours over the basic rule would be included in the 48-hour working week, that is, the maximum legal duration of working time including also the overtime, entering into the term 'labour' because:
 - It would be limited to the number of 13 hours per week for a part-time individual contract of employment, i.e. adding to those 35-hours related to main workload, which contradicts with the right to work (guaranteed constitutionally) in the plurality of functions and there is no clear and unequivocal regulation to justify it (any limitation in this sense would be an incompatibility, but incompatibilities cannot be deduced about interpretation but they must be expressly indicating what and exactly till where it would be a limitation) and, more than this,
 - "overtime", taking into account the normal monthly working hours for doctors-that is, by reference to a single individual labor contract (the main one - of maximum 35 hours per week)-is prohibited by art. 1 para (6) of the Regulation. In the same direction is art. 21 para (5) of Law No. 153/2017 which provides that in workplaces where the duration of working time has been reduced, overtime is considered temporary, being required to compensate them with free time. Or if we consider on-call hours as mandatory - so as a rule — it would contradict this thesis.
- Also, according to art. 21 para (6) of the same law, employees who are paid through the plurality of functions cannot do overtime. In accordance with the provisions of art. 5 para. (3) of Cap. II of Law No. 153/2017, doctors who perform on-call hours exceeding the legal workload and normal working time from the main function will conclude with the unity a part-time individual contract of employment. Being a second contract of employment, it is obvious that doctors find themselves in a situation of plurality of functions.

Conclusions and proposal of *de lege ferenda*

In conclusion, we consider that remain from these analyzed provisions, the following solutions that may come off especially on "axis" Regulation:

- On-call hours are, indeed, mandatory, if:
 - it is observed under the main workload their limit as provided in art. 4 of the Regulation (referring to the first contract);
 - for their provision another part-time employment contract has been concluded (it is the second contract – for plurality of functions), so for a smaller number of hours to those corresponding to a full time workload (main), for example up to 35 hours per week, with the possibility to extend in total, up to a limit of 48 hours per week according to common law, except in cases of force majeure or for urgent works aimed at preventing accidents or removal of accident consequences elimination times (in this case corresponding to the need to ensure continuity of medical assistance).
- Overtime (in the classical sense - of common law) –except for the on-call hours exceeding the full time workload is not possible (that is overtime in relation to the first contract, limited, in our example, at 35 hours per week).

On the other hand, when applying the analysed provisions, it should be approved, in accordance with art. 8 from Chapter II of Annex no. II of the framework Law No. 153/2017, a new Regulation on working hours, organizing and carrying out on-call hours in public units in the health system, by order of the Ministry of Health, in with the consultation with the unions organizations signing the collective labour contract at the level of the Health Branch (so that it will replace the current one). However, it does not exist yet ... If it exists, it will, raise indeed, the problem of interpretation and application (possibly) abusive.

De lege ferenda, it is necessary their restatement to clarify their agreement in accordance with the other provisions in this matter and in particular with the principle of freedom of labour.

REFERENCES

Treatys

- Rotilă, V. (2013), *Studiu asupra timpului de muncă în sectorul sanitar din România. Analiză de caz: gărziile medicilor*, Sodalitas Publishing House, Galați.

(<http://cercetare-sociala.ro/index.php/studii-ghiduri/studii/item/38-studiu-asupra-timpului-de-munca-in-sectorul-sanitar-din-romania-analiza-de-caz-garzile-medicalor>)

Rotilă, V. (2016), *Orele de gardă efectuate de medici constituie timp de lucru și trebuie plătite cu toate drepturile aferente*, în vol. *Calitatea vieții profesionale a salariaților din Sănătate; studii, analize și demersuri privind unii dintre indicatori*, Sodalitas Publishing House, Galați. (http://www.cercetare-sociala.ro/media/k2/attachments/Volum_calitatea_vietii_profesional_e.pdf)

Ștefănescu, A., Rotilă, V. (2016), *Actualitatea „dezrobiiului modern” în dreptul muncii și exemplul exploatării cadrelor sanitare din perspectiva gărziilor*, în *Revista română de dreptul muncii*, No. 4/2016;

Țiclea, A. (2016), *Tratat de dreptul muncii*, 10th Edition, Universul juridic Publishing House, Bucharest.

Legislation

Law no. 153/2017 regarding personnel paid from public funds.

Law no. 53/2003 – Labor Code, republished in Official Romanian Gazette, Part I, no. 345 dated May 18th 2011, republished.

Order of Ministry of Health no. 1375/2016 for the amendment Regulation of 1 July 2004 concerning working hours, organizing and carrying out on-call hours in public units from the health sector (approved by Order of Ministry of Health no 870/2004).