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Some Aspects Regarding the Temporary Employment Contract

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Abstract: *This material aims, through its content, to present some particularities of the temporary employment contract seen as an innovative tool at the European and national level to make labor relations more flexible. The article begins with the presentation of the legal framework applicable to this type of employment contract, it continues with the explanation of the concept and the specific features of the contract, and ends with some considerations regarding the duration for which it can be concluded. Special attention is paid to the contractual clauses, but also to the trial period.*

Keywords: *temporary work, temporary work agent, contractual clauses, trial period, salary.*

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1. The legal framework applicable to the temporary employment contract

In the European Union, the unitary and harmonized regulation regarding the status of the temporary employee were designed for the member states through Directive 2008/104/EC of the European Parliament and of the Council (European Parliament, 2008).

In Romania, the normative acts that regulate this type of temporary work contract are: the Labor Code, art.88-102 (Parliament of Romania, 2003), G.O. no. 1256/2011 regarding the operating conditions as well as the authorization procedure of the temporary work agent (Government of Romania, 2011), Order of the Minister of Labor, Family and Social Protection no. 208/08.02.2012 for the approval of the Instructions regarding the authorization procedure of the temporary work agent (Bălăneasa, 2021).

2. Temporary employment contract. Concept, legal nature, duration and features

According to art. 94 paragraph 1 of the Labor Code, the temporary employment contract is an individual employment contract concluded in writing between the temporary employment agent and the temporary employee, for the duration of a mission (Parliament of Romania, 2011).

If in Romania the category of a temporary work agent includes all legal entities, including public institutions, but also non-governmental organizations (Marica, 2019), according to Directive 2008/104/EEC, the temporary work agent can also be a natural person (European Parliament and Council European, 2008).

The other party to the contract, the temporary employee, is, according to art. 88 paragraph 2 of the Labor Code, the person who concluded a temporary work contract with a temporary work agent, in order to make them available to a user, in order to temporarily work under the supervision and the management of the latter (Parliament of Romania, 2003). Therefore, the temporary employee can be any person who meets the general and special conditions to be an employee and exercise the profession/job/function for those who conclude the temporary employment contract. Not only Romanian citizens, but also foreign citizens, as well as stateless persons with domicile or residence in Romania, can have the respective quality, based on the work authorization or residence permit for the purpose of work (Țiclea, 2020, p. 550).

Para. 1 of art. 94 specifies the legal nature of the temporary employment contract, which is an individual employment contract, but with a special character, different from the standard contract. This character results significantly from the characteristics of the parties (temporary employment agent and temporary employee) as well as from the determined duration, which is during a particular mission (Ţiclea, 2017, p. 274).

It is thus regulated that the temporary work agent concludes temporary work contracts with temporary employees, in order to make them available to a user for whom they will work for the period established by the agent and the user through the provisions of a contract.

According to art.90 para.1-3 of the Labor Code, the temporary work assignment is established for a term that cannot exceed 24 months and can be extended for successive periods which, added to the initial duration of the assignment, cannot exceed a period of 36 months. The conditions under which the duration of a temporary work assignment can be extended are provided in the temporary work contract or may be the subject of an additional act to this contract (Parliament of Romania, 2011).

By Law no. 40/2011 (Parliament of Romania, 2011) an important amendment was made, providing for the possibility of concluding an employment contract for an indefinite period between the temporary employment agent and the temporary employee. Before the changes, it was allowed to conclude a contract on a single mission, and the former art. 94 para. 3 provided that for each new mission an additional act to the contract was to be concluded. After the changes made by the law, the current art. 95 paragraph 3 stipulates that a temporary employment contract is concluded for each new mission (Drăgan, 2015).

In the legal doctrine, the open-ended contract is regarded as a framework contract that is implemented for each mission, through the fixed-term contract (Ştefănescu, 2011, p. 22; Ţiclea, 2015, p. 367).

The essential characteristics of the individual temporary work contract are:

- It is a type of fixed-term contract of 24 months to 36 months. Art. 90 para. 2 and 3 of the Labor Code provides for the possibility of extending the duration of the assignment up to 36 months through the initial temporary employment contract or through a subsequent additional act: "The duration of the temporary employment assignment can be extended for successive periods which, added to the duration of the initial mission, cannot exceed a period of 36 months. The conditions under which the duration of a temporary work assignment can be extended are provided in

the temporary work contract or may be the subject of an additional act to this contract".

- the work is provided by the employee to the user where they are assigned by their employer or the temporary work agent for the duration of a mission, agreed with the employer and by the other two parties to the contract (the agent and the user);

- The temporary work contract can be concluded for one or more missions, that can be fulfilled for one or more beneficiaries, but without exceeding the term of 36 months (Țiclea & Georgescu, 2019). For each new assignment, a temporary employment contract is concluded between the parties.

We find that this type of contract is similar to the typical fixed-term employment contract in terms of its duration and the work for a specific mission. What is particular about this temporary work contract is that there are several missions for whom a fixed-term contract is concluded each time with the temporary work agent, and between missions the Labor Code provides that the employee must be at the disposal of the temporary work agent on the basis of an employment contract for an indefinite period. By agreement between parties, the employee must either be present at the headquarters of the employer (for the entire work schedule or only for a part of it), or can remain at home (in the same way, for the entire duration of the work schedule or only for a part of it), expecting to be summoned and to present themselves operatively to the call of the employer. Nothing prevents that, between missions, following the consensus of the parties through the work contract that is concluded for an indefinite period, that the employee work, in any form allowed by the Labor Code, for the temporary work agent and, of course, to receive a salary (Ștefănescu, 2017) or to be on leave without pay (Dimitriu, 2018).

3. General conditions regarding the conclusion of the temporary employment contract

The temporary employment contract, even if it has a special status, cannot ignore the conditions required by law for any employment contract as regards: prior information of the employee, prior notices in the case of certain categories of employees, the work permit for foreign citizens and obtaining the medical certificate by the employee. These are prerequisites for concluding the temporary employment contract (Țiclea, 2015, p. 79.).

According to the above-mentioned author, this type of employment contract has similar characteristics to civil contracts but is also differentiated by its own characteristics.

The general provisions for any contract apply to this type of contract, namely that for its valid conclusion, the conditions regarding the capacity, consent, cause, object and form of the contract must be met. The temporary employee must have full capacity of use and exercise of their legal rights. According to art. 13 of the Labor Code, the capacity to exercise is acquired at 16 years old, which is different from the regular requirement of the law, where it is acquired at 18 years old. So the capacity of the temporary employee is acquired at 16 years. Also, the temporary work agent must have full capacity to exercise their rights, the contract is signed by the one who represents the company (administrator, general manager, chairman of the board of directors or any other person who has the prerogatives to sign employment contracts). I believe that this capacity of the agent should be met at the time of his authorization by the Ministry of Labor and not at the time of registration with the Trade Registry or other entities.

The object of the temporary employment contract must be lawful and moral - the provision of work by the employee to a user.

The object of the contract should not be confused with the object of the activity of the temporary work agent, for which the agent was authorized. The agent has a specific object of activity, acquiring this quality based on an authorization procedure and special operating conditions established by G.O. no. 1256/2011.

This specific object of activity consists of "contracting activities, on a temporary basis, of hiring personnel", according to the Code of Commercial Activities (CAEN).

In other words, the temporary work agent "rents" an employee to various users for various temporary assignments, and for each of this new assignment a temporary work contract will be concluded. Based on this unique specific activity object of the temporary work agent and of the individual employment contract (for a fixed or indefinite period) concluded with the employee, during the period between two assignments the employee will not perform work for/at the temporary work agent, being exclusively at his disposal. The temporary employee can only perform work for users found by to the temporary work agent, not for the temporary work agent, between two missions the employee is exclusively at the disposal of the temporary work agent (Preduț, 2020).

Regarding the form of the employment contract through a temporary work agent, the provisions of art. 37 of the Labor Code "the

rights and obligations regarding the labor relations between the employer and the employee are established according to the law, through negotiation, within the framework of collective labor contracts and individual labor contracts". The contract is concluded in writing between the temporary work agent and the employee, however, the temporary work contract is a specific one, because the work performed by the employee is directly in the benefit of the user and indirectly in the benefit of the employer. Thus, the temporary employment contract appears as being subsequent to the employment contract concluded between the temporary employment agent and the user, and the relationship between the user and the temporary employee is a quasi-contractual one (Țiclea, 2016).

According to art. 102 of the Labor Code, temporary work agents are prohibited from charging fees to temporary employees in exchange for efforts to recruit them or for concluding a temporary work contract. Failure to comply with this provision is sanctioned according to art. 260 para. 1 letter o of the Labor Code. According to the legal text, the violation by the temporary work agent of the obligation provided for in art. 102, is sanctioned with a fine from 5,000 lei to 10,000 lei, for each person identified, without exceeding the cumulative value of 100,000 lei.

4. General and specific clauses contained in the temporary employment contract

In accordance with the provisions of art. 94 paragraph 2 of the Labor Code (Parliament of Romania, 2003), "in the temporary employment contract it is specified, apart from the elements provided for in art. 17 and art. 18 para. 1) the conditions under which the mission is to be carried out, the duration of the mission, the identity and headquarters of the user, as well as the amount and methods of remuneration of the temporary employee". This legal provision refers to the common, general elements of any standard employment contract, but also to a number of common elements.

These common elements found in art. 17 and art. 18 paragraph 1 of the Labor Code are:

"the identity of the parties, the place of work, the employer's headquarters/domicile, the position/occupation, the job description, specifying the job duties, the criteria for evaluating the employee's professional activity, the specific risks of the job, the date from which the contract is to produce its effects, the duration, the duration of the vacation to which the employee is entitled, the conditions for granting the notice by the contracting parties and its duration, the basic salary, other constituent elements of salary

income, as well as the periodicity of the payment of the salary to which the employee is entitled".

Regarding the salary, the Labor Code regulates in art. 96 para. 2 and para. 5 that throughout the duration of the mission the temporary employee benefits from the salary paid by the temporary employment agent and if he does not pay, they will be paid by the user, based on the request of the temporary employee.

Other elements contained in the temporary work contract and common to any type of contract are provided for in the same article 17 and art. 18 paragraph 1 of the Labor Code (Parliament of Romania, 2003): the normal duration of work, expressed in hours/day and hours/ week; indication of the collective labor contract that regulates the working conditions of the employee; the duration of the trial period, the duration of the work period to be performed abroad; the currency in which the salary will be paid, as well as the methods of payment; benefits in money and/or in kind related to carrying out the activity abroad; climate conditions; the main labor law regulations in that country; the customs within the society, the non-observance of which would endanger their life, liberty or personal safety; the worker's repatriation conditions, as the case may be;

Through the prism of its special character, it is necessary, however, that it also contains certain specific clauses (Drăgan, 2015). According to art. 94. paragraph2 of the Labor Code, the following specific clauses will be mandatorily inserted: the conditions under which the mission is to be carried out; mission duration; the identity and location of the user; the amount and methods of remuneration of the temporary employee".

If we refer to the special clauses of this type of employment contract, the legislator has regulated trial periods for carrying out the mission depending on its duration. Thus, in table no. 1 we will compare these trial periods.

Table no.1. Trial periods stipulated in employment contracts by the temporary employment agents compared to trial periods stipulated in fixed-term employment contracts

The trial period of the temporary employment contract according to art.97 of the Labor Code	*The trial period of a fixed-term employment contract, according to art. 85 of the Labor Code*
- 2 working days, if the temporary employment contract is concluded for a period less than or equal to one month;	- 5 working days for a duration of the individual employment contract of less than 3 months
- 5 working days, if the temporary employment contract is concluded for a period between one month and 3 months;	
- 15 working days, if the temporary employment contract is concluded for a period between 3 and 6 months;	- 15 working days for a duration of the individual employment contract between 3 and 6 months
- 20 working days, if the temporary employment contract is concluded for a period longer than 6 months;	- 30 working days for a duration of the individual employment contract of more than 6 months
- 30 working days, in the case of employees in management positions, for a duration of the temporary employment contract of more than 6 months.	- 45 working days in the case of employees employed in management positions, for a duration of the individual employment contract of more than 6 months.

Source: Authors' own conception

What is interesting and can be seen from the analysis of the two articles presented in comparison in the table above is that the legislator provided in the Labor Code different trial periods for the contract through a temporary work agent and for the fixed-term contract, although the maximum duration of both is the same for a maximum of 36 months (Parlamentul României, 2011).

We find that the period of 15 working days is the only trial period common to the two types of contracts, in the sense that if the temporary and fixed-term employment contract is concluded for a period between 3 and 6 months, then the trial period it is fixed for 15 working days. It is also noted that the duration of the trial period for the fixed-term contract is longer when we refer to missions longer than 6 months. In addition, we note

that for periods less than or equal to 1 month the trial period is 2 working days in the case of a temporary employment contract and 5 working days in the case of a fixed-term contract if it is less than 3 months. For the mission periods between 1-3 months, the trial period is the same as in the case of the fixed-term contract, namely 5 working days.

5. Termination of the contract with the temporary work agent

Para. 4 of art. 95 of the Labor Code (Parliament of Romania, 2003) expressly regulates the moment of termination of the temporary employment contract either at the end of the mission for which it was concluded or at the date of the user's renunciation to the services of that employee under the conditions provided by the employment contract concluded between the temporary work agent and the user.

The legal doctrine (Țiclea, 2020) considers that this last case of termination is a unique case of termination of an individual employment contract: upon the intervention of a third party and not of one of the parties to this contract.

At the end of the assignment, between the temporary employee and the user it is allowed to conclude an individual employment contract, in which case the duration of the assignment already carried out is taken into account when determining the salary rights as well as the other rights provided by the labor legislation - art. 99 paragraph 1 of the Labor Code (Parliament of Romania, 2011).

Conclusions

In the European Union, a unified and harmonized regulation for the member states of the status of the temporary employee was desired, so that in Romania three normative acts were adopted that regulate this type of temporary employment contract: the Labor Code (art.88-102), G.O. no. 1256/2011 and Order of the Minister of Labor, Family and Social Protection no. 208/08.02.2012.

The temporary employment contract is an individual employment contract concluded in writing between the temporary employment agent and the temporary employee, for the duration of a mission that must be expressly specified with the possibility of extension through an additional act or mentioned in the initial contract.

This type of contract has particularities and cannot in any way be confused with the fixed-term contract, although both include the general clauses provided by art.17 and art.18 paragraph 1 of the Labor Code. We

believe, as the practice of economic units demonstrates, that this type of contract will be used more and more in Romania as it is much easier to conclude a temporary work contract in periods of growth and lack of staff.

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