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IMPLEMENTATION OF SOME EUROPEAN COUNTRIES' LEGISLATION ON THE CRITERIA FOR UKRAINIAN LABOUR RELATIONS' IDENTIFICATION

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SUMMARY

Article deals with implementation of some European countries' legislation on the criteria for Ukrainian labour relations' identification. The legislative framework of Malta and Portugal is explored. The criteria of labor relations' identification at the business entities for the legislation of Ukraine are offered. Thus, for example, such criteria can be: if a person performs work to one customer for six months; the person receives for more than six months 85% of the income from one customer and so on. The implementation of the proposed criteria in Ukrainian practice will help to reduce the level of hidden labor relations.

Key words: labour relations, legal employment, criteria for legal relations, legal employment identification, labour legislation.

ІМПЛЕМЕНТАЦІЯ ЗАКОНОДАВСТВА ОКРЕМИХ ЄВРОПЕЙСЬКИХ КРАЇН ЩОДО КРИТЕРІЇВ ІДЕНТИФІКАЦІЇ ТРУДОВИХ ВІДНОСИН В УКРАЇНІ

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АНОТАЦІЯ

Статтю присвячено питанням імплементації законодавства деяких європейських країн щодо критеріїв ідентифікації трудових відносин в Україні. Досліджено законодавчу базу Мальти та Португалії. Запропоновано критерії ідентифікації трудових відносин суб'єктів господарювання за законодавством України. Так, наприклад, такими критеріями можуть бути: виконання людиною протягом шести місяців роботи для одного замовника; отримання понад півроку 85% доходу від одного замовника тощо. Впровадження запропонованих критеріїв в українську практику допоможе знизити рівень прихованих трудових відносин.

Ключові слова: трудові відносини, легальне працевлаштування, критерії правовідносин, юридична ідентифікація трудових відносин, трудове законодавство.

Statement of the problem. The issue of legal employment and the development of the labor market of Ukraine was on the agenda of the Ukrainian authorities. This is indeed an important issue because it is not possible to achieve sustainable economic development without neglecting the labor and social rights of citizens. In addition, Ukraine and the EU agreed to strengthen dialogue and cooperation to implement employment policies and ensure decent work. These are safe and healthy working conditions, social dialogue, social protection, social inclusion, gender equality and non-discrimination. Therefore, if we are going to the European Union, then such agreements should be a benchmark for legal employment of the population. And economic prosperity cannot be achieved if only the interests of the owners of the capital – employers, are met, and the needs of the employees who multiply that capital will be at the forefront. Thus, the balance of interests of both employer and employee should be traced. That is why the employment relations at the enterprise must be regulated both by the legislation of Ukraine and the internal documents of the entity.

The relevance of the research topic. In today's conditions of operating businesses, the vast majority of business owners are trying to optimize their costs. In the cases of the checks that were hold concerning the legality of labor relations, such a question remains unsolved: "Why almost all hired workers of the production stage are working at the minimum wage that is established by the Ukrainian labor legislation?" Also stays relevant the issue concerning the provement of the employment, not civil relations. This is explained by the fact that the legislative framework in this area in the sphere of the Ukrainian labor relations is not perfect and there is no functioning mechanism for determining at the legislative level the criteria for qualifying relations as labor. That is why this topic is urgent and needs detailed study.

Status of research. This question is the subject of research of both domestic and foreign scientists. In particular, the criteria for determining precisely labor relations, the question of legal employment under different conditions of functioning enterprises are considered in the works of such authors as: B. Aires [1], M. Brincat [2], M. Carrilho [1], S. Luz [1], L. Pace [2], O. Shemyatin [3], S. Silveira [4], T. Suchik [3].

The Object and Purpose of the Article is to implement the experience of some European countries' legislation concerning the criteria of legal employment's identification at the enterprises to the Ukrainian labour relations.

Presentation of the main material. Considering domestic court practice, the question of real labor-based relations' provement, rather than the existence of civil-law relations, remains open today. The necessity of defining in Ukraine at the legislative level the criteria for qualifying relations as labor is interpreted, paradoxically, in practice by exclusively controlling and verifying authorities. According to T. Suchyk, O. Shemyatkin, lawyers-practitioners, in some cases the argumentation of fiscal authorities is not logical at all. Considering one example of their own practice, they note that there was a case where the fiscal authorities concluded that there were actually labour relations between the customer and the individual entrepreneur only because there were employees with similar functions in the staff of such customer [3]. Analyzing the above example, we can say that, according to the position of fiscal authorities, outsourcing of the majority of functions for enterprises and organizations becomes impossible at all.

It is also advisable to refer to Ukrainian court practice. Thus, domestic courts determine the criteria for identifying employment relationships at enterprises and institutions at their own discretion. Moreover, there is not even a single approach at the level of court practice. And the explanations of the higher courts have not yet been developed or proclaimed, which is one of the consequences of different qualifications in such circumstances. In some cases, for example, the courts proceed solely from the formal features of a relationship, such as the existence of a civil contract and acts of services rendered or works performed, which is sufficient to qualify the relations as civil. In other circumstances, they examine the nature and character of the relations based on the actual relations between the parties [3]. In the current context of Ukraine's integration aspirations, in order to balance the views of the courts in this regard, the question of identifying the criteria for labour relations existence is urgent. So, based on the recommendations of the International Labor Organization (ILO) on labor relations No. 198, we can say that "the national policy of the state should at least provide for measures to distinguish between workers and self-employed person" [5; 6, p. 28]. In particular, in order to reduce the level of illegal employment, some European countries have defined in advance the legislative criteria for the division of labor and civil relations. One example is Malta (Fig. 1).

Analyzing the information presented in Figure 1, it should be noted that, in 2012, Malta's legislation identified eight criteria for qualifying relations as labour. However, if only five of the eight criteria are traced in enterprise or other institution, this would mean that such relations should be qualified as labour. This relations' distinction practice allowed Malta to protect the rights of employees of enterprises and guarantee them adequate protection. If we compare the legislation of Ukraine and Malta, today, as noted earlier, in Ukraine, we can only compare the employment contract with the civil contract. By the method of court practice's analysis we can come to conclusions, which relations are exactly labor in the specific circumstances.

Speaking about Portugal's labour law, the Labor Code of Portugal [7] sets out similar criteria for de facto labour relations in comparison with Malta's. For example, in Portuguese labour law, for enterprises and organizations, an additional criterion is fixed such as performing work at the customer's location or at a place designated by the customer [4; 1]. Whereas in the Netherlands, for example, the presumption of employment is generally fixed if a person performs work for the customer for three consecutive months on a regular basis, at least 20 hours per month [8]. Thus, analyzing the experience of the European countries, we see that the main criterion for qualifying relations as labour is the criterion of so-called control and subordination of the executor to the customer. In particular, we are talking about performing work according to the instructions and under the control of the customer. Moreover, from the above informa-

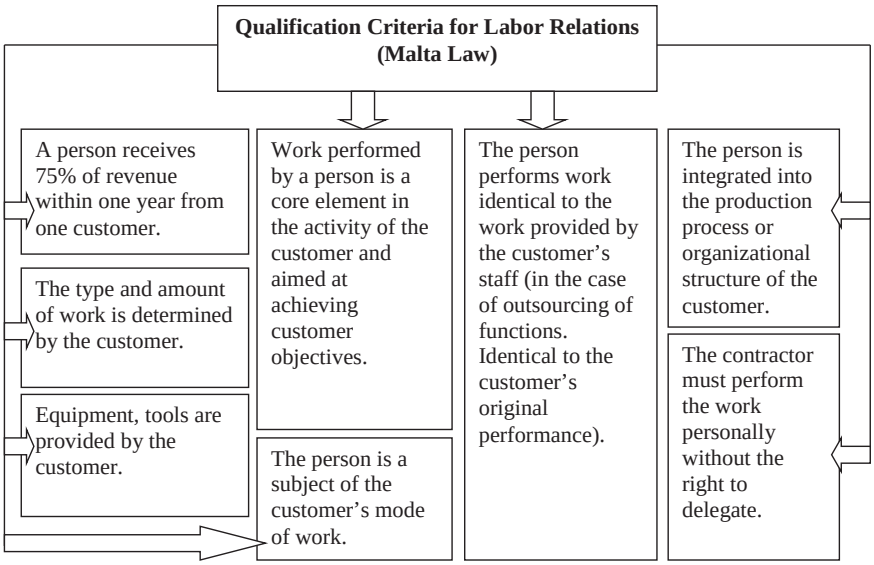

Fig. 1. Eight criteria for qualifying relations as labour one under law of Malta

Source: created by the authors based on their own research and generalization of these sources [2; 6]

tion we can state that very often one can observe the criterion of integrating the performer into the customer structure. Thus, the presence of labour relations indicates the ability of the contractor to give instructions to other employees of the customer, to use benefits similar to those provided for full-time employees. We also focus on the criteria of economic dependence of the performer on one customer, when the main or sole source of performer's income is a single customer, which, in principle, is not typical for business.

If we talk about labour and civil relations in Ukraine, the parties in the labor relations are the employer and employee, and in civil law – the customer and the executor. It is revealed that there is no such distinction under the legislation of the European countries studied above, which in practice simplifies the process of identifying hidden labour relations, based only on the list of statutory criteria. Unfortunately, the legislation of Ukraine does not provide such criteria, they can only be distinguished by comparing existing relations in enterprises. However, it is advisable to emphasize that there is another group of countries in the world that identify the criteria for qualifying relations as employment, based solely on case law. According to the practice in Ukraine, the employers of the private sector are trying to prove the existence of labour relations, based on the comparison of certain points of employment and civil contracts.

Based on the information of the Civil Code of Ukraine [9] and the Labour Code of Ukraine [10], we have made a comparison of labor and civil contracts. Thus, by such a criterion as the normative regulation the employment contract is governed by the rules of labor and civil law (Art. 21 of Labour Code), while civil contracts – exclusively by the rules of civil law (Art. 626 of Civil Code). Parties of the employment contract are employer and employee. In civil contracts – customer and contractor.

Comparing forms of contracts, it should be noted that the employment contract is concluded verbally and in writing form, in cases stipulated by the legislation (provisions of Art. 24 of the Labor Code define only writing form for special cases). Art. 208 of Civil Code states that civil contracts are concluded only in writing form.

Even the essence of contracts is different. The employee should perform the work in accordance with his/her qualifications and should obey the rules of internal labor regulations, as well as to be subordinate and supervised by the employer. The contractor of civil contract should perform the work or provide the services at his own risk, and the customer should accept and pay for it. The contractor neither submits to the internal labour regulations, nor subordinates himself to the customer. In labour relations an application for an employment contract is submitted and an order for hiring an employee is accepted. In civil law relations, the parties sign a written contract, but decree or order is not issued. The object of the labour contract is the process of work itself. Material result of work or service – is the object of the civil contract.

The employment contract is concluded for an indefinite period. A fixed-term contract can only be concluded if the employment relationship cannot be established indefinitely, taking into account the nature of the work, the conditions of its performance or the interests of the employee and in other cases provided for by law. The term of the civil contract is determined by the parties.

The documents submitted for those contracts are different in these two types of contract. For an employment contract: 1) identity document (passport, military ticket, birth certificate, certificate from place serving sentence); 2) a record book; 3) certificate on the identification number of the individual; 4) certificate of compulsory state social insurance; 5) a document on professional training (if the job requires such training); 6) health certificate (when required by law). For civil contract list of documents is shorter. It is enough to have identity document (passport, military ticket, birth certificate, certificate from place serving sentence) and certificate on the identification number of the individual. Record into the record book is brought under labor contracts, while under civil – there is no such requirement. The employee is hired for a position in the staff of the enterprise. The contractor does not belong to the staff of the enterprise.

The age at which contracts can be made also varies. Employment contracts can be concluded with the achievement of:

- 16 years – independently;
- 15 years (as an exception) – with the consent of one of the parents or the substitute person;
- 14 years students of secondary schools, vocational and secondary specialized educational institutions (under certain conditions) (Art. 188 of the Labor Code), for certain categories of workers this age may be raised.

Civil contracts can be concluded with the achievement of:

- 18 years and in other cases stipulated by law acquisition of full civil capacity independently;
- from the age of 14 – with the consent of parents (adoptive parents) or trustees.

In labour law the owner is obliged to provide the working conditions necessary for the work (Art. 141 of the Labor Code). That is, the employee receives everything necessary to perform the work specified in the employment contract: workplace, necessary materials, equipment, etc. The civil contractor uses his materials and means of work, unless otherwise specified and stipulated in the contract. The employee is obliged to perform the work entrusted to him personally (Art. 30 of the Labor Code). The Contractor, in the cases provided for in the contract, has the right to assign the execution of this contract to a third party.

Salary amount within labour contract:

- depends on the complexity and conditions of work performed;
- depends on the professional and business qualities of the employee;
- depends on the results of his work and business activity of the enterprise;
- may not be less than the minimum wage prescribed by law;
- must be paid at least twice a month.

When we have civil relations the amount and the procedure of payment are determined and fixed by the contract and does not depend on the minimum wage.

When concluding an employment contract, an employee is guaranteed by labor legislation:

- the valuation of work;
- weekends, holidays and holidays;
- remuneration for deviation from normal working conditions;
- unemployment assistance;
- payment of temporary disability assistance.

The civil legislation of Ukraine does not provide privileges and guarantees. They are provided only when the contractor independently makes payments to social funds or when the parties have agreed on the time of rendering services, compensation payments at the expense of the customer, etc.

The employee at the conclusion of the employment contract can be bring to:

- disciplinary responsibility (reprimand, dismissal);
- limited material responsibility;
- full material responsibility (only in cases directly provided by law).

The duty to prove the guilt of the worker rests with the employer. A full material responsibility agreement can be concluded with the employee.

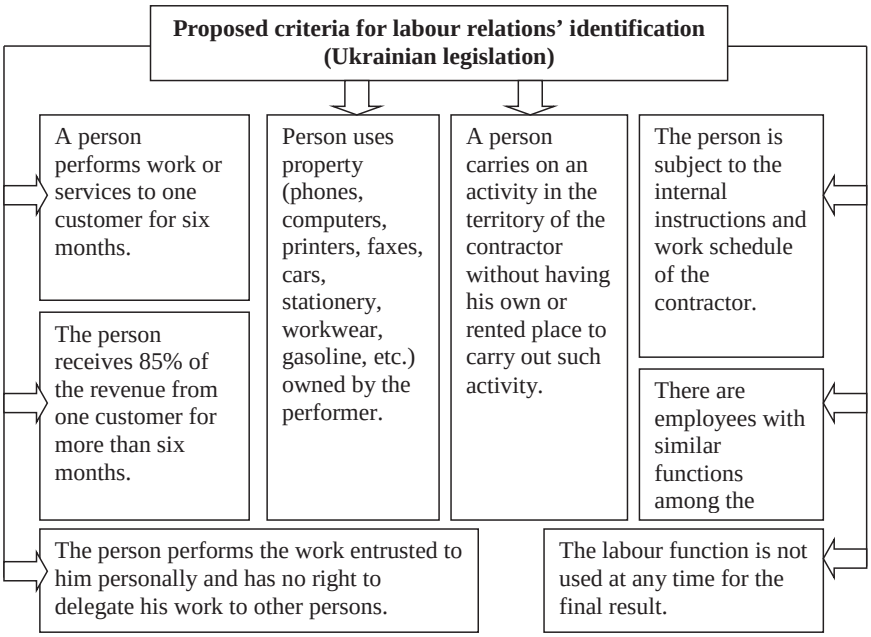

Fig. 2. Proposed criteria for employment's identification in business entities for Ukrainian legislation

Source: improved by authors based on own research and sources [1–5; 7–8]

The Contractor is fully liable for:
- damage caused to the customer;
- income they have not received;
- lost profit if it is not proved that the damage was not caused by his fault, or unless otherwise stipulated by the contract (penalties, early termination of the contract, compensation for damages) or by law.

In labour relations the employer has the risk of negative work consequences. In civil law relations – the contractor.

The grounds for termination of the employment contract are determined by the Labor Code, which may be:
- agreement of the parties;
- expiration of the term for which it was concluded;
- employee initiative;
- the initiative of the owner or the body authorized by him, etc.

In civil relations termination of the contract determined:
- by agreement of the parties;
- by the end of the term for which it was concluded;
- after the completion of the work stipulated by the contract and the transfer of the results to its customer, about which the act signed by the parties and payment of the work performed.

The settlement of a dispute arising out of an employment contract occurs through an employee's petition to the labor disputes commission, the trade union or court. Civil disputes are settled only by court procedure.

Thus, to comment above mentioned, first of all it should be borne in mind that the employment contract is nevertheless concluded in accordance with Chapter III of the Labor Code, and its object is a working process, not a material result of a work or service. In particular, it is about performing a job in a certain specialty, qualification, position, that is, performing certain job function by hired employee (Art. 23 of the Labor Code). However, it should be understood that the labour function usually does not provide any final result, and the employee should perform the work entrusted to him personally and has no right to delegate its performance to other employees. The employee should also comply with the rules of the internal work order. While in accordance with civil contracts the employee independently organizes the work process, personally executes it and is responsible for it. So, we come to the conclusion that if all of the above features are inherent in the relations with an individual, then it will be a labour law relation, not civil. Moreover, it is not the employers but the representatives of the inspection bodies who have to prove the existence and legality of the employment, and not of civil law relations.

Thus, today, one of the security establishment measures in the sphere of business activity is a process aimed at reducing the level of hidden labor relations by means of the legally defined criteria for the identification of labor relations. As we noted in the publications [11, p. 34; 12, p. 114], the necessity of defining in the legislative level the relations' qualification criteria as labour is dictated by the practice of the control bodies on relations' re-qualification, which now boils down to interpretation by the authorities of the relations' signs at their own discretion. And this, in turn, is the result of unjustified accruals and criminal proceedings against officials of payers who work with real, not pseudo-entrepreneurs [3]. Therefore, having analyzed the legislative practice of other countries of the world, we consider it expedient for the legislation of Ukraine to identify eight basic criteria for the labour relations' identification in the business sphere. It should be noted that if three of them take place in practice, then such relations are subject to re-qualification (Fig. 2).

Thus, taking into account our own research and research of foreign specialists-practitioners in this sphere in Figure 2, we proposed to distinguish the following criteria for the identification of labour relations:

1) the person performs work or provides services to one customer within six months;

2) the person performs the work entrusted to him personally and has no right to delegate his work to other persons;

3) the person receives 85% of the income from one customer for more than six months;

4) the person uses property (telephones, computers, printers, faxes, cars, stationery, workwear, gasoline, etc.) owned by the performer;

5) the person carries out activities in the territory of the contractor without having his own or rented place for carrying out such activity;

6) the person is subject to the internal instructions and work regulations of the executor;

7) there are employees with similar functions among the staff of the customer;

8) the working function does not predict any final result [13].

However, scholars note that given practice of foreign countries to certain areas of activity, in particular, such as information technology, due to their specificity and psychology of taxes, which has formed over time, these criteria for the employment relations' identification cannot be applied.

Conclusions. Having done the investigation, we found that in Ukraine the primary qualification criteria for labor relations in the field of business activity is the criterion of subordination and accountability of the employee to the employer. Implementation of the proposed criteria for the labour relations' identification in the Ukrainian legislation in the field of business activity will contribute in practice to reducing the level of hidden labor relations, eliminating unreasonable charges and criminal proceedings against officials of payers, working with real employee (not pseudo entrepreneurs), which will increase the level of enterprises' security in the context of European integration. It is proved that Ukraine would be worth borrowing from the experience of Denmark and France regarding the responsibility of employers for late payment of wages and depending on the degree of public danger and wage arrears, to propose changes to national legislation, in particular to the Labour Code, Criminal Code, Code on Administrative Offenses of Ukraine.

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