EMPLOYER'S OBLIGATIONS IN THE DOMAIN OF WORK RELATIONS PROVIDED IN SPECIALS LAWS AND THE PROTECTIONS OF EMPLOYEES' RIGHTS IN ROMANIA I

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Abstract

In this moment, the labour legislation is one of the most beautiful areas of research. As it is beautiful, as it is rigid, difficult and changeable.

In this article, we decided to do a series of analyzes of certain obligations of employers in labour relations matters set forth in special laws. We will have regard to the provisions in various laws (Labour Code, government decisions, ministerial orders and other lesser-known acts).

We aimed to analyze those legal rules which stipulates sanctions due to their violation. We try to present as clearly through examples, how employers should comply with those obligations in order not to be sanctioned by the state control agents. In other words, the research will show the correct way in which employers must fulfill their obligations in relation to the control institutions such as Labour Inspection and the county agencies for employment.

Key Words: *Employer / employee / work relations / Romanian Labour Inspection / contravention*

JEL Classification: *[K10, K23, K31]*

The right to work is a fundamental human right protected by the Romanian Constitution and through many international legal instruments. Thus, according to Art. 41 of the Constitution, "the right to work can not be restricted". The right to work is protected even through international instruments, of which: Art. 15 of the Charter of Fundamental Rights of the European Union "Everyone has the right to work [...]"; Part II, Article 1 - art. 19 of the European Social Charter regulates the right to work and other rights to which a person who works is entitled to[1]. Article 23.1 of the Universal Declaration of Human Rights states: Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment[2].

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[1] For more details, see I. Moroianu-Zlătescu, *Drepturi sociale: tratate europene*,. I.R.D.O Publishing House, Bucharest, 2009, pp. 9-18; Irina Moroianu-Zlătescu, *Drepturile omului: un sistem in evolutie*, I.R.D.O Publishing House, Bucharest, 2008, pp. 70-73.

[2] I. Moroianu-Zlătescu, *Drepturile omului: un sistem în evoluție*, I.R.D.O Publishing House, Bucharest, 2008, pp. 79-100.

Since the provisions from the special laws are many more, the article will be continued with part II which will contain further more analyze of the special laws and it will have the conclusions and the *lex ferenda* proposals.

In the Antiquity period the labour was considered a human instinct action for survival (procuration of food and shelter)[3] and conservation of the human species. During the years, with the evolution of human society, labour became a minded activity[4].

As it is widely known, the Labour Code is the basic, general norm in the domain of work relations. The Labour Code provides a series of employer obligations, which are sanctioned primarily under the legal aspect of contraventions[5] and sometimes under the aspect of criminal offences.

From the very 1st article of the Labour Code, the domains to be regulated are provided: "This code regulates the domain of work rapports, the method in which the control of rule application in the domain of work rapports is checked, as well as labour jurisdiction". As such, one notices that Law 53/2003 also encompasses dispositions regarding *the way in which the control of rule application in the domain of work rapports is checked*. In other words, it includes dispositions which offer security to legal relationships and give control bodies the right to verify the way in which employers follow their obligations.

The Labour Code includes the main contraventions which appear as a result of not following the imperative dispositions of the Code. Thus, contraventional responsibility is regulated in Chapter IV – Contraventional Responsibility, while criminal responsibility is covered in Chapter V – Criminal Responsibility.

The contraventions, as well as the offenses regulated in the articles of the Labour Code are generally known, and for this reason we have suggested that this research look into other contraventions, which are less known by employers.

We must mention that the necessary premise for application of the special law's provisions is represented by the existence of an employment contract.

1. Contraventions provided in Law no. 108/1999 regarding establishment and organisation of the Romanian Labour Inspection

Law no. 108/1999 establishes the organisation and functioning background of Labour Inspection[6] as well as the rights and obligations of labour inspectors.

Art. 23, para. 1 of Law no. 108/1999 regulates three contraventions often encountered in practice:

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[3] N. Roș, *Commentary on the amendment of unemployment Law*, in „Fiat Iustitia", no. 2/2015, p. 125.
[4] *Ibidem*.
[5] For "*contraventions*" please see: E. M. Fodor, *Drept administrativ*, Argonaut Publishing House, Cluj-Napoca, 2008, pp. 301-327.
[6] Regarding the Romanian Labour Inspection, please see: I. T. Ștefănescu, *Tratat teoretic și practic de drept al muncii*, ed. a 2-a revăzută și adăugită, Universul Juridic Publishing House, Bucharest, 2012, pp. 828-839.

1.1 Preventing labour inspectors from performing the check[7]

Preventing labour inspectors in any way from totally or partially executing checks or performing inquiries into events according to legal provisions, through any action or inaction of the unit's leader, of the legal representative, of an employee, a pre-designated person or any other person found at the place submitted to control, including refusal to fill in the identification form or to supply information on the event inquired upon[8];

From our point of view, this contravention does not hold in the case in which, for example, during a check, the labour inspectors on site find that the unit is closed and nobody is present at the workplace. The word "prevention" must be corroborated with a subjective factor, namely human action or inaction, and not with an objective factor. As a result, if the work hours of a unit are from 8:00 to 17:00 and the time of the labour inspector check is 18:00, it is clear that a "prevention" of labour inspectors cannot be taken into consideration. From our point of view, in this situation, labour inspectors will draw up an inspection report or a record of proceedings in which they will note that at the date and time of the check the unit does not conduct business. Another interpretation could give way to abuses from the labour inspectors.

A completely different situation appears when, for example, the administrator or an employee closes the office and refuses to open the door (inaction), or refuses to provide the employment contracts. However, this contravention will not be held if the person responsible with the administration of documents (the human resources specialist) is not present at the workplace and the documents are locked in a cabinet/room, to which only the human resources specialist has the key. In this case, the representatives of the employer must offer proof of good faith, meaning to present to the inspector the fact that the employee is not at the workplace and the documents cannot be supplied, but will be offered when the human resources responsible returns. Of course, this implies a subjective consideration of the labour inspector's according to case. The inspector can ask the employer's representatives to supply the documents within a certain deadline, at the territorial inspectorate headquarters. It is very important that the employer prove good faith: to call the relevant employee, to note in the record of proceedings that he does not refuse nor is opposed to the check, but that due to objective reasons he cannot supply the requested documents. In most cases such as this, labour inspectors will leave an invitation for the employer, asking them to present themselves at the territorial inspectorate, with the requested documents and within a certain timeframe. In this case it is recommended that the human

[7]See:http://www.avocatnet.ro/content/articles/id_38936/Ce-amenzi-aplica-inspectorii-ITM-angajatorilor- care-incalca-legislatia-muncii.html, accesed în 10.05.2016.

[8] Al. Țiclea, *Tratat de dreptul muncii: legislație, doctrină*, ed. a 6-a, Universul Juridic Publishing House, Bucharest, 2012, p. 884.

resources specialist attend; they will make a declaration and mention that they were gone from the unit at the date and time of the check. All this corroborated evidence will prove the employer's good faith.

It is normal for employers to prove these objective circumstances since labour inspectors cannot previously know who they will find at the workplace, which employees are absent, where the documents are kept, etc.

1.2 Employers' refusal to fulfil the measures imposed by labour inspectors[9]

The checked unit not fulfilling or partially fulfilling the measures imposed by the labour inspector, within the established timeframe[10];

When exercising their attributes, labour inspectors have the possibility to apply measures. The measure or measures apply through a record of proceedings or a record of findings and contravention sanctioning. Practically, measures represent action obligations that the labour inspectors compel employers to implement.

Below, we shall enumerate the countermeasures most often encountered in practice, relating to labour rapports:

- issue of copies of an employment contracts,
- issue of copies of appended documents,
- correcting erroneous data in REVISAL,
- drawing up decisions to cease an employment contracts,
- the delivery of REVISAL,
- payment of salaries,
- drawing up yearly holiday scheduling,
- offering water during extreme heat periods,
- designating, through decision, a person to operate the REVISAL software,
- drawing up job descriptions,
- conducting medical investigations.

It is important to remember that these "measures" are not defined in either Law no. 108/1999, nor in Government Regulation no. 1377/1999 regarding the approval of Labour Inspection organisation and functioning Regulations, as well as for establishment of organisational measures. Furthermore, through Government Emergency Ordinance no. 86/2014 regarding the establishment of reorganisation measures for central public administration and the modification of certain normative

[9] Art. 23, para. 1 of Law no. 108/1999.
[10] See http://legislatiamuncii.manager.ro/a/8298/neindeplinirea-masurilor-dispuse-de-inspectorul-de-munca-se-sanctioneaza.html, accesed în 10.05.2016.

documents, it was provided that: Art. 5. – (1) The National Agency for Labour Inspection and Social Security is founded, as a specialised body belonging to central public administration, having legal personality and subordinated to the Ministry of Labour, Family, Social Protection and the Elderly, by merging Labour Inspection and the National Agency for Payment and Social Inspection.

Through Law no. 174/2015, the Government Emergency Ordinance no. 86/2014 was approved, with some alterations, and it was mentioned that: Law no. 108/1999 for the founding and organisation of Labour Inspection, reprinted in The Official Gazette of Romania, Part I, no. 290, May 3rd 2012, with its subsequent alterations, and Government Emergency Ordinance no. 113/2011 regarding the organisation and functioning of the National Agency for Payment and Social Inspection, published in The Official Gazette of Romania, Part I, no. 921, December 23rd 2011, approved with alterations and additions through Law no. 198/2012, are revoked at the date at which the law provided in para. (10) comes into force.

Currently, the Law regarding organisation, functioning and attributions of the National Agency for Labour Inspection and Social Security is under public debate, as well as the alteration and addition of normative documents, alongside a RESOLUTION in relation to the organisation, functioning and attribution of the National Agency for Labour Inspection and Social Security.

On a close reading of the normative documents mentioned above, it does not follow what these measures are. The lawmaker did not define or enumerate then. In what concerns their definition from our perspective, measures are obligations to act, established as the employer's task by the labour inspectors as a result of not fulfilling legal norms. Concerning their enumeration, such a thing is not necessary. More so, an enumeration of measures is not practically useful, since new legal norms always appear, and as such continuous updates of applicable measures would be needed. Application of measures is left to the discretion of the labour inspector. The labour inspector, relating to the actual situation, will decide if the application of measures is necessary.

As mentioned earlier, from our point of view, measures are obligations of action, obligations submitted to employers by labour inspectors. These are useful especially if the lawmaker has not provided sanctions for not following certain norms in the domain of work relations (example: not drawing up the decision to cease an employment contract, not drawing up the schedule for yearly holidays, refusing to issue copies of documents). One notices that the measures are imposed in order to counteract passivity or even refusal on part of the employer in fulfilling certain obligations.

Measures must be applied by the employer either immediately or before the deadline set by labour inspectors.

A delicate issue arises in relation to the possibility of applying a certain measure in the case of undeclared work. To be exact, the following problem emerges: if, following a check, persons who provide labour without having sealed an employment contract are found, can labour inspectors impose a measure to compel employers to sign an employment contract?

From our point of view, such a measure cannot be applied. Since the employment contract is a willing accord, it cannot be forcefully signed as the result of a measure imposed by labour inspectors.

We conclude this by mentioning that the necessary premise for application of a measure is represented by the existence of an employment contract.

1.3. Refusal on the part of the employer to submit to labour inspectors, upon request and within an established timeframe, information and documents needed for verification or for inquiry into events[11]

Failure by the leader of the unit, the legal representative, employees, a pre-designated person or any other person found at the place of check, to respect the obligation of supplying work inspectors, within the established timeframe, with requested documents[12] and information, necessary to execute the check or an inquiry into events[13].

The finding and sanctioning of contraventions such as that mentioned above is done only by labour inspectors. The sanction that can be applied for any of the three contraventions is between 5000 and 10000 lei. The offender may pay off half of the minimum amount of the fine within 48 hours, according to art. 24, para. 1 of the same legal document.

2. Contraventions regulated by Law no. 467/2006, regarding establishing the general frame of information and consulting of employees

2.1 Failure to inform employee representatives / syndicates regarding the economical and financial situation of the unit and regarding work vacancies.

Thus, according to the provisions of art. 5, Law no. 467/2006:

"(1) Employers are obligated to inform and consult the representatives of employees, according to legislation in force, in relation to:

a) recent evolution and probable evolution of activities, and the financial situation of the company

[11] Art. 23, para. 1 of Law no. 108/1999.

[12] Judecătoria Tulcea, civil judgment no. 298/2009 cited in A. P. Coman, N. Moroşanu, *Contravenția*, Moroşanu Publishing House, Bucharest, 2010, pp. 473-476 *apud* Al. Țiclea, *op. cit.,* 2012, p. 846.

[13] Al. Țiclea, *Tratat de jurisprudență în materia dreptului muncii*, Universul Juridic Publishing House, Bucharest, 2011, pp. 844-846, Art. 23, para. 1 of Law no. 108/1999.

b) the situation, structure, and probable evolution of employment within the company, as well as regarding eventual measures of anticipation that are taken into consideration, especially when employment is in peril;

c) decisions that can lead to major changes within labour organisation, contractual relationships or work rapports, including those provided in the Romanian legislation regarding specific information and consulting procedures in the case of collective dismissals, and workers' rights protection in case the business is transferred".

Para. 2 of art. 5 provides that information is to be done at a suitable time, in a suitable way and with appropriate contents, in order to permit employee representatives to examine the problem adequately and to prepare a consultation, if the case may be.

It should also be mentioned that the legal document does not provide a certain periodicity for informing employee representatives. However, in practice, they are informed during negotiations held in order to adopt a unit-wide employment contract or after submitting the annual fiscal breakdown to the relevant fiscal body.

Failure to comply to this obligation can be fined with a sum of 1000 to 20000 lei.

2.2. The submission, in bad faith, of incorrect or incomplete information

Thus, according to art. 9, lett. c, the transmission, in bad faith, of incorrect or incomplete information, under the conditions of art. 5, para. (2), of the kind that does not permit employee representatives to formulate an adequate viewpoint in order to prepare subsequent consultation, represents a contravention and is sanctioned with a fine of 5000 to 50000 lei. It must be noted that Law 467/2006 does not provide the possibility to pay off half of the minimum amount of the fine within 48 hours!

3. Contraventions regulated by the law of social dialogue no. 62/2010

3.1 Employer's refusal to begin negotiation for the collective work agreement

According to the provisions of art. 129, Law no. 62/2010, negotiations for the collective work agreement is compulsory only for units with a minimum of 21 employees.

The initiative for negotiation belongs to the employer or employer's organisation. The employer or the employer's organisation initiates the collective negotiation at least 45 calendar days before collective work agreements expire or before expiry of the period of applicability for clauses in documents appended to collective work agreements. If the employer or the employer's organisation does not initiate negotiation, this will begin at the written request of the representative

syndicate or the employee representatives, within a maximum of 10 days after communicating the request[14].

It must be noted that the legal text only sanctions not beginning negotiations in order to adopt the collective work agreement at a unit level. As a result, the parties (the employer and the employee representatives / the syndicate) are not obligated to adopt a collective agreement; it is only compulsory for the employer to start negotiations, which can be finalised either by adopting a collective employment contract, by strike or with the parties not reaching an agreement, but without commencing a labour conflict.

4. Contraventions regulated by Government Emergency Ordinance no. 96/2003 regarding the protection of maternity in workplaces[15]

4.1 According to art. 4 of the ordinance, employers are obligated to:

a) prevent the exposure of employees who are pregnant, breastfeeding or returning from maternity leave, to risks that can affect their safety and health,

b) employees who are pregnant, breastfeeding or returning from maternity leave must not be forced to perform work which is damaging to their health, to their state of pregnancy or to the newborn, as the case may be.

Failure to follow these provisions represents a contravention, sanctioned with a fine of 2500 to 5000 lei.

Government Emergency Ordinance no. 96/2003 does not mention the possibility to pay off half of the fine minimum amount within 48 hours.

4.2 Notifying the territorial Labour Inspectorate, the occupational physician and the Public Health Agency regarding an employee's state of pregnancy.

Thus, according to provisions in art. 7, para. 1, within 10 days from being informed by an employee that she is pregnant, has recently given birth or is breastfeeding, the employer is obligated to notify the occupational physician and the territorial Labour Inspectorate in whose circuit they operate. It should be noted that the employee is obligated to inform her employer in writing regarding her pregnancy and to supply documents as proof of her pregnancy (medical certificate that ascertains the pregnancy).

4.3 Keeping confidentiality regarding the employee's pregnancy

In addition, *when pregnancy is not visible*, the employer is obligated to keep confidentiality with respect to the pregnancy and will not inform other employees without the pregnant employee's written approval, and only with the purpose of continuing the smooth conduct of business[16].

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[14] Art. 129 of Law no. 62/2010.

[15] Also see http://legislatiamuncii.manager.ro/a/7186/ce-obligatii-are-angajatorul-fata-de-salariata-gravida. html, accessed on 02.07.2016, at 18:20.

[16] Art. 8 of Government Emergency Ordinance no. 96/2003.

Breaching either of the two obligations constitutes a contravention and is sanctioned with a fine of 2500 to 5000 lei.

Government Emergency Ordinance no. 96/2003 does not mention the possibility to pay off half of the fine minimum amount within 48 hours.

4.4 In the case of an employee who is pregnant, breastfeeding or has recently given birth, the employer is obligated to accordingly modify her work conditions and/or schedule, or, if it is not possible, to reassign her to another position that does not present risks for her health or safety, according to the occupational physician or general practitioner's recommendation, and maintaining her salary income[17].

If the employer, due to an objectively justified reason, cannot adequately modify work conditions and/or the schedule, if it is not possible for her to be reassigned to another position, without risks to her health or safety, employees have a right to maternal risk leave, as follows[18]:

a) before the date when maternity leave is requested, established according to legal regulations regarding the public pensions systems and other social insurance rights, for pregnant employees[19];

b) before returning from compulsory postnatal leave, employees who have recently given birth or who are breastfeeding, if they do not request leave and remuneration for raising and caring for the child until they reach 2 years of age, or, in the case of handicapped children, until 3 years of age[20].

Maternal risk leave can be granted, fully or fractioned, for a period that cannot exceed 120 days, by the general practitioner or a specialised doctor, who will issue a medical certificate with this purpose; however, it cannot be granted simultaneously with other leaves provided by legislation regarding the public system of pensions and other social insurance rights[21].

Breach of these obligations constitutes a contravention and is sanctioned with a fine of 5000 to 10000 lei.

Government Emergency Ordinance no. 96/2003 does not mention the possibility to pay off half of the fine minimum amount within 48 hours.

4.5 Obligation to grant pregnant employees working hour waivers for prenatal medical examinations[22]

According to art. 15 of the Government Emergency Ordinance no. 96/2003, employers are obligated to grant pregnant employees working hour waivers for

[17] Art. 10 of Government Emergency Ordinance no. 96/2003.
[18] Art. 10 of Government Emergency Ordinance no. 96/2003.
[19] Art. 10 alin. 1 lit. a of Government Emergency Ordinance no. 96/2003.
[20] Art. 10 alin. 1 lit. b. of Government Emergency Ordinance no. 96/2003.
[21] Art. 10 alin. 2 from Government Emergency Ordinance no. 96/2003.
[22] See http://www.avocatnet.ro/content/articles/id_43068/Protec%C8%9Bia-maternit%C4%83%C8%9Bii-la-locul-de-munc%C4%83-in-2016-Ce-obliga%C8%9Bii-are-angajatorul.html, accessed on 02.07.2016, at 18:34.

prenatal medical examinations within a maximum of 16 hours per month, if the examinations can only be conducted during work hours, without the diminishing of salary rights.

Working hour waivers for prenatal medical examinations represent a number of free hours, paid by the employer to the employee, during the normal work schedule, in order to conduct prenatal examinations and tests, on the basis of the general practitioner's or the specialised doctor's recommendation.

4.6 The obligation to grant breastfeeding employees two one-hour breaks during the normal work schedule, until the child is 1 year of age.

According to the provisions of art. 17 of the Government Emergency Ordinance no. 96/2003, employers are obligated to grant breastfeeding employees two breastfeeding breaks of one hour each during work hours. These breaks include the time for traveling to and from the place where the child is[23].

At the mother's request, breastfeeding breaks can be replaced with the reduction of her usual work time by two hours every day.

Breaks and the reduction of usual work time, granted for breastfeeding, are included in the work schedule, do not diminish the salary income and are wholly covered by the employer's salary fund.

In the case in which the employer offers special rooms for breastfeeding in his unit, these will fulfill the hygiene conditions according to sanitary norms in force.

4.7 Employees who are pregnant, breastfeeding, or who have recently given birth cannot be obligated to work night shifts[24]

It must be noted that the legal text provides that employees *cannot be obligated.* The legal text does not prohibit the night-time work of said employees, as is the case of, for example, underage workers. As a result, *per a contrario*, employees can provide night work if they give their consent[25].

It is very important to have the consent of an employee who finds herself in one of the three situations: pregnant, breastfeeding, recently given birth. The legal text does not make a difference between tacit or expressed acceptance; however, from our viewpoint, in order to be able to speak about unequivocal acceptance, it is recommended that the employer take a statement from the employee in which she mentions that she consents to work nights. Furthermore, it is recommended that the employer request the occupational physician to issue a proving document in which it will be mentioned whether the employee's health is endangered in the case of night work.

If the employee's health is affected by night work, the employer is obligated, on the basis of the employee's written request and the justifying medical

[23] See Art. 17, para. 1,2,3,4 of Government Emergency Ordinance no. 96/2003.
[24] See Art. 19 of Government Emergency Ordinance no. 96/2003.
[25] *Ibidem.*

document, to transfer the employee to another position with a daytime schedule, while maintaining her monthly gross salary[26].

If the employer cannot offer a position that does not endanger the employee's health, she will benefit from maternity risk leave and allowance[27].

Breach of these obligations constitutes a contravention and is sanctioned with a fine of 5000 to 10000 lei.

4.8 The employer's obligation not to cease work rapports in the case of employees who are on maternity risk leave, maternity leave, leave in order to raise a child who is not yet 2 years of age, or, in the case of handicapped children, 3 years of age; employees who are on leave in order to care for a sick child who is not yet 7 years of age, or in the case of handicapped children, 18 years of age[28].

The interdiction to cease work rapports in the cases above can be extended once, within 6 months after the employee returns to the work unit[29].

This obligation does not exist if dismissal is executed due to reasons that intervene as a result of legal reorganisation or the employer's bankruptcy, within the conditions of the law[30].

Since the provisions from the special laws are far more numerous, the article will be continued with part II which will contain further more analyze of the special laws and it will have the conclusions and the *lex ferenda* proposals.

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9. Labour Code.

[26] Art. 19 alin. 2 of Government Emergency Ordinance no. 96/2003.
[27] Art. 19 alin. 3 of Government Emergency Ordinance no. 96/2003.
[28] Art 21 of Government Emergency Ordinance no. 96/2003.
[29] Art 21 alin. 2 of Government Emergency Ordinance no. 96/2003.
[30] *Ibidem.*

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