



Blurring the Definition of Employment Relations in Russia: Case Law on the General Notion and Some Atypical Forms of Labor

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Transformation of Russian labour law in the last decades shows the clear trend to differentiation and fragmentation with constantly growing number of special norms covering specific (atypical) types of employment relationships. At the same time modern labour law reflects only some of recently appearing forms of employment, such as temporary agency work or telework. The paper deals with the definition of labor relations and some atypical forms of employment.

Keywords: employment relationship, the Labour Code of the Russian Federation, employment contract, case-law, atypical forms of employment.

Neaiškus darbo santykių apibrėžimas Rusijoje: teismų praktika dėl bendrosios idėjos ir kai kurių netipinių darbo formų

Pastarųjų dešimtmečių Rusijos darbo teisės transformacija rodo aiškią diferenciacijos ir susiskaidymo tendenciją, kai nuolat daugėja specialiųjų normų, apimančių specifinius (netipinius) darbo santykių tipus. Tuo pat metu šiuolaikinė darbo teisė atspindi tik kai kurias neseniai pasirodžiusias užimtumo formas, tokias kaip laikinųjų agentūrų darbas ar nuotolinis darbas. Straipsnyje nagrinėjama darbo santykių definicijos ir kai kurių netipinių užimtumo formų problematika.

Pagrindiniai žodžiai: darbo santykiai, Rusijos Federacijos darbo kodeksas, darbo sutartis, teismų praktika, netipinės įdarbinimo formos

1. Determining the Existence of the Employment Relationship in General

1.1. Presumption of an Employment Relationship and the Authority to Determine Its Existence

In 2013, a new article 19.1 of the Labor Code of the Russian Federation¹ (further – the “Labor Code”) Labour Code was introduced² with an aim to establish a presumption of the existence of an employment

¹ Трудовой кодекс Российской Федерации от 30.12.2001 г. №197-ФЗ. *Собрание законодательства Российской Федерации*, 07.01.2002, №1 (ч. 1), ст. 3.

² Introduced by the Federal Law of 28.12.2013 No.421-FZ.

relationship. Taking into account para. 11 of the ILO Employment Relationship Recommendation, 2006 (No. 198) a new detailed article of Labor Code that establishes the presumption of the existence of the employment relationship in the cases of “unavoidable doubt by the judge” was introduced in the end of 2013.³ This norm is the clear sign that in many cases it is very difficult for a judge to make a correct distinction between employment and a civil law contract, which deal with the matters of labor. The case law in this area is abundant. Such criteria as subordination; regulation of the process rather than the result of work; usage by the employer of certain formalities that are due in an employment relationship; the personal scope of work; the existence of analogous work performed under employment contract; the duration or repetitive nature of a relationship, and certain others will be discussed in the paper with illustrations of how frequently courts use them as a marker of existence or lack of existence of the employment relationship.

During the Soviet period, the mainstream approach to the definition of employment relationship was based on three main characteristics. They were called *personal*, *property (material)* and *organizational* attributes of an employment relationship.⁴

These attributes are reflected in the current statutory definition of employment relationships, which is included in article 56 of the Labor Code. According to article 56 of the Labor Code, an “employment contract is an agreement between an employer and an employee, according to which employer obliges to provide employee with work on specified work function, to ensure the work conditions prescribed in the labour legislation as well as in other acts that contain norms of labour law, collective agreements and accords, local normative acts and this agreement, to pay wages in time and in full, while the worker obliges to personally carry out the work function defined by this agreement in the interest and under management and control of the employer, and to observe the internal work regulations adopted by this employer.”⁵ The specific term “work function” is used to underline the distinct character of employment relations compared to civil law relations, and generally means that employment contract regulates the *process* of work itself rather than some material *result* of work, as it would be the case in civil law contracts.

The employment relations (Russian – *trudovye otnosheniya*) are defined in the article 15 of the Labor Code as “the relations that are based on the agreement between the employee and employer concerning the personal and paid performance of work function (the work at certain position in accordance with internal work regulations, profession, specialization and qualification; specific type of assigned work) in the interest, under management and control of the employer, whereas employee follows the internal work regulations, while the employer ensures the work conditions, prescribed in the labour legislation as well as other acts that contain norms of labour law, collective agreements and accords,

³ Art. 19.1 of the Labour Code introduced by the Federal Law of 28.12.2013 No.421-FZ. This new regulation was almost unnoticed in the media and professional society, because this new law contained a detailed regulation of the new “special evaluation of working conditions” procedure performed by the private agencies, which was introduced to substitute the previously working mechanism of state “attestation of workplaces.” The debates concerning this new occupational and safety procedure were so big that fundamental norms on presumption of employment relations, also contained in this law, were out of public attention. See, for example: СКАЧКОВА, Г. С. Охрана труда и специальная оценка его условий. *Трудовое право в России и за рубежом*, № 2, 2014, с. 27–31; Михайлова А. Закон о специальной оценке условий труда, или что стало с аттестацией рабочих мест. *Garant Database*: <<http://www.garant.ru/interview/525921/>>; ЧУДОВА, Е. А. Некоторые проблемы применения законодательства о специальной оценке условий труда. *Трудовое право в России и за рубежом*, № 2, 2015, с. 50 и 53, *et al.*

⁴ See the major writings of this period on the issue: ГИНЦБУРГ, Л. Я. *Социалистическое трудовое правоотношение*. Москва, 1977; АЛЕКСАНДРОВ, Н. Г. *Трудовое правоотношение*. Москва, 1948, *et al.*

⁵ *Sobraniye Zakonodatelstva Rossiyskoy Federazii* of 7 January 2002, No. 1, Item. 3. As amended by the Federal Law of 2 May 2014 No.116-FZ (*Sobraniye Zakonodatelstva Rossiyskoy Federazii* of 12 May 2014, No. 19, Item. 2321).

local normative acts and employment contract.” According to the Labor Code,⁶ the employment relations may only arise upon the conclusion of employment contract. The employment contract may be considered concluded by the court if there will be proof that a person was authorized to conclude the employment contract on behalf of the employer who assigned the work to an employee, even if the contract was not made in writing.

All types of employment relationships (i.e., different categories of employees) or specific situations, such as the transfer of undertaking or others, are covered by the statutory definition contained in the article 15 of the Labor Code.

The criteria of recognition of an employment relationship and an employment contract’s existence follow from their statutory definitions. The criteria that are associated with work instructions, control over the work, and integration may be extracted from the text of Articles 15 and 56 of the Labor Code as follows:

- a) the employment contract is concluded to perform the “work function” (*trudovaya funktsiya*), which is explained in the statutory definition of the employment relationship as “the work at certain position in accordance with internal work regulations, profession, specialization and qualification; specific type of assigned work.” This “work function” is used as a distinguishing marker when a choice is made between civil law and employment contracts. Whereas in civil law contracts the subject of agreement is considered to be some *result* of work, the notion of “work function” means that employment contract rather regulates the work as some continuous *process*⁷;
- b) both definitions of art. 15 and 56 contain the references to the fact that work in the employment contract is done “in the interest of the employer.” This mentioning of an “interested party” is the result of a modification in the Labor Code done in 2014 (see above);
- c) the reference to the “management and control” of the employer was also added to the definitions in art. 15 and 56 by the Labor Code amendment in 2014;
- d) the subordination element of the employment relations is underlined by the reference to the employee obligation to “observe the internal work regulations” that are adopted by the employer. Internal work regulations are the plant-level norms that regulate the issues of the internal organization of work and the discipline. Internal work regulations are adopted⁸ in a procedure of taking into account the opinion of the plant trade union and, “as a rule,” they are made as an addendum to the plant-level collective agreement.

In practice, the subordination element of the employment relations is not limited to the employee’s obligation to observe the internal work regulations. Any other legal local acts of the employer that are applicable to certain employee, are binding upon him or her. Obviously, the employer also has the power to make single-time orders connected with the performance of work if they do not fall outside the scope of the employment contract and are not illegal. There are no known cases where the courts would interpret these definitions in a narrow way and limit the subordination of the employee only to the observance of internal work regulations.

In its Resolution of May 29, 2018, No. 15, the Supreme Court of the Russian Federation repeats the contents of that articles 15 and 56 of the Labor Code⁹ as a list of indicators of employment relationship existence. Further, the Supreme Court states that the existence of the employment relationship may be characterized by the sustainable and continuous nature of relations between the parties, subordination,

⁶ Labour Code, Art. 16, para. 1.

⁷ A. Kurennoy (ed.). *Trudovoye pravo Rossii* (3-d ed.), Moscow, Prospect, 2016, p. 103.

⁸ According to art. 190 of the Labour Code.

⁹ Para. 17 of the Supreme Court resolution of 29 May 2018 No. 15.

and the dependence of work, the execution of work only at a specified profession, qualification, or work position, and the existence of additional guarantees for employees, which are established in the labor law norms.¹⁰ Besides that, the Supreme Court directly quotes the characteristics of an employment relationship, which are listed in Recommendation No. 198 as the guide for the courts in establishing the fact of employment relationship.

1.2. The Case-Law on the Definition of an Employment Relationship

The case law that is directly based on statutory definitions. In a large number of court decisions¹¹ that deal with the qualification of an employment relationship as such, the main indicator of an employment relationship is the fact that the object of a relationship is the *process of work, rather than its result*.

The second commonly used criterion is the fact of *subordination* of the employee to the employer. This criterion is usually repeated as an additional argument in the court decisions that already have references to work as a process and not the result.

Although such a criterion as the *interest* of employer has been added to text of the definitions of employment relationship and employment contract, there does not seem to be any case law that would use it.

The notion of *management and control* by the employer is difficult to distinguish from subordination. However, numerous decisions have direct references to the management and/or control over the process of work by the employer.¹²

¹⁰ *Ibid.*

¹¹ See, eg: Decision of Basmanny District Court of Moscow of 25 July 2011 on case No. 2-1553/11 (hereinafter “Case 2-1553/11”); Resolution of the First Moscow Appeal Arbitration Court of 3 September 2015 No. 01АП-5227/15 (hereinafter “Case 01АП-5227/15”); Resolution of the Fifth Appeal Arbitration Court of 9 July 2015 No. 05АП-5317/15 (hereinafter “Case 05АП-5317/15”); Appeal Ruling of Khanty-Mansiysk Yugra Autonomous Region Court on the case No. 33-2422/2015 (hereinafter “Case 33-2422/2015”); Appeal Ruling of the Saint-Petersburg City Court of 21 October 2012 No. 33-14515/2012 (hereinafter “Case 33-14515/2012”); Ruling of the Supreme Court of the Russian Federation of 17 August 2015 No. 41-ГК 15-14 (hereinafter “Case 41-ГК 15-14”); Cassation Ruling of the Perm Regional Court of 20 April 2011 No. 33-3818 (hereinafter “Case 33-3818”); Decision of the Norilsk City Court on the Case No. 2-873/2011 of 25 March 2011 (hereinafter “Case 2-873/2011”); Appeal Ruling of the Omsk City Court of 12 August 2015 on Case No. 33-5407/2015 (hereinafter “Case 33-5407/2015”); Decision of the Kemerovo City Court of 22 September 2015 on Case No. 33-9847/2015 (hereinafter “Case 33-9847/2015”); Decision of the Yuzhno-Kurilsk District Court of 18 September 2015 on Case No. 2-260/2015 ~ M-240/2015 (hereinafter “Case 2-260/2015”); Decision of Syktyvkar City Court of 8 September 2015 on Case No. 2-6696/2015 ~ M-5212/2015 (hereinafter “Case 2-6696/2015”); Decision of Anapa City Court of 17 September 2015 on Case No. 2-3138/2015 ~ M-2655/2015 (hereinafter “Case 2-3138/2015”); Ruling of the Supreme Court of the Russian Federation of 21 March 2008 No. 25-B07-27 (hereinafter “Case 25-B07-27”); Decision of the Kogalym City Court of 29 June 2012 on Case No. 2-612/2012 (hereinafter “Case 2-612/2012”); Moscow Regional Court Ruling of 23 September 2010 on Case No. 33-18274 (hereinafter “Case 33-18274”); Appeal Ruling of Berezovski Regional Court of 27 October 2012 on Case No. A33-8600/2012 (hereinafter “Case A33-8600/2012”); Decision of Berezovski Regional Court of 25 August 2015 on Case No. 2-847/2015 (hereinafter “Case 2-847/2015”); Decision of Central District Court of Barnaul of 15 June 2015 on Case No. 2-3189/2015 (hereinafter “Case 2-3189/2015”); Appeal Ruling of the Supreme Court of Republic Buryatia of 13 May 2015 on Case No. 33-1589 (hereinafter “Case 33-1589”); Appeal Ruling of the Supreme Court of Republic Tatarstan of 22 June 2015 on Case No. 33-9164/2015 (hereinafter “Case 33-9164/2015”); Appeal Ruling of the Moscow City Court of 8 October 2014 on Case No. 33-26729 (hereinafter “Case 33-26729”); Appeal Ruling of the Khabarovsk Regional Court of 29 January 2014 on Case No. 33-401/2014 (hereinafter “Case 33-401/2014”); Appeal Ruling of the Supreme Court of Sakha Republic (Yakutia) of 27 August 2014 on Case No. 33-2931/14 (hereinafter “Case 33-2931/14”).

¹² Appeal Ruling of the Supreme Court of Republic Tatarstan of 8 June 2015 on Case No. 33-8229/2015 (hereinafter “Case 33-8229/2015”); Resolution of the Arbitration Court of North Caucasus Region of 29 May 2015 on Case No. A32-17466/2014 (hereinafter “Case A32-17466/2014”); Case 05АП-5317/15; Case 2-260/2015; Case 25-B07-27; Case 2-3189/2015; Case 33-1589; Case 33-401/2014.

As long as *internal work regulations* are the formal acts issued by the employer, its application or lack of its applicability to the person who carries out work are rather common for the courts.¹³

Additional indicators used by the courts. There are various indicators that are used by the courts to identify the existence of an employment relationship beyond the formal text of the criteria mentioned in the Labor Code. As it was stated above, the Supreme Court recently reminded¹⁴ other courts that they should use the wide range of evidences in the process of establishing an employment relationship's fact of existence. More specifically, the Supreme Court has suggested that the existence of an employment relationship may be proven by *written evidences*, such as the entry permits to an employer's office; the books of the registration of employees' entrance and leaving the office; the local normative acts of the employer, including shift schedules, the schedules of annual leaves, orders on the posting of employees, documents relying the responsibility for fire safety on the employee, the agreements on full material responsibility of employees, the information concerning the transfer of wages on the employee's bank card; the documents concerning the business activity of an employer, such as delivery notes of an employer filled or signed by the employee, tax invoices, copies of cash-books, journey sheets, applications on goods delivery, certificates of work completed, journals of visitors, mutual correspondence, including the emails; the occupational safety and health documents, such as the journal of registration of instructions on occupational safety at the workplace, the assignment of employee to the medical inspection, the act of medical inspection, the charter of the specialized evaluation of working conditions, as well as *witness evidences*, *audio-* and *video-records*, and other evidences. At least before the adoption of the Supreme Court Resolution of May 29, 2018, the courts were rather conservative on the issue of acceptance of a wide range of evidences by the employees. Whether or not they would become more liberal in accepting different kinds of proofs, this will become clear only after some time after the adoption of this Supreme Court Resolution.

One of the most common indicators currently used by courts are the actions of the employer of certain *formalities that are due in an employment relationship*, despite the fact that the employer claims that the contract is based on civil law. Those may include the listing of the job in the local act that contains the list of company job positions (jobs schedule)¹⁵ or mentioning the occupational duties of a worker,¹⁶ writing down information about the work done into the labor booklet,¹⁷ the conclusion of an obligatory medical insurance contract,¹⁸ issuing the order to hire the worker,¹⁹ notions

¹³ Appeal Ruling of the Moscow City Court of 14 August 2015 on Case No. 33-26150/2015 (hereinafter "Case 33-26150/2015"); Resolution of the Far East Region Arbitration Court of 26 March 2015 on Case No. A24-2955/2014 (hereinafter "Case A24-2955/2014"); Appeal Ruling of the Sverdlovsk Region Court of 18 March 2015 on Case No. 33-3524/2015 (hereinafter "Case 33-3524/2015"); Appeal Ruling of the Pskov Region Court of 29 April 2014 on Case No. 33-642/2014 (hereinafter "Case 33-642/2014"); Ruling of the Moscow City Court of 15 December 2011 No. 4r/4-11228 (hereinafter "Case 4r/4-11228"); Decision of the Kuybyshev District Court of Omsk of 3 August 2015 on Case No. 2-1828/2015 (hereinafter "Case 2-1828/2015"); Case 2-1553/11; Case 05АП-5317/15; Case 33-8229/2015; Case 33-2422/2015; Case 33-14515/2012; Appeal Ruling of Rostov Region Court of 17 November 2014 on Case No. 33-14545/2014 (hereinafter "Case No. 33-14545/2014"); Case 2-873/2011; Case 33-5407/2015; Case 2-260/2015; Case 2-6696/2015; Case 2-3138/2015; Case 33-18274; Case A33-8600/2012; Case 2-847/2015; Case 33-1589; Case 33-9164/2015; Case 33-401/2014; Case 33-2931/14.

¹⁴ Para. 18, Supreme Court Resolution of 29 May 2018 No. 15.

¹⁵ Case 33-8229/2015; Case 33-3818; Case 2-3138/2015.

¹⁶ Case 2-1553/11; Case 33-14515/2012; Case 33-3818; Case 25-B07-27; Case A33-8600/2012; Case 2-847/2015.

¹⁷ Appeal Ruling of the Saint-Petersburg City Court of 27 April 2015 on Case No. 2-2214/2014 (hereinafter "Case 2-2214/2014"); Case 4r/4-11228; Case 33-3524/2015.

¹⁸ Case 4r/4-11228.

¹⁹ Case 33-9164/2015.

on the possibility to post the worker to work-related trips,²⁰ reference to the additional education of the worker on the “ordering party” expense,²¹ or some other formal “labor law actions” on behalf of the employer. Similarly, the lack of such actions may be used by the courts sometimes as evidence of a lack of employment relations. Close to this is the existence of the employment contracts for the performance of the *similar job* within the enterprise, which have been either concluded earlier with the same worker that currently works on civil law terms, or with different employees – simultaneously with the worker in question.²²

The *personal scope* of the relationship is also often used as an indicator of an employment relationship.²³

The existence of a specified *place of work* is also frequently used by the courts.²⁴

Numerous court decisions have references to the regulation in civil law contract of the conditions on *working time or the time of rest*,²⁵ or *wages*.²⁶ Rather common is the notion of the courts that an *employment contract is less specific* on defining the exact obligations of worker (sometimes with additional reference to the lack of single-time character of work).²⁷ Close to this is the reference to the long *duration of contract*,²⁸ or, on the contrary, the lack of such reference as a sign of civil law nature of relations.²⁹ In one of the cases, the fact of performance of *additional work* that is not mentioned specifically in the contract was used as an indicator of the existence of an employment relationship.³⁰ In some cases, there were references to the *standard and repetitive nature of contracts* as an indicator.³¹

Arbitration courts usually examine the cases of disputes between employers and social insurance fund, finding out the bogus civil law contracts designed to avoid paying social insurance dues. As grounds for re-qualification, they use indicators based on the characteristics of the employment contract listed in the Labor Code and some others. Among these grounds, applied by arbitration courts, are: the regularity of the payment of salary,³² a long-continued relationship³³; provisions in the contract, such

²⁰ Case 01АП-5227/15; Case 33-8229/2015; Case 2-3189/2015.

²¹ Case A32-17466/2014.

²² Case 01АП-5227/15; Case 33-14515/2012; Case A32-17466/2014; Case 25-B07-27; Case 4r/4-11228; Case 2-3189/2015.

²³ Case 01АП-5227/15; Case 05АП-5317/15; Case 33-26150/2015; Case 33-3818; Case 33-9847/2015; Case 2-260/2015; Case 33-401/2014; Case 33-2931/14.

²⁴ Case 01АП-5227/15; Case 05АП-5317/15; Case 41-ГК 15-14; Case 33-3818; Case 2-873/2011; Case 33-5407/2015; Case 2-260/2015; Case 33-642/2014; Case 25-B07-27; Case 2-1828/2015; Case 2-3189/2015; ; Case 33-1589; Case 33-401/2014.

²⁵ Moscow Regional Court Ruling of 16 September 201 on Case No. 33-17882 (hereinafter “Case 33-17882”); Case 05АП-5317/15; Case 33-2422/2015; Case33-26150/2015; Case 33-3818; Case A24-2955/2014; Case33-3524/2015; Case 2-873/2011; Case 2-260/2015; Case 33-642/2014; Case 33-18274; Case 2-3189/2015; Case 33-1589; Case 33-26729; Case 33-401/20145; Case 33-2931/14.

²⁶ Case 2-1553/11; Case 05АП-5317/15; Case 33-8229/2015; Case 33-14515/2012; Case 41-ГК 15-14; Case 2-2214/2014; Case 33-3818; Case A32-17466/2014; Case 33-9847/2015; Case 2-3138/2015; Case 33-642/2014; Case 2-612/2012; Case 33-17882; Case A33-8600/2012; Case 2-3189/2015; Case 33-14545/2014; Case 33-401/2014.

²⁷ Case 01АП-5227/15; Case 05АП-5317/15; Case A32-17466/2014; Case 33-5407/2015; Case 2-6696/2015; Case 2-612/2012; Case A33-8600/2012; Case 2-847/2015; Case 2-3189/2015; Case 33-1589; Case 33-401/2014; Case 33-2931/14.

²⁸ Case 01АП-5227/15; Case 05АП-5317/15; Case 41-ГК 15-14; Case A32-17466/2014.

²⁹ Case 33-26729.

³⁰ Case 33-8229/2015.

³¹ Case 05АП-5317/15; Case A32-17466/2014.

³² Ruling of the Federal Arbitration Court of Volgo-Vyatsky district from 16 July 2012 on case № A43-14361/2011.

³³ Ruling of the Federal Arbitration Court of Volgo-Vyatsky district from 16 July 2012 on case № A43-14361/2011; ruling of the Federal Arbitration Court of West-Siberian district from 27 April 2011 on case № A27-6452/2010.

as obligations on liability of damages of the worker,³⁴ an obligation of the worker to fulfill the work personally³⁵ or follow the internal local regulation of the contractor,³⁶ an obligation of the contractor to provide health and safety,³⁷ or social insurance,³⁸ provisions on “work function,”³⁹ provisions on working hours.⁴⁰ This case law is generally in line with the general decisions of jurisdiction courts.

It seems that there is no case-law where the ordinary or arbitration courts were referring to the *economic dependence of the employee* as an indicator of the existence of an employment relationship. This seems to be irrelevant for Russian courts from the point of view of the qualification of the type of relationship.

2. Specific Types of Work Arrangements

2.1. General and Special Norms of Russian Labor Law

Since the Soviet period, Russian labor law operates with a concept of “the unity and differentiation.” The *unity* means that to all types of employment relations, the same basic norms and principles are applied. However, certain specific types of employment relationships are regulated by special norms that reflect the distinct nature of such relationships depending either on the type of employment (e.g., executive staff, home workers, etc.), or gender and/or family status of the worker, or age, or the climate conditions of work (work in the areas of the Far North of Russia), or other factors. The regulation of specific types of work by the special norms is called *the differentiation* of labor law. Some “differentiation” norms of Russian law are criticized by the ILO and Council of Europe as being discriminative.⁴¹ The debate concerning vague boundaries between the differentiation and discrimination in modern Russian labor law is one of the significant topics in academic writing.⁴²

³⁴ *Ibid.*

³⁵ *Ibid.*; Ruling of the Federal Arbitration Court of West-Siberian district from 24 November 2010 on case № A33-15600/2009.

³⁶ *Ibid.*

³⁷ Ruling of the Federal Arbitration Court of Volgo-Vyatsky district from 16 July 2012 on case № A43-14361/2011; ruling of the Federal Arbitration Court of West-Siberian district from 27 April 2011 on case № A27-6452/2010.

³⁸ Ruling of the Federal Arbitration Court of West-Siberian district from 9 November 2010 on case № A66-2676/2010.

³⁹ Ruling of the Federal Arbitration Court of West-Siberian district from 27 April 2011 on case № A27-6452/2010; ruling of the Federal Arbitration Court of West-Siberian district from 9 November 2011 on case № A66-2676/2010.

⁴⁰ *Ibid.*

⁴¹ International Labour Conference, 100th Session, 2011. Report of the Committee of Experts on the Application of Conventions and Recommendations (CEACR). Report III (Part 1A). P. 464; ILO. Report of the Committee of Experts on the Application of Conventions and Recommendations (2012). Individual Observation concerning Discrimination (Employment and Occupation) Convention, 1958 (№. 111). Russian Federation (ratification: 1961) Published: 2013. // Normlex Database: URL: <http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3084477>, *et al.*

⁴² See: ЛУШНИКОВ, А. М. Проблемы дифференциации в правовом регулировании отношений в сфере труда. *Проблемы дифференциации в правовом регулировании отношений в сфере труда и социального обеспечения: Материалы Пятой международной научно-практической конференции*, с. 14–15; КУРЕННОЙ, А. М. Дифференциация или дискриминация? *Проблемы дифференциации в правовом регулировании <...>*, с. 47–50; ЗАЙЦЕВА, О. Б. Влияние отдельных объективных факторов дифференциации на трудовую правосубъектность работника *Проблемы дифференциации в правовом регулировании <...>*, с. 69; САЛИКОВА, Н. М. Проблемы соотношения дифференциации и дискриминации в оплате труда *Проблемы дифференциации в правовом регулировании <...>*, с. 92–97; ЛЮТОВ, Н. Л. Дискриминация и дифференциация в трудовом праве: сравнительно-правовой аспект *Проблемы дифференциации в правовом регулировании <...>*, с. 112–118.

During the last decades the number of the “differentiation” norms, which cover specific categories of workers, is constantly growing. The Labor Code includes 21 chapters which cover special norms on different types of employment relations, including 7 that were introduced after the adoption of the Labor Code in 2001. Separately from these chapters, there are 13 articles of the Labor Code (10 of them are adopted after the Labor Code came into force) that also cover specific categories of employees with a smaller amount of special regulation. Such growth of special “differentiation” norms is a good illustration of the trend on the fragmentation of employment relationships in modern Russian labor law. The introduction of the many new forms of employment relationships is a direct consequence of the changing paradigm of work, its transfer from the industrial nature of the 20th century toward the services types of the post-industrial era.⁴³ The same could be said about the blurring line between the employment relationship and work provided under the civil law contracts. This trend is clearly noted not only in the academic literature in Russia, but also by the legislator.

All specific categories of work that are mentioned in the Labor Code relate to the employment relationship in the narrow sense of word,⁴⁴ i.e. to work which is fully regulated by the labor law norms. The Russian legal system does not operate with a broader concept of a “worker” that includes both employees under labor legislation and civil law contractors. Neither it is aware of some intermediary forms, such as employee-like persons in German or Austrian law or dependent contractors. Irrespective of economic dependence, all contractors that do not fall within the scope of an employment relationship are covered by civil law norms. The only legal link between civil law contractors and employees may be found in the Law “On the Employment of the Population in the Russian Federation,”⁴⁵ which lists civil law contractors as “occupied persons,” i.e., that they can not apply for unemployment benefits.

Some types of work may be regulated by civil or labor law even if the work is completely the same depending on the legal status of employee. For example, the work in cooperatives is regulated by civil legislation, if it is a work of a member of this cooperative. If the cooperative would employ someone who does not take part in cooperative property, such work is subject to labor law regulation.

There is not much clarity regarding the very definition of a “typical” or “standard” employment relationship⁴⁶: any actual employment relation that occurs in practice is regulated by some specific norms that relate to the narrow field of activity. The most common understanding of standard employment is that it is work, characterized by a full-time, open-ended employment contract between an employer and an employee.⁴⁷ It is often added that work according to a standard employment contract is supposed to be performed at the employer’s premises and supposed to be continued indefinitely.⁴⁸ Correspondingly,

⁴³ See: KNEGT, R. Regulation of Labour Relations and the Development of Employment. *The Employment Contract as an Exclusionary Device*. R. Knegt (ed.) Intersentia: 2008, p. 13–46; *Changing Industrial Relations and Modernisation of Labour Law. Liber Amicorum* in Honour of Professor Marco Biagi. R. Blanpain, M. Weiss (eds.) The Hague, et al. Kluwer Law International, 2003; *The boundaries and Frontiers of Labour Law*. G. Davidov, B. Langille (eds.) Oxford and Portland, Oregon: Hart Publishing, 2006, et al.

⁴⁴ This approach contradicts the one used in Serbia, where atypical employment is not considered as employment relationship. See the Jasna Povek chapter in this monograph.

⁴⁵ Ст. 2, Закон Российской Федерации от 19.04.1991 г. №1032-1 «О занятости населения в Российской Федерации». *Собрание законодательства Российской Федерации*, № 17, 22.04.1996 г., ст. 1915.

⁴⁶ See: РОЖНИКОВ, Л. В. Трудовые договоры специальных субъектов трудового права. Дис. на соиск. уч. степени к. ю. н., Москва, 1999.

⁴⁷ See: CASALE, G.; PERULLI, A. *Towards the Single Employment Contract: comparative reflections*. Geneva: ILO, 2014. P. 11 et al.

⁴⁸ DELSEN, L. Atypical Employment. *An International Perspective. Causes, consequences and policy*. Groningen: Wolters-Noordhof, 1995. P. 1; REGALIA, I. New forms of employment and new problems of regulation. *Regulating New Forms of Employment: Local experiments and social innovation in Europe*. London and New York: Routledge, 2006, p. 6, et al.

atypical employment is usually understood as work that deviates from these “classical” characteristics. Russian academic writing generally reproduces this international approach.⁴⁹

The most frequently mentioned forms of atypical employment usually include temporary agency work, work via online platforms, distant work (or telework), job sharing, on-call work, etc. Some of these forms, especially the temporary agency work, are described in terms of *precarious work*.⁵⁰

Some atypical forms of employment are directly reflected in the Labor Code: part-time work, fixed-term employment contracts work (with additional special norms on short-term contracts and seasonal work), a combination of work, distant work, home-based work, rotational work, and temporary agency work, and some others. Certain types of professions and types of employees that are subject to specific regulation by the Labor Code, may also be named atypical: managing personnel, teaching and academic staff, professional sportsmen and trainers, underground workers, the employees of faith-based organizations, transport staff, and some others. It is impossible to provide more or less detailed analysis of all these types of relations and types of work within the framework of the current paper. I will try to give a snapshot overview of only some types of work arrangements which may be called atypical and which are subject of the most significant debate in Russian legal academia, namely the remote work (telework) and temporary agency work.

All these atypical forms of work are debated from the point of view of their conformity to the general definition of employment relations discussed above.

2.2. Remote Work (Telework)

In 2013, a new chapter 49.1 on remote work was introduced in the Labor Code.⁵¹ For quite a long time, Russian labor law was used to regulate home-based work arrangements.⁵² The norms on home-based work are dealing with situations when an employee (in most cases, a person with disabilities)

⁴⁹ DELSEN, L. *Atypical Employment* <...>, p. 1; REGALIA, I. *New forms of employment* <...>, p. 6 *et al.*

See: ГИМПЕЛЬСОН, В.; КАПЕЛЮШНИКОВ, Р. *Нестандартная занятость и российский рынок труда*. Препринт WP3/2005/05. – Москва: ГУ ВШЭ, 2005, с. 3–4. Available at: <https://www.hse.ru/data/2010/05/04/1216408139/WP3_2005_05.pdf>; ЗАКАЛЮЖНАЯ, Н. В. *Нетипичные трудовые отношения: видоизменение классических признаков*. *Научные ведомости БелГУ*. Серия «Философия, социология, право», №16(187), 2014, с. 128; КОРКИН, Е. А. *Отношения по применению нетипичного труда: понятие, виды, общие вопросы правового регулирования*: дис. <...> канд. юрид. наук. СПб., 2012; МОЦНАЯ, О. В. *Нетипичная трудовая занятость: Некоторые проблемы теории и практики*. Автореферат диссертации на соискание ученой степени кандидата юридических наук. Москва, 2009, с. 10; ШАБАНОВА М. А. *Особенности правового регулирования нетипичных трудовых договоров*: дис. <...> канд. юрид. наук. Ярославль, 2008, *et al.*

⁵⁰ Russian sociology and economics have borrowed the notion of precarious work from the Western writing. No legal norms that take into account the precariousness of work have been adopted up to the moment of writing. See more: ВОЛЬЧИК, В. В.; ПОСУХОВА, О. Ю. *Прекариат и профессиональная идентичность в контексте институциональных изменений*. *Terra economicus*, t. 14(2), 2016, с. 159–173; ЛОГИНОВА, Л. В. *Прекаризация в системе социально-трудовых отношений: проблемы и перспективы институционализации*. *Вестник СПбГУ*. Серия 12. Социология, 2016, Вып. 3, с. 34–47; МАСЛОВА, Е. В. *Прекариат как проявление нестандартной занятости и его особенности (на примере Воронежской области)*. *Вестник Омского университета*. Серия «Экономика», 2016, № 3, с. 201–208; ПАНОВ, А. М. *Неустойчивая занятость: концептуализация понятия и критерии оценки*. *Вопросы территориального развития*, №3 3 (33), 2016, с. 1–11. In English see: BIZYUKOV, P. *Precarious employment in Russia: a form of degradation in labour relation*. *Workers and the Global Informal Economy*. S. Routh, V. Borghi (eds.), Routledge, 2016.

⁵¹ Chapter 49.1 of the Labour Code. Adopted by the Федеральный закон от 05.04.2013 г. №60-ФЗ «О внесении изменений в отдельные законодательные акты Российской Федерации». *Собрание законодательства Российской Федерации*, 08.04.2013 г., №14, ст. 1668.

⁵² These norms are currently contained in chapter 49 of the Labour Code. They also existed in earlier Russian and Soviet legislation, well before the adoption of the ILO Home Work Convention, 1966 (No. 177).

performs some work at their home using the materials that are provided by the employer. The most specific part of regulation of home-based work is that a home-worker may use the help of his or her family members in performing the work. Although remote work is sometimes confused with home-based work, its nature is quite different from the latter.⁵³

The remote work is also performed outside the employer's premises. Nevertheless, while the place of performance of home-based work is fixed in the employment contract and may be controlled by the employer, the employment contract for remote work does not contain any notion of a place of work. Therefore, the employer does not have any possibility to control the actual process of the performance of remote work, including the control of such crucial issues as actual working time and safe and healthy conditions of work. The regulation of remote work by the tools of labor law raises the issue of how suitable the traditional indicator of distinguishing the existence of an employment relationship is, i.e., the regulation of process rather than the results of work, to all modern forms of employment relations.⁵⁴

Chapter 49.1 of the Labor Code contains a number of important exemptions from general labour law norms. The remote employees may conclude employment contracts by means of electronic communication (using a digital signature), while other employment relations are supposed to be established by the employment contracts made in writing. Certain other bureaucratic formalities concerning the remote employment relations are allowed to be done in digital form.⁵⁵ The employers of remote employees are relieved from almost all responsibilities on occupational safety and health,⁵⁶ and the regime of working time of such employees is organized by themselves.⁵⁷ Hardly explainable is the norm of the Labor Code⁵⁸ that allows the parties of a remote employment contract to stipulate the additional grounds for dismissal, which could extend normally exhaustive list of dismissal grounds. This provision of Labour Code seems to discriminate remote employees compared to most of other categories of employees without sufficient reasons for that.

Although the new chapter of the Labor Code has somehow filled the regulative gap on telework, significant legal issues still remain unsolved. There is criticism of the new norms because they ignore the issue of transnational remote employment relations, especially in the situations when the employee performs most of the work remotely from another country, but at certain moment comes to the employer's premises in Russia.⁵⁹ Another gap is the lack of regulation of the mixed relations, when a part of work is done by the employee remotely and part of it has to be done at the employer's premises⁶⁰ (e.g., university professors and school teachers examining students' works remotely and going to classes for lectures at the employer's premises). Although all general norms concerning freedom of association,

⁵³ See more about distinction between home based and remote work: ЗАКАЛЮЖНАЯ, Н. В. Дистанционная работа и схожие правоотношения. *Право. Журнал Высшей школы экономики*, 2015, № 2, с. 80–8; ТОМАШЕВСКИЙ, К. Л. Компьютерное надомничество (телеработа) как одна из гибких форм занятости в XXI веке. *Трудовое право в России и за рубежом*, №3, 2011, с. 32–36.

⁵⁴ See: ВАСИЛЬЕВА, Ю. В.; ШУРАЛЕВА, С. В. Содержание трудового договора о дистанционной работе: теоретические аспекты. *Вестник Пермского университета. Юридические науки*, 2015, Вып. 2(28), с. 88–97.

⁵⁵ Art. 312.2 of the Labour Code.

⁵⁶ Except for taking preventive measures concerning the emergency situations at work, allowing labor inspectors to check the occupational safety and health conditions and the execution of their lawful orders, and providing mandatory social insurance for cases of industrial accidents and occupational diseases (paras. 17, 20–21, art. 212 of the Labor Code).

⁵⁷ Art. 312.4 of the Labour Code.

⁵⁸ Para 1, art. 312.5 of the Labour Code.

⁵⁹ GERASIMOVA, E.; KORSHUNOVA, T.; CHERNYAEVA, D. New Russian Legislation on Employment of Teleworkers: Comparative Assessment and Implications for Future Development. *Pravo. Zhurnal Vysshey shkoly ekonomiki*, No. 2, 2017, p. 122.

⁶⁰ *Ibid.*, p. 120.

collective bargaining and prohibition of discrimination are formally applicable to remote employees equally as to all other employees, the practical implementation of these rights may be rather difficult. When it comes to freedom of association and collective bargaining, the physical absence of remote employees at an employer's premises makes it almost impossible for them to organize. In the issues of discrimination, the remote employee would hardly prove that he or she is underpaid for the work of equal value, because the employer can justify the lower payment compared to other workers by the fact that other workers are immediately available to the employers because of their presence at the employer's premises.

2.3. Temporary Agency Work

Temporary agency work was a matter of very heated debates not only in academic literature⁶¹ but also in the mass media and trade union and employment agency public campaigns for about ten years before 2014. In Russia, the situations when an employment agency becomes an employer for an employee with a view of further assigning him or her to the user undertaking is named *zayomniy trud* ("leased labor"), which means that the employee's work becomes a subject of the contract between two other parties, and the employee is "leased" by one party to another. Such a scheme was strongly criticized by trade unions and left-wing media for creating precarious workplaces and weakening the trade unions' possibilities on the representation of workers.⁶² The ILO Private Employment Agencies Convention, 1997 (No. 181) was treated by social partners as a tool to legitimate the scheme of "leased labor"; therefore, Russia did not ratify it. There was also no progress on the adoption of the legislation on temporary agency work for over a decade before 2014. The amendments to the Labour Code and the Law "On the Employment of the Population in the Russian Federation" were introduced by the Federal Law No.116-FZ of May 5, 2014, which came into force on January 1, 2016.⁶³ The new regulation starts with a loud declaration that "leased labour is forbidden."⁶⁴ The "leased labor" is defined as the "work of employees, assigned temporarily by employer to other individuals or legal entities under the contract on provision of labor of employees (personnel)."⁶⁵ However, further on, the law explains that it is permitted to conclude the *contract on provision of labor of employees (personnel) (dogovor o predostavlenii truda rabotnikov (personala))*, with rules of such provision which are set in the new chapter 53.1 of the Labor Code. It is practically impossible to distinguish between the forbidden "leased labor" and a legitimate "contract on the provision of labor of employees."⁶⁶ Therefore, the legal statement about the "prohibition of leased labor" is just a political declaration.

⁶¹ See: ВЛАСЕНКО, М. С. *Проблемы правового регулирования заемного труда в России*. Дис. <...> канд. юрид. наук: 12.00.05 Москва, 2009; КРИВОЙ, Я. В. *Правовое регулирование заемного труда: международно-правовой, сравнительный и национальный аспекты*. Дис. <...> канд. юрид. наук: 12.00.05 Москва, 2006; РЫМ-КЕВИЧ, О. П. *Сравнительно-правовой анализ регулирования отношений по заемному труду*: Дис. <...> канд. юрид. наук: 12.00.05 СПб., 2005; ЛУШНИКОВА, М. В.; ЛУШНИКОВ, А. М. *Заемный труд: исторический опыт и перспективы правового регулирования. Человек и труд*, 2004, № 7.

⁶² See more about these disputes at: НУРТДИНОВА, А. *Заемный труд: особенности организации и возможности правового регулирования. Хозяйство и право*, 2004, № 9. Concerning the actual consequences of application of assigning the employees see: БИЗЮКОВ, П. В.; ГЕРАСИМОВА, Е. С.; САУРИН, С. А. *Заемный труд: последствия для работника*. Москва, 2012.

⁶³ Federal Law No.116-FZ of May 5, 2014 "On changes into particular normative acts" (*Sobraniye Zakonodatelstva Rossiyskoy Federazii* of 12 May 2014, No. 19, Item. 2321). The Law came into force since January 1, 2016.

⁶⁴ Art. 56.1 of the Labour Code.

⁶⁵ Art. 56.1, chapter 53.1 of the Labour Code.

⁶⁶ See also: ЗАКАЛЮЖНАЯ, Н. В. *Заемный труд и неустойчивая занятость: российский и зарубежный опыт. Право. Журнал Высшей школы экономики*, 2015, № 4, с. 123.

Nevertheless, the new legislation sets up a number of significant limitations on the conclusion of such contracts on provision of labour. First of all, the law provides for⁶⁷ the requirements concerning the certification of employment agencies (the absence of tax debts, no criminal record of the chief executive officer of the agency, sufficient capital, etc.). Another requirement for the implementation of provision of labor scheme is the payment for work which must not be lower than the payment for the same work of the employees of the user undertaking.⁶⁸ However, if there are no employees performing the same job, this requirement becomes inapplicable. Even if there are such employees at user undertaking, it would be very difficult for the assigned workers to prove the discrimination, because the amount of wage of each specific employee is personal data that is subject to legal protection.

Although the official employer of the assigned employee is the employment agency, the user undertaking bears the subsidiary liability in respect of assigned employees in cases when the employment agency fails to fulfill its obligations.⁶⁹

More serious limitations for assigning the work are established by the limitation of situations when such a scheme may be used. According to art. 341.2, para. 2 of the Labor Code, it is only permitted to assign employees in three situations: a) personal help to people without taking part in the business activity; b) temporary performance of duties of absent employees; c) knowingly conducting a temporary enlargement of the user undertaking activity (up to 9 months). Nevertheless, it is not quite clear how to deal with a situation when the last (and most popular in practice) ground for using this assignment scheme was implemented with the breach of law. For example, when the labor inspector finds out that in fact the assigned employee was working according to this “temporary enlargement” ground for more than 9 months, there is no explanation on the legal consequences of such a breach for all parties of the contract, including the employee. Neither it is clear what ought to be done if the temporary agency changes the employees for this “temporary enlargement,” while each of them works 9 months or less, but the period of using assigned labour in sum is longer.

In addition to limitation of the cases when the assigned labor may be used, the Law “On the Employment of the Population in the Russian Federation” sets out⁷⁰ the list of situations when it is prohibited to assign the employees. These situations include: a) substitution of strikers; b) performance of work during the layover of the employer; c) substitution of employees lawfully refusing to work without going on strike (cases of delay of payment of wages and danger to occupational safety and health).

Summing up the limitations on using the work through temporary employment agencies, it may be stated that although the very scheme of “leased labor” is quietly legalized despite the loud declarations about its official prohibition, the legal limitations on using this scheme are rather significant. The main limitation for assigning the employees is the limited list of situations, but up to now the practical implementation of the control over the “temporary” character of assigning the employees is not well-established.

2.4. Other Atypical Forms of Work

As it was mentioned above, the Labor Code deals with quite a big number of types of employment relationships that may be labeled as “atypical”: part-time work, fixed and (separately) short term contracts,

⁶⁷ Para. 6, art. 18.1, Law ‘On Employment of the Population in the Russian Federation’.

⁶⁸ Part 2, art. 341.1 of the Labour Code.

⁶⁹ Article 341.5 of the Labour Code.

⁷⁰ Para. 12, art. 18.1, Law ‘On Employment of the Population in the Russian Federation’.

seasonal work, different specific professions, etc.⁷¹ These specific forms of employment covered by the Labor Code associate with recently appearing new forms of organization of work only to limited extent.

The *work via online platforms* and *crowdworking* is widely used in Russia. As in the other countries, one of the most prominent examples is the case of taxi drivers that work via Uber, Gettaxi and Yandex taxi platforms. There were some cases of protests by the drivers against the unfair conditions of work.⁷² Another example is a very popular Youdo online platform⁷³ that connects the customers of any (sometimes quite exotic) services with the people who may provide them. However, all such types of work are not falling within the scope of labor law up to now. There is no known case law up to the moment of writing that would deal with attempts of such workers to achieve the status of employees.

Russian labor law is not equipped to the idea of *job sharing*. The only close form are the *part time work arrangements*,⁷⁴ but they deal with single relationships between employer and one employee who may be asked to work with a flexible schedule.⁷⁵ There are no limitations concerning the minimum proportion of the part time work compared to the normal forty hours per week time, but in any case, the amount of this proportion must be clearly fixed in the employment contract. Therefore, it would be illegal to conclude the so-called zero-hours contract in Russia.

Conclusion

The transformation of Russian labor law in the last decades shows a clear trend toward the differentiation and fragmentation with a constantly growing number of special norms covering specific (atypical) types of employment relationships. At the same time, modern labor law reflects only some of the recently appearing forms of employment, such as temporary agency work or telework. The legislation that regulates temporary agency work draws certain barriers on the way of the most notorious forms of it. The norms on distant work (telework) contain quite serious gaps and ignore the possibility of transnational work according to such schemes. Both atypical forms must theoretically prevent employees from discrimination compared to standard work, but it seems to be very difficult to give the effect to the prohibition of discrimination in such cases.

Other modern types of atypical work, such as job sharing or work via online platforms, remain outside the scope of labor legislation.

The borderline between the work as an independent contractor and employment in many cases becomes more and more obscure, and it is not surprising that case law does not show much uniformity in cases of distinguishing the fact of existence of employment relation. The presumption of the existence of employment in cases of the “unavoidable doubt” of the court, which was introduced in the Labor Code in 2014, is supposed to balance this case law to certain extent, but up to now it is difficult to point out the clear trend in case law determination in favor of employment relations. The economic motivation of employers to hide the employment relationship in order to avoid social security payments

⁷¹ See more on the issue: *Неустойчивая занятость в Российской Федерации: теория и методология выявления, оценивание и вектор сокращения* / Под ред. В. Н. Бобкова. Москва: Кнорус, 2018, с. 260–277; LYUTOV, N.; GERASIMOVA, E. Trying to balance economic and labour rights: the case of Russia. *Research Handbook on Labour, Business and Human Rights Law*. Edited by J.R. Bellace and B. ter Haar. Edward Elgar: Cheltenham, Northampton, 2019, p. 207–228.

⁷² See: КАРАБАЕВ, А. От Яндексa не уедешь. *Gazeta.ru*, 23 September 2016. Available at: <https://www.gazeta.ru/auto/2016/09/23_a_10211681.shtml>.

⁷³ See the Youdo site: <<https://youdo.com/>>.

⁷⁴ Art. 93 of the Labour Code.

⁷⁵ Art. 102 of the Labour Code.

may be a more influential factor on the practice of bogus civil law contracts than the mentioned legal presumption. The motivation to conclude real employment contracts without hiding them under the civil law veil is even weaker, taking into account that the responsibility for such actions arises irrespective of whether the relations between the parties are in the grey zone between employment and civil law and that the parties misinterpreted the vague provisions of law, or whether it is a deliberate misconduct by the employer.

Although this is not yet established in the existing law, the possible prospect for the modification of the legal approach to distinction between the civil law and employment contract may be shifted from the current subordination criteria toward the economic dependence. However, this does not seem to happen in the nearest future because of the conservative attitude to the idea of the modification of labor law by most of the constituents: trade unions and (to a lesser extent) the state.

Blurring the Definition of Employment Relations in Russia: Case Law on the General Notion and Some Atypical Forms of Labor

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S u m m a r y

The transformation of Russian labor law in the last decades shows a clear trend to differentiation and fragmentation with a constantly growing number of special norms covering specific (atypical) types of employment relationships. At the same time, modern labor law reflects only some of the recently appearing forms of employment, such as temporary agency work or telework. The legislation that regulates temporary agency work draws certain barriers on the way of the most notorious forms of it. The norms on distant work (telework) contain quite serious gaps and ignore the possibility of transnational work, according to such schemes. Both atypical forms must theoretically prevent employees from discrimination compared to standard work, but it seems to be very difficult to give the effect to the prohibition of discrimination in such cases.

Other modern types of atypical work, such as job sharing or work via online platforms, remain outside of scope of labor legislation.

The borderline between work as independent contractor and employment in many cases becomes more and more obscure, and it is not surprising that case law does not show much uniformity in cases of distinguishing the fact of existence of employment relation. The presumption of the existence of employment in cases of the “unavoidable doubt” of the court, which was introduced in the Labor Code in 2014, is supposed to balance this case law to certain extent, but up to now it is difficult to point out the clear trend in case law determination in favor of employment relations. The economic motivation of employers to hide the employment relationship in order to avoid the social security payments may be a more influential factor on the practice of bogus civil law contracts than the mentioned legal presumption. The motivation to conclude real employment contracts without hiding them under the civil law veil is even weaker, taking into account that the responsibility for such actions arises irrespective of whether the relations between the parties are in the grey zone between employment and civil law, and that the parties misinterpreted the vague provisions of law, or whether it is a deliberate misconduct by the employer.

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Neaiškus darbo santykių apibrėžimas Rusijoje: teismų praktika dėl bendrosios idėjos ir kai kurių netipinių darbo formų

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S a n t r a u k a

Pastarųjų dešimtmečių Rusijos darbo teisės transformacija rodo aiškią diferenciacijos ir susiskaidymo tendenciją, kai nuolat daugėja specialiųjų normų, apimančių specifinius (netipinius) darbo santykių tipus. Tuo pat metu šiuolaikinė darbo teisė atspindi tik kai kurias neseniai pasirodžiusias užimtumo formas, tokias kaip laikinųjų agentūrų darbas ar nuotolinis darbas. Teisės aktai, reglamentuojantys laikinųjų agentūrų darbą, nubrėžė tam tikras kliūtis žinomiausioms jo formoms kurti. Nuotolinio darbo normose yra gana didelių spragų ir nepaisoma tarptautinio darbo pagal tokias schemas galimybes. Teoriškai abi netipinės formos turi užkirsti kelią darbuotojams diskriminuoti, palyginti su įprastu darbu, tačiau tokiais atvejais diskriminacijos draudimą įgyvendinti yra labai sunku.

Kiti šiuolaikiniai netipinio darbo tipai, tokie kaip darbo pasidalijimas ar darbas per internetines platformas, netaikomi darbo įstatymų taikymo srityje.

Ribos tarp darbo kaip nepriklausomo rangovo ir užimtumo daugeliu atvejų tampa vis labiau neaiškios, ir nenuostabu, kad teismų praktika neparodo daug vienodumo tais atvejais, kai galima atskirti darbo santykių egzistavimo faktą. Įdarbinimo egzistavimo prielaida „neišvengiamų teismo abejonių“ atvejais, kuri buvo įvesta 2014 m. Darbo kodekse, turėtų iš dalies subalansuoti šią teismų praktiką, tačiau iki šiol sunku nurodyti aiškų teismų praktikos nustatymo palankumą darbo santykiams. Darbdavių ekonominė motyvacija slėpti darbo santykius siekiant išvengti socialinio draudimo įmokų gali turėti didesnę poveikį neteisėtų civilinės teisės sutarčių praktikai nei minėta teisinė prezumpcija. Motyvacija sudaryti realias darbo sutartis neslepiančias jų po civilinės teisės šydu yra dar silpnesnė, atsižvelgiant į tai, kad atsakomybė už tokius veiksmus kyla neatsižvelgiant į tai, ar šalių santykiai yra pilkojoje zonoje tarp darbo ir civilinės teisės, o šalys neteisėtai aiškino neaiškias įstatymų nuostatas, ar tai yra tyčinis darbdavio netinkamas elgesys.

Nors tai dar nenustatyta galiojančiame įstatyme, galimybė pakeisti teisinį požiūrį į skirtumą tarp civilinės teisės ir darbo sutarties gali būti pakeista nuo dabartinių pavaldumo kriterijų link ekonominės priklausomybės. Tačiau panašu, kad artimiausiu metu tai neįvyks dėl konservatyvaus požiūrio į daugumos rinkėjų: profesinių sąjungų ir (mažesniu mastu) valstybės požiūrį į darbo teisės pakeitimo idėją.