

ILLEGAL EMPLOYMENT AND THE POSSIBILITY OF REDUCING IT USING WORK OUTSIDE THE EMPLOYMENT

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Abstract: *Under the illegal employment, in the context of our topic, we mean the work without any legal basis (contract) and social control in relation to any obligation of the employer to society – state, regarding the use of such work. This is about a factual work as a form of illegal employment, which is present in not only economically underdeveloped countries but also developed ones. There are many reasons why employers resort to illegal employment as a form of engagement needed work, but its massiveness is caused by, poor economic conditions, some transition problems determined by the influence of market economy, where it often appears, inevitable or uncontrollable redundant manpower from the state and organized social sector. With organized performance of the relevant subjects and appropriate application forms of work outside the employment (temporary and part-time jobs, temporary and part-time jobs with a person who is a member of the youth or student unions, service contract, a contract of representation or mediation, contract for professional training and development, additional work and self-employment), at this stage of development of our society, would significantly affect the return of the legal activities of many forms of illegal work, especially illegal employment.*

Keywords: *illegal employment, factual work, work outside the employment, legalization of work, flexible employment*

THE PHENOMENON OF THE ILLEGAL EMPLOYMENT IN GENERAL

Guaranteed right to work, in accordance with the law as the supreme constitutional principle, is an important manifestation of human rights and freedoms. A guarantee of right to work in accordance with the law means working with all the consequences of legal work, which, as a rule, nobody can renounce. It is understandable that the constitutional and legal concept of legal work has its own negation in the form of work that does not respect the legal requirements and conditions. Here, first of all, we think of illegal employment as the most typical form of unlawful activities violating the principle of equality in the acquisition and enjoyment of the right, in the context of the work and labor, the principle of „legally recognized as a universal principle which is based both in the scope of international instruments dedicated to the freedoms and rights of man and citizen (declarations,

conventions, pacts, charters, constitutions of international organizations), and internal documents of the modern states (constitutions, constitutional acts, laws and other acts).“¹

Illegal employment is a „gray zone“ of engagement as well as work outside social and state control, which as such is a form of exploitation of human labor and injury achieved, declared in legal documents and partially realized in practice, the universal principles of right to work legally based. Without a more detailed and critical review and consideration of the concept of illegal work, which goes beyond the purpose of scientific reviews on this paper, in the context of our topic, we mean the work without any legal basis (contract) and social control in relation to any obligation of the employer to society – state, regarding the use of such work. This is about a factual work as a form of illegal employment, which is present in not only economically underdeveloped countries but also developed ones.

Generally speaking, there are many reasons why employers use illegal employment as a form of necessary labor engagement (discouraging legal provisions governing the scope of work, sometimes complex and long procedure for admission to work, different, economically inadequate, the rates for hiring labor, slow changing of workers' habits in respect of the obligations and standards set by their employer, etc.), it is subject to its massiveness, but poor economic conditions, and some transition problems all the more pronounced influence of the market economy, where it often appears, inevitable or uncontrollable, redundant power from the state and social sectors. Further privatization of the sector is to intensify this process, which will worsen the already bad situation of the early privatization.²

In factual work, such as illegal employment, the worker is deprived of adequate remuneration and rights. In addition to direct damage suffered by the government by non-paying obligations for this work (taxes, contributions and other income), the state suffers collateral damage, as this problem affects many spheres of public and social life and became a priority issue.

CERTAIN ASPECTS OF THE ILLEGAL EMPLOYMENT IN THE REPUBLIC OF SERBIA

1. The state of illegal employment in the context of specific indicators

Serbia is faced with a decades-long problem of the illegal employment, to which it has not provided the appropriate system solutions, but relevant subjects applied and implemented extensive measures that result in limited success of repressive activity, which devalues the concept of a serious lack of long-term preventive measures. A process that requires a permanent multi-purpose general social activity and cooperation at all levels, which can

¹ V. L'egalite en matiere d'emploi dans les legislations et autres normes nationales, Bureau international du Travail, Geneve, 1967., B. Sunderica, Pravo Medunarodne organizacije rada, Beograd, 2001.

² „At this moment the work on the black market, factual work or work where the basis of employment does not exist, at private employers (founders of shops and private companies) in Serbia is around one million workers. These are mostly workers from the age of 16 to 30. They are very heterogeneous in structure of qualifications and occupations. Both sexes are fairly evenly present. This information was presented by the Committee of Federation of Independent Unions of Belgrade, at a press conference held on 26 September 1994.“, I. Tomovic, Fakticki rad u svetlu aktuelnih zbivanja sa posebnim osvrtom na inspekciju rada, „Radni odnosi i upravljanje“, br.12/94, Belgrade, p.32.

seriously affect the progress in the prevention of this pathological socio-economic phenomena.

We have highlighted that the problem of illegal employment is caused by various factors, from inherited relationships, relative poverty and underdeveloped economies and markets, to open borders for immigrants, foreign workers (according to unofficial data, 20 thousand Chinese is illegally employed and the National Employment Service has issued them a few hundred work permits, while the number of illegal foreign workers has reached 2% of total employees, which is not negligible in the circumstances of new announcement of termination of employment contract), whose work is cheap, lacking social control through the work of inspection bodies who do not have sufficient financial and organizational support, many bankruptcies of companies and bad privatization, which resulted in a large number of newly employees who find its opportunity in the underground economy, dealing outside regular business flows in the full sense of the word, and other circumstances of general or individual character.

Estimates of the number of people in Serbia who are working illegally is disturbing, regardless of their relativity. Illegal employment is present mostly in trade, catering, craft, industrial and manufacturing facilities and construction. Supervision of the Labor Inspectorate showed that for the work in the informal economy young people are often required, unskilled workers, with high school education, employed with no regular wages, the unemployed over 40 years of age, recipients of unemployment benefit and social assistance.³

It is estimated that, unofficially, in Serbia there are 500 to 700 thousand workers working illegally, and that only last year 300 thousand people decide to take part in the illegal flow of business.⁴ According to research, the European Commission in July 2008 has shown that 275 thousand people are working illegally.⁵ The underground economy encompass 33.9 of gross national income, i.e. it has taken 40% of the market in Belgrade, and half of the goods arrived illegally in Serbia and the Serbian budget is losing almost 4 billion Euros per year, Union of Employers of Serbia estimates. Economists estimate that non-payment of taxes and contributions on salaries costs the state 11 billion dinars per month.

We have highlighted that the illegal employment is present in developed countries too, but in those countries, it is reduced to a tolerable level and in terms of the state and workers. In the European Union the average number of illegal workers is 6.5 to 7% of total employment, 8% in Italy, for example, while in Serbia is 13% to 14% of employees.

In any case, regarding the reasons for the increase of illegal employment in Serbia, the main reasons for increase are unemployment and taxes. However, illegal employment has other causes and manifestations, including a number of executives and managers of large foreign companies in our country, whose monthly salaries amount to several thousand Euros, do not pay tax on earnings, but rather, as a rule, reported in home country where they are logged on as an employee. Likewise, a work permit is not required for founders of companies and entrepreneurs who run business in Serbia, or for employment based on service contracts, which is favorable circumstance for the occurrence of illegal employment. In addition to non-payment of taxes and obligations, forms of illegal employment are expressed by non-payment of overtime, denial of annual leave and the like.

³ <http://www.mondo.rs>

⁴ <http://www.rts.rs>; <http://www.novosti.rs>

⁵ www.blic.rs

2. General overview of supervision by the inspection work to detect illegal employment

Supervision of labor is governed by the provisions of Articles 157 – 163 of Labor Law, which refers to the application of laws, regulations on labor relations, general laws and contracts, which regulate the rights, obligations, and responsibilities of employees. For the exercise of this control, the labor inspection is in charge and monitoring is carried out directly by the labor inspector.⁶

Labor inspectors point out that the main problem in the struggle against of illegal employment is those who work illegally does not want to cooperate with the authorities regarding their status because the illegal employment is often their only source of income. Then, poor legal decisions and ambiguity of the provisions hinder effectiveness in practice, as the employer is obliged to report the employee eight days after the beginning of his work, upon the determination by the labor inspector that the worker is officially illegal, the employer argues that the period of eight days still ongoing, which is difficult to determine in specific cases. Violation proceedings against employers for failure to report employee are taking long time, and it often happens that the statute is obsolete. In cases where employer is fined with a globe, it is often below the legal minimum (for illegal employment Labor Law provides for a fine of 600 thousand to one million dinars), there are even cases in which people have been sentenced to 10 thousand Dinnars in repeated cases, because the penalties applicable under the Labor Law already referred to the Law on Minor Offences, which are much lower, which devalues the work of state bodies in this field of labor relations. Controls have shown that employers often abuse the institution of probation, with the justification that it is necessary that before the conclusion of the work are convinced whether hired person meets the required criteria.

According to official data, Labor inspections performed more than 390 thousand supervisions, which included monitoring 350 thousand of workers. Of about 6 thousand illegal workers, 5 thousand of them were admitted to the employment relationship by the intervention of inspection.

3. Possible actions and measures of supervision and other entities to reduce illegal employment

General state and social measures and activities to combat illegal employment represents a complex issue that requires special elaboration and analysis and goes beyond the purpose of this scientific review, but we will discuss them basically, while the assumed function and significance of forms of work that are not employment, in order to combat against illegal employment we will elaborate in detail, which is its main purpose and main theme.

The state is obliged to ensure optimal physical, organizational, and technical prerequisites for combating against illegal employment, even under the condition of pronounced recession and the associated poverty of population. However, the current situation does not instill hope in this regard.⁷

Particular attention should be paid to finding ways to, appropriate and effective, reduce taxes for employer for engagement on legal grounds provided by law.

⁶ M. Srdic, „Radno pravo“, Belgrade, 2006, p. 71

⁷ „To what extent a country is determined to deal with the more frequent issue (work on black market) is best seen in the budget that is allocated for the work of the Inspectorate. Modest 34 million dinars were meant for the only institution qualified for the fight against work on the black market“, <http://www.novosti.rs>

It is necessary to intensify the supervision of the work of inspection (because the increase in the number of contract conclusion and registration of the compulsory social insurance after inspection is evident), to improve the processing of misdemeanor charges by providing an objective procedure, using the available legal instruments to impose appropriate penalties and to avoid the frequent cases of obsolescence.⁸

WORK OUTSIDE THE EMPLOYMENT IN SCOPE OF LABOR LAW LEGISLATION OF THE REPUBLIC OF SERBIA

The current Labor Law from 2005,⁹ granted part of the solution from the last Labor Relations Act ("Official Gazette of RS", br.55/96 and 28/2001) and the previous Labor Act ("Official Gazette of RS", no.: 70/2001 and 73/2001) editing work outside the employment, and some institutes are renamed or redefined.

They are adapted as forms of work outside the employment, *temporary and part-time jobs, temporary and part-time jobs over the youth and student unions and working contracts*, just it was determined by two previous laws. The current legislature, again, introduced *additional work* that, as a form of work outside the employment and labor law institute in general, the former lawmaker eliminated for some unknown reason.

According to *Agreement on vocational education and training*, the legislator has returned to the legal regulation of voluntary work that the previous legislature, also unjustly left out as a form of work outside the employment. Notwithstanding the apparent alternation of volunteer work, it is the same labor law institute, in essence.

Agreement on mediation is the service contract, another contract in the function of labor law relations. To what extent will this new base of engaging work outside the employment to be applied in practice and whether, and how much will affect the reduction of illegal unemployment will be seen over time of its application.

Self-employment as a form of engagement work, remained in the structure of the law, as in the previous legal decision, outside the forms of work outside the employment, but with it, perhaps this would highlight its features and flexible forms of employment, but also avoid its functional definition according to these forms of work in conceptual terms. We assume that the determination under this system topic is legal theory, and responses in practice.

Predicting these forms of work outside the employment legislator, objective, consolidated platform from which further, possibly, some theoretical and practical finishing solutions, to create a lasting concept of flexible forms of work and employment, in the presence of international forms, appropriate and adapted to our working conditions.

Our suggestion was to introduce new forms of flexible employment contract-author and license agreement or transfer of patent rights¹⁰ with these forms of work outside the employment, thereby, increasing the number of forms of work outside the employment, create more opportunities for increasing employment in circumstances where unemployment

⁸ „ In the Inspectorate of work several measures are proposed to overcome and reduce the " black labor", such as registration of the concluded contracts at the competent municipal or other governmental authority (employment services, or the Pension Fund), better coordination of inspection services, accelerating infringement procedures, and troubleshooting of limitation and imposing the sentences below the statutory minimum.“, Tanjug, <http://www.mondo.rs>

⁹ „Službeni glasnik RS“, br.24/2005, 61/2005 i 54/2009).

¹⁰ Mr Draško Bosanac, „Ugovori o radu kojima se ne zasniva radni odnos“, Doctoral dissertation, Belgrade, 2006.

is taking very disturbing proportions. State should ensure effective functioning of the labor market, in which the supply and demand would be possible to find many types of work, whose form and method of engagement is not a permanent employment.¹¹

It should be noted that neither our legal theory is not sufficiently to dealt with, or engaged in forms of work outside the employment, and thus there is no doctrinal foundation from which the legislator, taking into account certain legal experiences, could standardize these institutes in the most optimal way clearly-defined and legally enforceable in practice.

POSSIBLE EFFECTS OF WORK OUTSIDE THE EMPLOYMENT TO REDUCTION OF THE ILLEGAL EMPLOYMENT IN THE REPUBLIC OF SERBIA

The employment practices in the Republic of Serbia does not use enough legal ways of working forms that aren't legal employment for several reasons. Thus, we concluded that our legal theory is not sufficiently dealt with the phenomenon of these institutions, which resulted in incomplete legal decisions and non-making conditions that participants, primarily employers, notice the comparative advantages of these institutions, when there is no continual need for engagement work in the form of employment. Employers, not used to a wider offer of legal basis of engagement work often use semi-legal or illegal forms of work, which in its manifestations are often illegal employment. The circumstances of social conditions often favor such solutions, as we have already pointed out, the illegal work is held under the pretext of a difficult economic situation, which the introduction of work in legal fees even make worse. The employer often chooses such work as a temporary, interim solution that often turns into permanent status.

*Appropriate use of these forms of work outside the employment, at this stage of development of our society, would significantly affect the return of the legal activities of many forms of work, especially the illegal employment. To overcome the illegal employment using this work, in which the employer has fewer or different liabilities based on work engagement, it is necessary to continue to create conditions, primarily referring to the creation of certain economic and financial assumptions, through further promotion of market economy and the creation of a labor market with its important attributes (*higher level of work culture, work efficiency, professionalism, competence*), which in our country requires a significant change of awareness regarding the relationship to work.*

*On the serious reduction of illegal employment and unemployment in general, can influence employment policy, which is so placed that it does not neglect any of the available forms of engagement (taking into account the diversity of their current significance for employment). The function of all forms of engagement work, particularly forms of labor outside the employment, is to provide a variety of work and the possibility of using "cover" of the work of different nature and characteristics of different legal grounds. *The usage of forms of work outside the employment is conditioned by the demand for labor in the labor market, which is correlated with the degree of development of society.* The appropriate application of engagement work forms is a sign that society has some insight and control of labor, which*

¹¹ Bosanac, D., „Importance of flexible employment in terms of new technologies“, International journal of economics and law, Novi Sad, 2011.

significantly reduces the presence of informal types of labor, which are beyond social control, such as illegally employment. When the employer has at its disposal a range of legal basis of engagement, he can choose a basis that suits its specific needs and can shape the nature of individual work outside the employment to adjust job requirements or the nature of the engagement of their ability to align with the organizational, technological and personnel and material. He can choose legal basis for engaging that assumes fewer obligations toward the state and thereby avoid the risk of illegal employment, with all the consequences of such illegal behavior.

Based on prior discussion, presented observations, data and capabilities on the impact of individual factors on the subjects and reducing illegal employment, we can assume that in the coming period of increased unemployment, but also, tightened state control of many forms of illegal employment to be translated to a work on some of the legal basis which engages the work outside the employment relation. In some cases it will be a compromise solution that employers will chose to avoid paying strict penalties for using illegal employers, and obligations to the state in the use of illegal employment will be reduces to acceptable level, for them. Social trends and created problems of transition in which the company is, requires intensive and comprehensive control of the legality of work in all sectors, which will further contribute to the practical recognition of some forms of work outside the employment and in mission of the legalization of illegal employment, which will confirm the need for these forms of work, their theoretical and legislative refining and popularizing of their practical application.

RESUME

Illegal employment is a „gray zone“of work engagement as well as work outside the social and state control, work without any legal base of engaging. As such, it is a form of exploitation of human labor and violating of the universal principles of right to work.

Generally speaking, there are many reasons why employers use illegal employment as a form of necessary labor engagement (discouraging legal provisions governing the scope of work, sometimes complex and long procedure for admission to work, different, economically inadequate, the rates for hiring, slow changing of workers' habits in respect of the obligations and standards set by their employer, etc.).

Appropriate forms of work outside the employment (temporary and part-time jobs, temporary and part-time jobs with a person who is a member of the youth or student union, service contract, a contract of representation or mediation, the agreement on professional development and training, additional work and self-employment), at this stage of development of our society would significantly affect the return of the legal activities of many forms of work, especially the illegal employment.

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