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LEASING OF PERSONNEL - CONSEQUENCES ARISING FROM THE LACK OF IDENTITY BETWEEN THE FACTO AND THE IURE EMPLOYER

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Abstract: *This study aims to analyse the erosion of legal rigour and the promotion of contractual freedom, in the name of which, in practice, numerous abuses are committed, which, by definition, test the internal limits of the law and, not infrequently, even the external ones, leading to flagrant violation of the law.*

Specifically, in what follows, we will focus on describing and criticising an increasingly widespread phenomenon - namely that of labour lending, which we define in the broadest sense as a situation in which the worker performs work under the direction and for the benefit of another person, natural or legal, other than his or her employer. In practice, all types of staff leasing are promoted as a response to the need to make employment relationships more flexible and, above all, to business development, as they relieve de facto employers of the 'burdens' associated with managing their own workforce (selection, recruitment, hiring, organising work, guaranteeing workers' social protection).

Keywords: *temporary agency work; posting; flexible working.*

Introduction

As a result of the impact of digital technology, which is turning a new page in the social and economic history of the society, work and labour relations are changing at an accelerating pace. Labour law is 'called upon' not only to keep up with this pace, but also to put forward regulations that succeed in guiding the changes themselves.

Systematic reflection on the individual employment contract is currently under pressure from three converging trends: **(i)** an increase in the variety of manifestations of contractualism in employment relationships; **(ii)** a proliferation of jurisprudential benchmarks; and **(iii)** lack of legal guidance in solving increasingly complex judicial situations

Of these manifestations, those of contractualism in labour relations are as kaleidoscopic as they are saturated with fairly compact manifestations, of which the following are worth mentioning (Athanasiu, 2019, pp. 19- 41):

- The multiplication of types of employment contracts, but also of forms labour subcontracting for different types of services;
- Difficulties for the regulatory and supervisory authorities to keep pace in terms of understanding and adapting to the dynamism, complexity and diversity of new types of work, and, consequently, to regulate or, where necessary, sanction them;
- Diversification of professions, trades, occupations that are regulated by special laws and excluded from the scope of labour legislation (e.g.: cultural workers, domestic workers, nannies);
- Work on digital platforms, with special regard to *crowdwork* and its legal qualification;
- The lease of personnel, through the implementation of legal structures which are not regulated and lead to a lack of identity between the contractual and the *de facto* employer.

Thus, the labour market today is characterised by:

- *Contractual drift whereby the level of social protection specific to standard labour contracts is reduced;*

- *The flexibilization of working conditions is transformed into a source of informalisation.* After the escape from the generalised and often forced labour of the communist period, a period of continuous flexibilization of labour relations followed. Wage labour has declined in weight and quality due to post-communist deindustrialisation, being replaced by cheap informal and fragmented work;
- *The multiplication of subcontracting intermediated by temporary labour agencies, and not only.* Post-communist de-industrialisation was quasi-concomitant with the slow domestic emergence of a small number of multinationals interested in cheap and highly skilled labour, followed by the massive migration of qualified professionals, facilitated by the opening of the European labour market after 1 January 2007, following Romania's accession to the European Union. The domestic labour market was rapidly saturated with job providers and agencies facilitating emigration on a subcontracting basis. Thus, the standard individual employment contract reached a phase of slow regulatory degradation or dilution.
- *New industrialisation and the expansion of digitised services have come with the emergence of new skills and categories of workers and new types of employers, while the individual employment contract has retained its classical structure.* The standard individual employment contract was and still is conceived as a bilateral and personal contract between an employer and a worker. However, joint-stock companies, subsidiaries of multinationals, extended franchising and other variants of corporate management or the new human resource management have opened up new avenues for (sub)contracting labour. Contractual employment has become complemented, if not replaced, by the new human resource management with techniques of recruitment, selection, hiring, professional development etc., where the standard employment contract risks becoming an isolated institution**.**

Such labour market developments have three important negative consequences:

- Destructuring of the normative integrality of labour law and especially of the processes of unitary labour contracting;

- The erosion of legal rigour in the name of 'freedom of contract' and the ongoing flexibilization of labour contracting;
- The progressive weakening and marginalisation of the content of social policies concerning the labour market, the development of human capital and balanced relations between capital and labour.

None of these consequences should be ignored unless major macro-social and legal actions are taken. Correcting and preventing them would be possible, first, by revising the regulatory structure of labour law.

In our view, the way out of this *statu quo* is to review and, implicitly, to innovate the rules applicable to the individual employment contract, which is currently undergoing a process of adaptation to the changes in the field of work and labour relations;

This study sets out to analyse one of the consequences detailed above, namely the erosion of legal rigour and the promotion of contractual freedom, in the name of which numerous abuses are committed in practice, which, by definition, test the internal limits of the law and, more often than not, even the external ones, leading to flagrant breaches of the law.

Specifically, in what follows we will focus on describing and criticising an increasingly widespread phenomenon - namely that of labour lending, which we define in the broadest sense as a situation in which the worker performs work under the direction and for the benefit of another person, natural or legal, other than his or her employer.

The loan of personnel takes various forms in practice, some of which are regulated, such as temporary agency work, secondment (transnational, or secondment based on Art. 45 C. of the Labour Code), and others that "evade" the applicable regulatory framework, such as, but not limited to (a) "virtual secondments"; (b) the employment of a worker by one entity and the *de facto* provision of work for the benefit of several entities belonging, as a rule, to the same group of undertakings as the employing entity; (c) the employment of workers by one entity of the group on the basis of open ended employment agreement and their permanent lease to the other group entities; (d) the lending of staff

disguised in the form of service agreements; (e) co-employment; and (f) employer of record.

In practice, all these types of employee lease are promoted as a response to the need to make employment relationships more flexible and, above all, to *business* development, as they relieve *de facto* employers of the "burdens" associated with managing their own workforce (selection, recruitment, hiring, organisation of work, guaranteeing social protection for workers).

In reality, in addition to these motives, which are not unlawful, companies implementing such models of work organisation are (mainly) seeking to obtain unfair financial advantages in the form of cost reductions as a result of practices such as: (a) setting up letter-box companies in countries with cheap labour or favourable tax treatment for posting allowances and posting workers to countries with a higher level of social protection; (b) granting lower remuneration to "borrowed" workers compared to the level of remuneration enjoyed by workers recruited directly by the companies receiving the labour; (c) circumvention of the limitations imposed by the legislation on the organisation of working time in the case of part-time employment contracts - for the situation of workers shared between companies belonging to the same group; (d) making the workforce more precarious and reducing the level of social protection to which workers are entitled, as a result of the lack of identity between the *de jure* and *de facto* employer.

1. A brief look at the types of labour borrowing covered by the legislation of other countries.

In addition to the legal institutions mentioned above, some countries also regulate other institutions that allow for a worker to have more than one employer.

1.1 *Professional employer organisation* (PEO*)*

By way of example, in the United States of America (USA), professional employer organisations are set up, which are in fact companies specialising in workforce management.

Concretely, these companies deal with all administrative aspects of the labour force, such as the hiring process, preparation of employment documentation, additional documents, payment of social security contributions, etc., while the employer - the beneficiary of the work - concentrates on developing its own business, free from the red tape associated with hiring the workforce.

In this case, the employment contract is concluded between the employee, on the one hand, and the employer - the labour beneficiary, together with the PEO, on the other hand.

The difference between the companies specialised in personnel administration set up in Romania (so-called *outsourcing* companies) and the PEOs is that the PEOs become a party to the employment contracts.

According to the literature (Ramsey, 2024), PEOs provide services mainly for the benefit of small and medium-sized enterprises, on the basis of service provision contracts, in which the parties' responsibilities in their relations with employees are laid down.

Initially (before the 1970s), PEOs operated as specialised staff loan companies (similar to temporary employment agencies), which were used in practice to circumvent pension tax legislation. Thus, in order to circumvent these provisions, employees were dismissed by their employer and then immediately re-hired by companies specialised in loaning personnel, which placed them at the disposal of the dismissing employer (Ramsey, 2024, p. 102)

Over time, other benefits of employee leasing have been identified, with the number of PEOs growing significantly. According to some statistics, there are currently 523 PEOs established in the US, providing services to more than 200,000 small and medium-sized businesses (17% of all employers employing between 10 and 99 people), employing a

combined 4.5 million employees (roughly equal to the number of employees employed by the top four employers in the US)[1].

Turning to PEOs comes with a number of advantages and disadvantages for clients, which can be summarised as follows:

- Advantages:
  - Expert management of labour relations, reducing the risk of violations;
  - Attraction and retention of labour due to the provision of a larger and more consistent benefits package through the PEO;
  - Reducing costs generated by work organisation;
  - Increased efficiency:
- Disadvantages:
  - Limiting autonomy over work organisation;
  - Limiting the client's ability to freely choose the categories of benefits it provides to employees;
  - Additional costs in the price of services charged by PEOs.

Even though the number of PEOs is growing, they are under-regulated, with the industry being the one that has been reluctant to enact legislation to clarify their status.

However, regulations currently vary from state to state and in principle lay down either some authorisation requirements or rules relevant to tax matters - thus not specifically aimed at the area of employment relationships.

By way of example, the *Internal Service Revenue* has adopted a number of rules in this area[2] , the most relevant of which are the following:

- As a general rule, from a tax perspective, the common law employer remains responsible for the payment of taxes and social security

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[1] https://www.napeo.org/what-is-a-peo/about-the-peo-industry/industry-statistics (accessed on 15.03.2025).

[2] https://www.irs.gov/government-entities/third-party-payer-arrangements-professional-employer-organizations (accessed on 5 January 2025).

contributions, with a few exceptions, which require specific certification by the PEO;

- The common law employer is defined as the person for whose benefit an individual performs work as an employee, unless that person does not have control over the payment of remuneration for those services. In these cases, the person who is not the beneficiary of the labour, but has sole control over the remuneration paid to the employee, acquires the status of a legal employer (such as a PEO) - in which case he or she becomes liable for the payment of taxes and social security contributions.
- The tax code does not define the term co-employer and, as such, this concept is not covered by federal law. However, Treas. Reg. 31.3504-2 provides that a person who pays remuneration to individuals performing work under a contract for services may be designated to act as an employer with respect to the payment of remuneration. In this case, the PEO must show that it is an employer or co-employer of the employees performing work for the benefit of the client. Assumption of this capacity may also be implied if the PEO agrees to:
    - Recruit and employ the client's employees or place them at the client's disposal, either on a permanent or temporary basis, or share the specific prerogatives of the employer with the client;
    - Employ the client's employees in his own name and make them available to the client.

1.2 Employer of record (EOR)

In the context of the globalisation of the labour force and the constant attempt by companies to find a workforce to meet their business needs, wherever they may be located, a new form of staff lending has emerged, namely *employer of record.*

In essence, EORs are companies whose business is to hire labour and make it available, usually on a permanent basis, to other companies.

Employers call on the services of EORs when they wish to recruit labour from countries other than the one in which they have their main/secondary headquarters, in order to avoid the bureaucracy associated with managing the workforce - which in this case is

significantly hampered by the absence of an establishment in the employees' country of residence.

Such a practice also existed in the past, when, for the same purpose, employees were recruited in the territory of certain States by subsidiaries of companies, although the labour was performed exclusively for the benefit of the parent companies or other entities in the group.

In concrete terms, the EORs, at the request of their clients, identify the labour force in the territory of the countries where the EORs have their headquarters and, on their behalf, recruit the labour force and manage the employment relationship from start to finish (registration of employment contracts, conclusion of employment contracts, granting of benefits, conclusion of additional contracts, time sheets, suspension of employment contracts, termination of employment contracts, etc.).

EOR differs from both agency work and PEO from at least the following perspectives:

- In contrast to the situation of the temporary employment agency, as a rule, the EOR recruits employees to place them at the client's disposal on a permanent rather than temporary basis; the specific rules of agency work are not applicable;
- Unlike PEOs, in the case of the EOR, only the EOR is party to the labour contract, not the client - i.e. the *de facto* employer of the employees.

Therefore, in EOR, there is a complete separation between the contractual and the *de facto* employer, creating in reality an even more precarious situation for the employees than that of temporary employees, with the only difference that, as we have already pointed out, in EOR, as a rule, employees are recruited on the basis of employment contracts of indefinite duration, to perform work on a regular basis for the benefit of the *de facto* employer.

Among the benefits of the use of EOR by employers[1] , the following have been highlighted in practice:

- Limiting the legal risks associated with employment in jurisdictions where the employer does not have a legal presence and is not familiar with local law;
- Limiting (if not eliminating) any liability in dealing with employees - given that their contractual employer is the EOR;
- Allowing the client to focus on achieving their business and hire labour from anywhere (more efficient, cheaper);
- Attract talent from all jurisdictions, no borders.

It is interesting to note here that according to recent case law of the CJEU, Directive 2008/104/EC *"does not apply to a situation in which, on the one hand, the functions performed by a worker are permanently transferred by his employer to a third undertaking and, on the other hand, that worker, whose employment relationship with that employer is maintained as a result of that worker having exercised his right to object to the transfer of that employment relationship to that third undertaking, may, at the request of that employer, be required to perform on a permanent basis the work contractually owed to that third undertaking and, in that context, be subject, both organisationally and technically, to the management authority of the latter undertaking*[2] *."*

Whilst it is true that this decision was delivered by reference to a rather specific factual context (i.e. an objection to the transfer lodged by an employee in the context of a transfer of undertaking, coupled with a clause in the applicable collective labour contract obliging the transferor in such a situation to retain the employee who objected to the transfer and to make him available to the transferee), nevertheless, in the recitals to

[1] https://unity-connect.com/our-resources/blog/legal-responsibilities-of-an-employer-of-record/ (accessed on 2 January 2025)

[2]LD v ALB FILS Kliniken GmbH, Case c-427/ https://unity-connect.com/our-resources/blog/legal-responsibilities-of-an-employer-of-record/ , EU:C:2023:505.

the above decision, the CJEU advanced a number of arguments relevant[1] to our analysis, namely:

- It follows from the definitions of the concepts of 'temporary employment agent' and 'temporary worker' that the contract of employment must be concluded with a worker for the purpose of placing the latter at the disposal of a user undertaking;
- The employment relationship with the user undertaking must be of a temporary nature;
- The term 'temporary' refers only to the manner in which a worker is made available to that undertaking and should not be interpreted to mean that the user cannot use temporary labour to fill a permanent position;
- Directive 2008/104/EC promotes objectives such as reconciling the professional and personal lives of workers, the flexibility of undertakings, the creation of new jobs or the promotion of temporary workers' access to permanent employment. However, these objectives are not relevant in cases where a worker is made available on a permanent basis.

More specifically, to summarise the above, it follows that, according to the case law of the CJEU, the essence of temporary agency work is (i) the provision of the work and (ii) the temporary nature of the assignments.

It would therefore follow that the provisions of the Directive would not apply to temporary agency workers who make workers available on a permanent basis to their clients, since the requirement that the provision of workers must be temporary is not met.

We consider that, on the one hand, this solution does not take account of the way in which the types of loan of personnel have evolved, multiplied and diversified and, on the other hand, it has the potential to affect the situation of workers employed through EORs to a greater extent than that of any other type of worker who is the subject of a loan of personnel.

[1] Idem, paras 41-47.

We highlight this because, in practice, these workers are left in a *no man's land*, with not even the possibility, according to the case law of the CJEU, for the EOR activity to be qualified as specific to temporary agency work - with the correlative obligation to respect the specific protective measures of temporary agency work for these workers (e.g.: informing the worker, equal treatment between workers employed by the temporary agency and workers recruited directly by the beneficiary of the work, applicability of the terms of collective labour contracts concluded at the level of the beneficiary, etc.).

Moreover, a similar problem exists in the case of outsourcing companies which, under the cover of service provision contracts, lend staff recruited directly by them to their clients, and if these employees are asked to work at the client's premises, the institution of delegation is used, in a manifestly illegal manner.

Despite the fact that EORs openly and constantly promote their business model, including in Romania, and they are not authorised to act as temporary employment agencies, neither at national level nor in other Member States are there any indications that the competent authorities are taking action against such practices or that they are at least endeavouring to better understand this business model and its implications for the status of workers.

Unfortunately, the authorities seem to focus more on classic cases of undeclared work, which are more familiar to them, completely ignoring the implications that new forms of work and, by extension, new forms employee leasing are generating, and which dramatically affect the level of social protection of workers.

The legislative authorities have the same lack of interest in this phenomenon, which is nothing more than a veiled, but equally serious, way of commodifying labour and subordinating the fundamental rights of workers to economic interests.

The consequences of such a business model have been detailed in the preceding paragraphs on several occasions, which is why we will not repeat them here.

In conclusion, however, we would emphasise once again that the growing phenomenon of labour borrowing, which escapes all regulation, represents a real and extremely serious threat to the workers' state and their social protection, which calls for preventive and preventive measures.

In the following, our study will focus on one of the regulated forms of labour borrowing in national law, *i.e.* temporary agency work, analysing its capacity to achieve a balance between capital and labour.

2. Temporary agency work

2.1. *The EU legal framework*

Temporary agency work is regulated at EU level by Directive 2008/104 EC[1]. The Directive was adopted because new forms of work organisation and a greater variety of contractual arrangements for workers and enterprises, which better combine flexibility with security, are needed *(recital 9).* In addition, temporary agency work responds not only to the flexibility needs of enterprises but also to the need of workers to reconcile their professional and private lives. Temporary agency work thus contributes to job creation and to participation and integration in the labour market *(reason 11).*

The aim of the Directive, as set out in Article 2, is to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment is applied to temporary agency workers and that temporary agency workers are recognised as employers.

Account must also be taken of the need to establish an appropriate framework for the use of temporary agency work with a view to contributing effectively to job creation and the development of flexible forms of work.

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[1] Directive 2008/104 EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L327/05.12.2008, p. 9-14

Temporary agency labour is a relatively complex legal construct involving:

(i) Conclusion by the temporary employment agency[1] of a temporary employment contract with a temporary worker[2] , for the duration of one or more assignments ;[3]

(ii) Conclusion by the temporary agency worker of a contract with a user undertaking for the temporary worker .[4]

Even though temporary agency work is frequently encountered in practice and raises many questions of principle, the case law of the Court of Justice of the European Union on the subject is surprisingly scarce (a total of 14 recent decisions, the latest decision on the subject being delivered on 24 October 2024) and covered issues such as:

- *Limiting the number of temporary assignments to the same employer*, on which occasion the CJEU ruled as follows: "The first sentence of Article 5(5) of Directive 2008/104 of the European Parliament and of the Council of 19 November 2008 on temporary agency work must be interpreted as not precluding national legislation which does not limit the number of successive temporary work assignments which the same temporary worker may carry out with the same user undertaking and which does not make the lawfulness of

[1] According to Article 3(b) of Directive 2008/104/EC, a temporary agency is any natural or legal person who, in accordance with national law, concludes contracts of employment or employment relationships with temporary workers in order to place them at the disposal of user undertakings to work on a temporary basis under their supervision and direction.

[2] According to Article 3 lit. (c) of Directive 2008/104/EC, a temporary worker means a worker who has concluded a contract of employment or is in an employment relationship with a temporary employment agency with a view to being placed at the disposal of a user undertaking to work temporarily under its supervision and direction.

[3] According to Article 3(e) of Directive 2008/104/EC, temporary agency work means the period during which the temporary worker is placed at the disposal of the user undertaking to work temporarily under its supervision and direction.

[4] According to Article 3(d) of Directive 2008/104/EC, user undertaking means any natural or legal person for whom and under whose supervision and direction a temporary worker is temporarily working.

recourse to temporary agency work conditional on the indication of reasons of a technical nature or relating to production, organisational or replacement requirements justifying the use of temporary agency work. On the other hand, that provision must be interpreted as precluding a Member State from taking no measures to maintain the temporary nature of temporary agency work and national legislation which does not provide for any measures to prevent successive temporary work assignments of the same temporary worker to the same user undertaking for the purpose of circumventing the provisions of Directive 2008/104 as a whole" ;[1]

- *On the working conditions of temporary workers, the* CJEU ruled that *it is contrary to Directive 2008/104/EC that "the allowance which temporary workers may claim, in the event of termination of their employment relationship with a user undertaking, on the basis of days of paid annual leave not taken and the corresponding holiday allowance, is lower than the allowance which those workers could claim, in the same situation and on the same grounds, if they had been recruited directly by that user undertaking to occupy the same job for the same duration" ;*[2]

- *Applicable social security law in the case of temporary workers employed by a temporary work agency not carrying out substantial activities in the State of establishment* - The CJEU has concluded that a temporary agency worker established in a Member State, in order to be considered to "habitually carry out his activities" within the meaning of Article 12(1) of Regulation (EC) No. 883/2004 on the coordination of social security systems, as amended by Regulation (EU) No 465/2012, in that Member State, it must carry out a significant part of its activities of

[1] JH v KG, Case c-681/19, ECLI:EU:C:2020:823

[2]GD, ES v Luso Temp - Empresa de Trabalho Temporário SA Case c-426/2020, ECLI:EU:C:2022:373. See also CM v Time- Empresa de Trabalho Temporário SA, Case c-311.21, ECLI:EU:C:2022:983; XXX v Randstad Empleo ETT SAU, Serveo Servicios SAU, formerly Ferrovial Servicios SA, Axa Seguros Generales SA de Seguros y Reaseguros, Case c-649/22, ECLI:EU:C:2024:156

providing temporary workers to user undertakings established and pursuing their activities in the territory of that Member State[1] ;

- *The impact of Directive 2008/104 EC in cases where there is borrowing of workers by employers who are not authorised under the law of the Member State of establishment as temporary agency workers* - the CJEU ruling in principle as follows:
  - "The Directive applies to any natural or legal person who enters into a contract of employment or employment relationship with a worker in order to place him at the disposal of a user undertaking for temporary work under the supervision and direction of the latter and who places that worker at the disposal of that undertaking even if that person is not recognised under national law as a temporary employment agency worker since he does not have an administrative authorisation as such;
  - The concept of 'temporary agency work' covers a situation in which a worker is placed at the disposal of a user undertaking by to an undertaking whose business is to conclude contracts of employment or establish employment relationships with workers in order to place them at the disposal of a user undertaking for a given period, if that worker is under the supervision and direction of the latter undertaking and if that undertaking, on the one hand, imposes on him the work to be performed, the manner in which it is to be performed and compliance with its instructions and internal rules and, on the other hand, supervises and controls the manner in which the worker fulfils his duties;
  - A temporary worker placed at the disposal of a user undertaking within the meaning of this Directive must, during his assignment with that undertaking, receive a salary at least equal to that which he would have received if he had been recruited directly by that undertaking[2].

The relevance of these judgments lies in their practical impact in curbing abuses in this area, as they have the effect of discouraging

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[1] Team Power Europe" Eood v Direktor na Teritorialna direktsia na Natsionalna agentsia za prihodite - Varna, Case c-784/19, EU:C:2021:427

[2] LM against Omnitel Comunicaciones SL, Microsoft Ibérica SRL, Fondo de Garantía Salarial (Fogasa),Indi Marketers SL, Leadmarket S, Case c- 441/23, EU:C:2024:916.

practices that are at the margins of legality or even illegal, consisting either in setting up letter-boxes in the territories of Member States with cheap labour or in providing *de facto* staff, simulated in the form of service contracts.

Domestically, temporary agency work is regulated by Articles 88-102 of the Labour Code[1] and H.G. No 1256/2011 on the conditions of operation and the procedure for authorising temporary employment agencies[2].

2.2 Internal legal framework - Sharing of rights and obligations arising from the temporary agency labour contract in the relationship between the temporary employment agency, the temporary employee and the user vs. the protection of temporary workers

The temporary employment contract has a number of features which distinguish it from the standard employment contract, thus giving it a legal status in its own right.

Thus, the triangular relationship, specific to temporary agency work, in which the temporary employee is subordinated to both the temporary employment agent and the user, and in which the latter has both rights and obligations in relation to the temporary employee, implies a sharing of rights and obligations between the parties to the triangular relationship.

However, the absence of precise rules on the division of responsibilities between the temporary employment agent and the user in relations with the temporary employee, coupled with the fact that, although in principle the responsibility for the working conditions of temporary employees belongs, as a rule, to the temporary employment agent, these (i.e. working conditions) are, as a rule, determined by the user (Underhill, 2010, p. 339), in many cases leads to temporary workers being deprived of their statutory rights, as it is already well known that

[1] Republished in Oficial Gazette No 345 of 18 May 2012

[2] Published in Oficial Gazette No 5 of 4 January 2012.

they benefit from less favourable working conditions in comparison to workers employed in traditional forms of employment .[1] (Gravel, 2006, pp. 145-153, Mitlacher, 2005, pp. 370-388).

In this context, it should be recalled that labour law doctrine is unanimous in upholding the negotiated nature of the employment contract (Athanasiu, 2017, pp. 89-104; Ștefănescu, p. 226; Dima, 2017; Panaite, 2017, pp. 98-99; Radu, 2019, pp. 304-331), which implies that the parties are free to negotiate its terms, subject of course to compliance with the mandatory provisions of the law and of the applicable collective agreements [2] (Brun & Galland, 1978, pp. 138-142). It should be recalled here that the relationship of legal subordination, which is specific to labour relations, arises only when the employment contract is concluded . (Athanasiu & Dima, 2003, p. 252; Volonciu, p. 35).

Therefore, at the pre-contractual stage, the parties are equal, and the future employee may negotiate any of the working conditions proposed by the employer, of course, as mentioned, subject to compliance with the rules of Article 38 of the Labour Code.

However, in the case of temporary agency work, the principle of freedom of contract is severely limited by the fact that the essential elements of the employment contract have already been negotiated between the temporary employment agency and the user. This leads to the conclusion that, in principle, the prospective temporary employee has only the possibility of agreeing to the conclusion of the employment

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[1]International Labour Organization, The Role of Private Employment Agencies in the functioning of Labour Markets. International Labour Conference 81st Session, Report VI. Geneva: International Labour Office, 1994; International Labour Organization, Private employment agencies, temporary agency workers and their contribution to the labour market. Issues paper for discussion at the workshop to promote ratification of the Private Employment Agencies Convention 1997 (no. 181). Geneva: International Labour Office, 2009; International Labour Organization, Report III (Part 1B) General Survey concerning employment instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization. Geneva: International Labour Office, 2010.

[2] See Art. 11 and Art. 38 of the Labour Code.

contract on the terms already agreed between the temporary employment agency and the user or, conversely, of refusing the assignment.

Looked at it from this angle, the temporary agency work contract appears to be turning into a contract of adhesion, which once again emphasises the precarious nature of this form of labour.

Of course, it is possible that the view that we have expressed may not always be verified in practice. This is because, in many cases, the provision contract is in the legal nature of a framework contract, which lays down the principles governing the relationship between the parties, with the details of each assignment being determined in concrete terms on the basis of the user's request and specific needs.

In such cases, the temporary employment agency goes through the first stages of the selection process on the basis of the user's request and, subsequently, the candidates chosen by the temporary employment agency are checked by the user without any direct request from the user, in which context those selected for employment have the opportunity to enter into direct negotiations on the terms and conditions of employment with the user, even if there is no direct contractual relationship between the parties.

However, the mere fact that, in practice, situations of the kind described above may also arise is not such as to alter our conclusion that, from a regulatory point of view, the temporary employment contract is, to a large extent, a contract of adhesion.

Therefore, in order to mitigate the effects of such a conclusion, we consider that, *de lege ferenda*, it is necessary to expressly provide for the right of the temporary employee, prior to the conclusion of the temporary agency work contract, to be able to negotiate its terms, either directly or through the temporary employment agency, and, where appropriate, to have the contract of assignment or the legal acts concluded on the basis of it amended to reflect the results of the negotiation.

In this context, we will now turn to analyse the main rights and obligations of the parties to the employment contract, showing how these are concretised in the case of temporary agency work.

2.2.1 Rights of the temporary employee

The analysis of the rights and obligations of employees, as set out in Article 39 of the Labour Code, reveals that in the case of temporary employees, these are exercised/fulfilled both vis-à-vis the temporary employment agent and the user.

(i) Thus, as regards **the temporary employee's entitlement to remuneration for the work performed during the assignment**, he is entitled to receive a salary comparable to that received by an employee recruited directly by the user, who performs the same or similar work to that of the temporary employee[1] (Volonciu, p. 500; Nienhüser & Matiaske, 2006, pp. 64-77).

In addition, the Labour Code[2] stipulates that the temporary employment contract specifies the amount and the methods of remuneration of the temporary employee and enshrines the principle of equal remuneration between temporary employees and those recruited directly by the user. Also, HG no. 1256/2011[3] establishes the users' obligation to provide temporary employees with the same rights as those of employees recruited directly by the user, conferred by law, by the internal regulation or by the collective labour contract applicable at its level, as well as by any other specific regulations applicable to it.

In all cases, throughout the duration of the assignment, the temporary employee shall receive the salary paid by the temporary employment agency.

For the temporary agency to comply with its obligation to pay the temporary agency worker a salary comparable to that paid by the user to employees recruited directly by the user, the user shall inform the temporary agency of the salary rates applicable in his undertaking.

An interesting issue has been raised in the legal literature (Underhill,p. 341) in relation to the relevant provisions of Directive 2008/104/EC.

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[1] See Art. 92 para. (2) of the Labour Code.
[2] Art. 94 para. (2) in conjunction with Art. 96 para. (1) of the Labour Code.
[3] Art. 19 lit. d)

Thus, it was argued (Underhill,p. 341) that the text of the Directive is deficient in that it does not require compliance with the principle of equal pay by taking as a benchmark the comparable worker recruited directly by the user on the basis of an open ended employment contract. In other words, in the author's view, the law is likely to favour abuses, because it allows for the remuneration of temporary workers to be determined by reference to the remuneration received by a worker recruited directly by the user, but who works under another type of atypical contract (e.g. fixed-term employment contract) and who could receive lower remuneration than workers employed on a permanent basis.

Without denying that in practice workers employed under a fixed-term employment contract often do not enjoy the same rights as other workers, however, in the light of the applicable legal provisions, we consider that the above-mentioned view is not well-founded.

In support of our point of view, we recall that Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work[1] also establishes the principle of equal treatment between fixed-term workers and comparable workers with indefinite contracts, except where the difference in treatment is justified on objective grounds (clause 4).

It follows, therefore, from a combined interpretation of the legal texts under discussion, that both temporary workers and fixed-term workers are entitled to equal treatment with workers employed under contracts of indefinite duration, unless the employer can show good reasons justifying different and, by hypothesis, less favourable treatment. Thus, a situation in which a temporary worker's remuneration is set by reference to that of a fixed-term worker, which is lower than that of a comparable fixed-term worker, would amount to impermissible discrimination, which may be relied on by both fixed-term and temporary workers.

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[1] Published in J. Of. L 175, 10.7.1999, pp. 43-48.

In contrast to the above, as we have already pointed out, the obligation to pay wages is incumbent on the temporary employment agency, which must be informed by the user of the applicable wage levels. We consider that, in addition, the temporary employment agency must also take the necessary steps to ensure that the temporary employee enjoys equal treatment in this matter with comparable employees recruited directly by the employer (e.g. by checking in public registers to see whether there is a collective labour agreement concluded at sectoral or group of establishments level applicable to the user and imposing certain wage levels) (Volonciu p. 501).

However, if the user, in bad faith, conceals from the temporary employment agent the amount of the salary received by comparable employees recruited directly by the temporary employment agent, in order to optimise its wage costs, and thus to the detriment of the temporary employee, we consider that the liability of the temporary employment agent cannot be incurred under Article 92(2)(b) of the Staff Regulations. (3), but solely that of the user.

Lastly, as regards the right to remuneration, a final observation must be made, namely that, during the period between assignments, the obligation to pay the temporary employee is, *a fortiori,* incumbent on the temporary employment agency. However, since the temporary employee does not work between assignments, he is not entitled to a salary (i.e. consideration for the work done) but to an allowance.

(ii) As regards **the temporary employee's entitlement to daily and weekly rest and rest leave,** the relevant rules apply without conditions.

Thus, we merely recall here that, according to Article 135 of the Labour Code, "employees are entitled between two working days to a rest period of not less than 12 consecutive hours". Article 137 para. (1) of the Labour Code establishes that the weekly rest period is 48 consecutive hours, usually on Saturdays and Sundays.

The duration of rest leave cannot be less than 20 working days.

Of course, for the sake of clarity, all other legal provisions on the organisation of working and rest time are also fully applicable to temporary workers.

However, as a peculiarity deriving from the specific nature of temporary agency work, temporary employees may be subject to different rules in this area during their assignments with different users, insofar as there are special rules on the organisation of working time at their level, which are more favourable than those laid down by law [1].

As mentioned, Article 101 of the Labour Code requires that the provisions of internal regulations, as well as those of collective labour contracts applicable to employees employed with an individual employment contract of indefinite duration with the user, apply equally to temporary employees during their assignment with the user.

Therefore, during the execution of assignments, the temporary employee shall comply with the rules on the organisation of working time applicable to the user, by virtue of the prerogative of management which the user has over the temporary employee during the period of the assignment (see also Art. 11 para. (3) of HG No 1245/2011).

For the sake of clarity, we consider that the temporary employee will, during this period, also benefit from any paid days off enshrined in internal policies/collective labour agreement adopted by the user, as well as, where applicable, more favourable remuneration for overtime work, night work or work on public holidays[2].

(iii) The right to equal opportunities and equal treatment takes on specific connotations in this area, once again in view of the specific nature of temporary agency work.

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[1] According to Article 11 of the Labour Code, "The clauses of the individual employment contract may not contain provisions to the contrary or rights below the minimum level established by normative acts or collective labour agreements." The provisions of Article 100 of Law no. 367/2022 on social dialogue, published in M. Of. no.1328 of 22.12.2022 , as amended and supplemented, should also be taken into account.

[2] See in this regard Art. 101 of the Labour Code.

The principle of equal treatment is enshrined in general terms in Article 5 of the Labour Code, which states that 'the principle of equal treatment of all employees and employers shall apply in employment relationships'. The following paragraphs of Article 5 define the concepts of direct and indirect discrimination and prohibit such behaviour.

In particular, in the field of temporary agency work, the principle of equal treatment applies both to the relationship between the temporary employee and the temporary employment agency and to that between the temporary employee and the user.

During assignments, the principle of equal treatment is to be analysed primarily by reference to comparable employees of the user. The same applies to the right to dignity at work.

(iv) With regard to the **health and safety at work,** the obligations are shared between the temporary agency worker and the user. Although in a traditional situation, the obligation to ensure health and safety at work is, in principle, incumbent exclusively on the employer, in this case, during the assignment, this obligation is primarily incumbent on the user.

It is worth recalling the provisions of Article 91 para. (1) lit. c) of the Labour Code, according to which the content of the contract of assignment must include clauses on the specific working conditions in which the temporary employee will work, as well as on the personal protective and work equipment that the temporary employee must use. At the same time, Article 98 of the Labor Code provides that during the assignment, the employer is responsible for ensuring that the working conditions of the temporary employee are provided. In addition, if the temporary employee suffers an accident at work or occupational illness, the user is obliged to immediately inform the temporary employment agent.

(v) Temporary agency workers have a number of **collective rights**, which have a number of specific features arising from the specific nature of temporary agency work, namely the right to information and consultation, the right to take part in determining and improving working conditions and the working environment, the right to collective and

individual bargaining, the right to take part in collective action, and the right to form or join a trade union.

For example, Directive 2008/104/EC provides that, with regard to the terms and conditions of employment of temporary agency workers, Member States may allow derogations from the principle applicable in this area by means of collective labour agreements provided that the rules laid down in the terms of the collective agreements are sufficiently precise and accessible to enable the sectors and undertakings concerned to identify and comply with their obligations and the Member States to take the necessary measures to prevent abuse. Furthermore, with specific reference to the information and representation of temporary agency workers, Article 7 of Directive 2008/104/EC provides that 'temporary agency workers shall be taken into account, under the conditions laid down by the Member States, in calculating the threshold above which the bodies representing workers, established by Community and national law and collective agreements, are formed at the level of the temporary agency'.

Furthermore, para. (2) allows Member States to decide that temporary agency workers are to be taken into account when calculating the threshold above which bodies representing workers are formed at the level of the user undertaking, subject to the principle of equal treatment[1](Doerflinger & Pulignano, 2014, pp. 1-10; Pedaci & Burroni, 2014, pp. 169-194).

At the national level, Article 21 of Government Decision no 1256/2011 establishes that the number of temporary workers will be taken into account when establishing the minimum threshold for which

[1] For an analysis of the role of collective bargaining in temporary agency work in the European Union, see J. Arrowsmith, James, Temporary agency work and collective bargaining in the EU, Eurofund, 2011, available at https://www.eurofound.europa.eu/publications/report/2008/industrial-relations/temporary-agency-work-and-collective-bargaining-in-the-eu (accessed 15.03.2025).

the workers' representatives are elected at the user, as if they were directly employed by the latter.

Moreover, Art. 11 para. (3) of Government Decision no 1256/2011 1259/2011 provides that all the basic terms and conditions of work and employment laid down by *inter alia*, the applicable collective labour agreement, as well as by any other specific regulations applicable to the user are directly applicable to temporary employees during the assignment.

At national level (but the same applies to the other Member States of the European Union) there has been no serious concern to regulate the collective rights of temporary workers, the legislation only providing that temporary workers are taken into account when determining the minimum threshold for the election of employee representatives at the user - although, as mentioned above, Directive 2008/104/EC establishes the rule that the trade union rights (*lato sensu)* of temporary workers are exercised primarily in relations with the temporary employment agency.

In our opinion, the main explanation for the situation described above stems from the nature of temporary agency work, which is characterised by a high degree of precariousness. Being fragmented and eminently temporary work, it discourages unionisation and collective bargaining on the status and rights of agency workers.

Thus, it was shown (Heery, & Abbott, In Heery, & Salmon (Eds.), 2000, pp. 155-180) that five types of trade union 'approaches' to temporary agency work were identified, namely:

- Exclusion - where unions disregard temporary agency workers, as they may threaten the permanent workforce and weaken their (i.e. unions') power;
- Service provision - assumes that unions provide *ad hoc* support to temporary workers, but focus on defending the rights and interests of their members;
- Partnership - reflects attempts by trade unions to reach agreements that provide guarantees of job security, but such agreements are more likely to create benefits for permanent employees;

- Dialogue - involves efforts to influence government policy to reduce the vulnerabilities associated with temporary agency work;
- Mobilisation - refers to the trade union movement as a whole and its efforts by its members to fight against injustice in the workplace.

Indeed, the particularities of temporary agency work make it difficult to exercise collective rights, since the participation of temporary agency workers in collective bargaining at the level of the temporary agency is mainly relevant for the regulation of their rights and obligations between assignments, as they are subject to the rules applicable at user level during assignments.

Moreover, taking a step back, it is also difficult to imagine the functioning of a trade union at the level of the temporary employment agency, which would protect the interests of temporary employees (and not only those of administrative staff, who, in principle, work for the temporary employment agency on an indefinite basis), except in situations where employment contracts of indefinite duration are concluded between the temporary employment agency and the temporary employees - which, however, are isolated cases, if not almost non-existent in Romanian practice. Indeed, in such a situation, although it is legally possible to set up a trade union at the level of the temporary agency worker, the fact that temporary employees usually have fixed-term employment contracts and are integrated into user enterprises for the duration of their assignments makes it extremely difficult for such a trade union to function in the medium and long term, and to fulfil its fundamental role of protecting and promoting the rights of all its members (and not only those of 'permanent' employees), particularly through collective bargaining.

Of course, our above allegations should not be interpreted as opposing the establishment of trade unions/representative bodies of temporary agency workers at the level of the temporary agency worker or ignoring the role that they can play in improving the working conditions of temporary agency workers.

On the contrary, we consider that temporary agency workers, like other categories of workers, must be recognised as having fundamental

rights, such as the right to form or join a trade union, to take part in determining and improving working conditions and to bargain collectively.

We therefore consider that, *de lege ferenda*, an appropriate legal framework must be established to guarantee the exercise of collective rights by temporary agency workers, taking account of the, in principle limited, duration of their employment relationship with the temporary agency.

Returning to the provisions in force on the matter, as we have already pointed out, Government Decision no. 1256/2011 limits itself to establishing that the number of temporary employees will be taken into account when determining the minimum threshold for which employee representatives are elected, under the conditions of the law, at the user, as if they were workers directly employed by the user for the same period.

Although we understand the rationale behind this rule, we consider that, in the absence of legislative measures guaranteeing in practice the right of temporary employees to participate in determining and improving working conditions, it (i.e. the legal rule under discussion) does not make a real contribution to the safegurding and promotion of their rights.

(vi) Finally, with regard to the rights of temporary workers to **protection in the event of dismissal,** we consider that this is an illusory right.

Firstly, their (i.e. temporary employees') stability in employment is to a large extent affected by the (in principle) fixed duration of the employment relationship.

Secondly, their position is also 'weakened' by the fact that, according to Article 95 para. (4) of the Labour Code, the temporary employment contract is terminated at the end of the assignment for which it was concluded or if the user waves the employee before the end of the assignment, under the terms of the contract of assignment. At the same time, Article 100 of the Labour Code stipulates that the temporary employment agent who dismisses the temporary employee before the term stipulated in the temporary employment contract, for reasons other

than disciplinary ones, is obliged to comply with the legal regulations on the termination of the individual employment contract for reasons not related to the employee.

The precariousness resulting from the conclusion of a fixed-term employment relationship is therefore doubled by the possibility for the user to terminate the temporary employee at any time, subject, of course, to the conditions agreed in the contract of secondment, which in most cases provides for the user to be liable to pay a penalty for premature and unjustified termination of an assignment, a point to which we shall return in a later section of this study.

2.2.2. Obligations of temporary employees

(i) Like all other employees, **the main obligation of a temporary employee is to fulfil the normal working hours and perform the duties assigned to him under his job description**.

However, although this obligation is formally assumed by the employee vis-à-vis the temporary agency, it is actually discharged in the relationship with the user. In this respect, therefore, the role of the temporary employment agency is merely to 'take over' the rules agreed in the temporary agency contract into the temporary employment contract.

In this case, the peculiarity arises from the fact that both the working hours and duties included in the job description are set by someone other than the employer, i.e. the user. In this case, such a solution is natural, since the beneficiary of the work is the user and not the temporary employment agency.

This line of reasoning is expressly enshrined in Article 91, para. (2) of the Labour Code, which regulates the content of the temporary agency contract and stipulates that it must contain, *inter alia*, clauses concerning the specific characteristics of the job, in particular the qualifications required, the place of performance of the assignment and the working hours, as well as the specific working conditions.

In practice, as a rule, the contract of assignment is concluded first, and the temporary employment contract follows.

This rule has a number of important consequences which, in our view, have not been sufficiently analysed to date, namely that the prior agreement between the temporary agency worker and the user of the temporary work on working hours, job-specific duties and working conditions significantly restricts the temporary worker's freedom of negotiation when concluding the temporary employment contract.

(ii) With regard to **the temporary worker's obligation to comply with labour discipline,** this is mainly enforced in relations with the user, since the work is carried out for the user's benefit.

This conclusion also follows from express legal provisions, such as Article 101 of the Labour Code, according to which "the legal provisions, the provisions of the internal regulations, as well as those of the collective labour contracts applicable to employees employed on an individual employment contract of indefinite duration with the user shall also apply to temporary employees during their assignment with the user[1]."

Given that the temporary employee is integrated into the user's undertaking during his assignment, it is only natural that he should be subject to the rules in force at the user's level.

It can therefore be argued that the principle of equal treatment operates in two senses in this area, i.e. the temporary employee enjoys all the rights recognised in favour of employees recruited directly by the user, but is also subject to the obligations associated with those rights.

For the sake of clarity, it should be pointed out that, as in the case of other employees, the rules on labour discipline must be brought to the temporary employee's attention.

In addition, the actual monitoring of compliance with labour discipline will be carried out by the user and not by the temporary agency, which means that the prerogative of control rests with the user, unless the parties provide otherwise.

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[1] See also Art. 11 para. (3) of HG no 1256/2011.

Interesting issues may arise where the temporary employee commits breaches of labour discipline, given that such breaches are usually committed in relation to a person who is not the employer of the temporary employee (i.e. the temporary employee).

Firstly, the user cannot impose disciplinary sanctions on the temporary employee, since he is not the temporary employee's employer.

In the case of temporary agency work, the subordination of the temporary employee to the user is exclusively a factual situation, from a legal point of view all the rights and obligations arising from the temporary employment contract belong to the temporary employment agent.

Therefore, in the event of misconduct committed by the temporary employee during the assignment any disciplinary sanctions can be imposed only by the temporary employment agent, and, of course, on the basis of information and evidence received from the user.

Therefore, it is recommendable to include clauses in the temporary agency contract (or in any addenda thereto) which lay down specific rules on the disciplinary liability of temporary workers, particularly as regards the rules for organising disciplinary investigations, such as the appointment of a joint disciplinary committee, i.e. one on which both the user and the temporary agency worker are represented.

To conclude our considerations on this subject, it should also be pointed out that if a temporary employee commits disciplinary offences while between assignments (e.g. breach of the confidentiality clause), the temporary employment agency is the only person entitled to decide whether to impose a disciplinary penalty.

(iii) As regards the **temporary employee's obligation to comply with the provisions contained in the internal rules, the applicable collective labour agreement and the individual contract of employment,** we would simply point out that, during the period of assignments, the temporary employee is subject to the rules applicable to the user. In between assignments, of course, the rules applicable to the temporary employee are those applicable to the temporary employment agent (Ținca, 2010, pp. 33-48).

(iv) With regard to **the duty of loyalty**, we it is useful to make the following comments.

As it has been consistently held in the legal literature, the duty of fidelity encompasses the duty of non-competition and the duty of confidentiality (Ștefănescu, p. 316, Volonciu, pp. 198-199).

As far as the temporary employee is concerned, from a formal point of view, the duty of loyalty is owed to his employer, i.e. the temporary employment agency. Consequently, the temporary employee is under an obligation to refrain from committing acts which would breach that duty, such as disclosing information he has acquired access by virtue of his employment relationship with the temporary employment agency, discrediting the temporary employment agency or taking employment with a temporary employment agency - a competitor of his employer.

However, we believe that the specific nature of temporary agency work cannot be disregarded, which means that the work is performed for the benefit of a third party.

In order also to protect the user against possible acts of disloyalty on the part of the temporary employee, the contract of assignment should include clauses on the content of the temporary employee's duty of loyalty, which should further be incorporated into the temporary employment contract.

Another option is for the temporary agency worker to assume a duty of loyalty directly towards the user by signing an agreement with the latter. In this case, the user will be able to hold the temporary employee directly liable in the event of failure to fulfil the obligations under the agreement.

In addition to the above, it should also be pointed out that such obligations may also be incumbent on the temporary employee based on the internal regulations/collective labour agreement applicable to the user, which, for the duration of the assignment and subject to the temporary employee being informed of them, are fully binding.

2.2.3. Rights of the employer/user

As a matter of principle, the employer's rights, as regulated by the Labour Code, are, in the matter under consideration, shared between the temporary employment agent and the user.

For example, for the duration of the assignment, it is the user who determines the temporary employee's duties (even if initially agreed with the temporary employment agency, through the contract of assignment) and it is also the user who issues the instructions binding on the employee (subject, of course, to their legality) and exercises control over the way in which the work is performed.

For the sake of clarity, we consider that the general rules on the determination of work duties also apply in this area, in the sense that the user may not require the temporary employee to perform tasks other than those which fall within the scope of the type of work agreed in the temporary employment contract and which are closely linked to the duties set out in the job description.

As regards the individual performance objectives and the criteria for assessing them during the period of the assignment, it is for the user, as the beneficiary of the work performed by the temporary employee, to set them.

As regards the finding that disciplinary offences have been committed and the application of disciplinary sanctions, as indicated in another section of this study, we consider that this prerogative belongs to the temporary employment agency, in its capacity as the temporary employee's employer.

Consequently, in the absence of a direct legal link between the temporary employee and the user, the latter cannot impose disciplinary sanctions on the temporary employee.

2.2.4. Obligations of the temporary agency worker/user

The first of the employer's responsibilities governed by the Labour Code concerns the employer's **obligation to inform employees** about the working conditions and matters concerning the conduct of the employment relationship.

In the case of temporary agency work, this obligation is fulfilled in relations with the temporary employee by both the temporary employment agent and the user.

Thus, firstly, Article 91(1)(a) of the Labour Code provides that the temporary agency worker must be the employer of the temporary worker. (1) lit. c)- d) of the Labour Code stipulates that the contract of assignment must include clauses on the specific working conditions, the individual protective and work equipment that the temporary employee must use, as well as any other services and facilities for the temporary employee. The working conditions are therefore, in principle, fixed by the user, who then negotiates them in concrete terms with the temporary agency worker.

Article 94, para. (2) of the Labour Code stipulates that, in addition to the elements set out in Articles 17 and 18, the temporary employment contract shall specify the conditions under which the assignment is to be carried out[1] . According to Article 11 of Government Decision no. 1256/2011, if the temporary work assignment proposed by the temporary employment agent may endanger the life and physical and/or mental integrity of the temporary employee, the temporary employee is entitled to refuse the temporary work assignment. In such a case, the employee's refusal to carry out the assignment must be in writing, and the temporary agency staff member is prohibited from ordering dismissal on that ground.

In addition to the above, HG no. 1256/2011[2] also establishes a number of specific obligations for the user, namely:

- to inform temporary employees of all existing vacancies, with a view to ensuring equal opportunities with other employees with an

[1] The full text of Art. 94 para. (2) provides as follows "the temporary employment contract shall specify, in addition to the elements provided for in Art. (1), the conditions under which the assignment is to be carried out, the duration of the assignment, the identity and location of the user, as well as the amount and the arrangements for the temporary employee's remuneration.".

[2] Art. 19 of GD 1256/2011.

individual employment contract of indefinite duration with the user, for obtaining a permanent job, by posting a general notice in a place accessible to all employees working at the user in question;

- provide the temporary employee with access to the vocational training courses it organises for its employees
- make information on the use of temporary agency workers available to employees' representatives as part of the general information on employment;
- provide temporary employees with the same rights as those of employees employed under an individual contract of employment with the user, conferred by law, by the internal rules or collective labour contract applicable to the user, and by any other specific regulations applicable to the user;
- to provide and present accurate and factual information on the use of temporary employees when trade unions or, where appropriate, employees' representatives, established in accordance with the law, request the employment status of their own staff.

As regards the obligation to inform the temporary employee, in the first instance, this is carried out by the temporary labour agent, who will inform the employee of the elements concerning his/her employment relationship.

The content of the information obligation may vary according to whether the temporary agency contract is concluded for one or more assignments or for an indefinite period.

Thus, if the temporary agency contract is concluded for several assignments, it should also contain information on the conditions under which the temporary agency worker is to remain available between assignments, the amount of money to which he is entitled during this period, and any rights and obligations arising during this period.

In the following, we will focus on another type of borrowing frequently encountered in practice, namely secondment in the context of transnational service provision.

Conclusions

Labour law is not only expected to adapt to the new transformations. That would be too little. Many changes need to be anticipated, direct participation in European lawmaking needs to be intensified and changes need to be accompanied by creative and comprehensive national implementation. In addition, entrepreneurs are expected to improve their knowledge and anticipation of the social and economic implications of the new labour law.

A contrary approach creates the growing risk that labour will be seen as a commodity (O'Higgins, 1997, pp. 225-234)[1] and that pecuniary gain will take precedence over fundamental rights and individual self-realisation.

The principle that ”labour is not a commodity” is more than just a regulation contained in various international treaties; according to international law specialists (Starke, 1989, p. 77), it is a fundamental reference for public policies concerning the organisation and management of work.

In conclusion, the fundamental rights of workers cannot under any circumstances be subordinated to economic interests, let alone treating labour as any other type of good, the trading of which is governed by the

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[1] As early as the middle of the 20th century, the General Conference of the International Labour Organisation adopted, at its 26th Session in Philadelphia on 10 May 1944, the *Declaration of Philadelphia on the aims and purposes of the International Labour Organisation (*Declaration of Philadelphia of the International Labour Organisation. Declaration concerning the aims and purposes of the International Labour Organisation, https://www.ilo.org/legacy/english/inwork/cb-policy-guide/declarationofPhiladelphia1944.pdf . Accessed: March 2025. For the full text of the Philadephia Declaration see: Constitution of the International Labour Organization, Geneva, 1992, p. 22- n4.)[1] , which reaffirms the fundamental principles of the Organisation, and in particular the one concerning the idea that ***labour is not a commodity.*** The origin of the expression "labour is not a commodity" has been presented in detail by Paul O'Higgins. According to O'Higgins, it was the Irish economist John Kells Ingram who first coined the phrase "labour is not a commodity" in a speech to the 1880 Dublin conference of the British Trades Union Congress (TUC).

principle of contractualism. This is because ”the way in which the employment relationship is structured, as well as the contribution of legal values that it includes - safe and healthy working conditions, equal treatment under the law, the right to a decent income, the right to rest, etc. - forges its legal physiognomy, illustrating, through the essential nature of the elements that make it up, the values of society and of the individual” (Athanasiu, 2019, p.41).

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