ON THE REPRESENTATION OF EMPLOYERS IN EMPLOYMENT RELATIONS

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Abstract

According to the norms of Ukrainian legislation the institute of representation belongs to the sphere of Civil Law of Ukraine. At that the researchers of the science of the civil law have pointed out and emphasized the peculiarities of representation in different areas as sharing some common features it possesses different contents. The abovementioned peculiarity of representation has been attracting attention and is still under the research by scientists-laborers whose views on the presence of representation in the Labor Law are at times oppositional. The following are among those scientists: B. K. Behichev, O. V. Brylova, N. D. Hetmantseva, L. V. Zaitseva, M. S. Kaminska, V. H. Melnikova, V. O. Protsevskiy, S. M. Prylypko, H. A. Trunova, H. I. Chanysbeva, O. M. Iaroshenko and others. Despite numerous scientific debates in this area the topicality of the suggested subject of the research still remains extremely significant which is mainly predetermined by the absence of the norms on the regulation of the relations of representation in the current Law Code on Labor. This is why the aim of this research is to determine the possibilities of representation of employers according to the norms of Labor Law both in individual and collective labor relations alongside with the analysis of problematic issues in this area and the ways of their solution.

Keywords:

law, employment, management.

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On the Representation of Employers in Employment Relations

Before moving on to the subject of the research itself we should determine what is meant by the notion of employer. We would like to point out that the Law Code on Labor of Ukraine does not operate the abovementioned notion using instead such terms as “the owner of the enterprise, institution or organization or an authorized person or organization.” Alongside with that the current labor legislation of Ukraine contains the definition of “employer” which is being interpreted differently in different legal acts. Thus, according to Article 1 of the Law of Ukraine “On Organizations of Employers, their Associations, Rights and Guarantees of their Activity” [1: 216] such subject is defined as a legal body (enterprise, institution, organization) or individual entrepreneur which uses the work of physical persons within the boundaries of labor relationships. At the same time, according to Article 1 of the Law of Ukraine “On Professional Associations, their Rights and Guarantees of their Activity” the employer is either the owner of the enterprise, institution or organization regardless the type of its ownership, activity type and sphere of activity or an authorized authority (manager) or an individual who use hired labor in accordance with the law [2: 397]. A definition similar to the latter is also given in Article 1 of the Law of Ukraine “On the Protection of Labor” [3: 669]. Taking into consideration all the abovementioned, we may state that a legislator will use various approaches to the definition of the term “employer”. Whereas the Code of Laws on Labor and the Laws of Ukraine “On the Protection of Labor” and “On Professional Associations, their Rights and Guarantees of their Activity” determine legal representatives of a legal body or an individual who use hired labor, the Law of Ukraine “On Organizations of Employers, their Associations, Rights and Guarantees of their Activity” names immediate employers. These inaccuracies in the interpretation of such a significant subject of labor law lead to controversy among the scientists as well as in the law application practice.

Thus, either legal body or an individual may act as an employer; both are first of all subjects of civil legal relationships and both are granted civil legal capability which is different form their labor legal capacity. At that, the latter is not the same for an individual employer and for a legal body employer.

According to Article 92 of the Civil Code of Ukraine a legal body obtains civil rights and obligations and exercises them via their authorities that act according to statutory documents and the law. The procedure of formation of legal body authorities is determined by the statutory documents and the law. In cases predetermined by the law a legal body may obtain civil
rights and obligations and exercise them via its members. An authority or an individual who, according to the statutory documents of a legal body or the law, acts on the behalf of a legal body is obliged to act in the name of a legal body, conscientiously and rationally, and not to exceed their authority.

Taking into consideration this provision it is possible to state that labor agreements with hired workers on behalf of a legal body are drawn up by their representatives. Thus it is impossible not to mention that such views are not supported by all the scientists; some representatives of the labor law science deny the possibility of representation in labor relationships in general. Their position is mainly based on the following arguments.

Firstly, some scientists emphasize that personal character of labor legal relationship does not allow the replacement of subjects of both labor and closely connected to those legal relationships [4: 176 – 220]. Indeed, Article 30 of the Code of Laws on Labor of Ukraine emphasizes that a worker shall perform their duties personally and shall not sub-delegate their execution to the other party except for the cases predetermined by the law. But the abovementioned means that the regulations of the current legislation regarding the personal execution of their functions concern the worker and not the employer – neither a legal nor a physical body. This is why a legal body in labor relationships is represented by a designated person, for example the director or a manager of an enterprise. In this concern it would be rather logical to ask who signs the labor contract with the director or manager if he/she is the representative of a legal body. It is quite logical that the above-mentioned persons may not sign a contract with themselves. At that the dubious status of a manager of an organization as a managing authority and a hired worker leads to a range of problems and controversies as well as to competition between the norms of civil and labor law. Labor function of a manager is reflected in managing the industrial, administrative, financial and economical activity of an enterprise and organization of its functioning. In their turn, regulation of relationships regarding the management of corporate relationships is regulated by the civil legislation. This is probably the reason why current Code of Laws on Labor of Ukraine does not contain an obligation to draw up strictly a labor agreement and not civil-legal one with e.g. a manager or the director of a legal body except for the necessity to draw up a labor agreement in the form of contract in some cases predetermined by the Laws of Ukraine (part 3 Article 21 of the Code of Laws on Labor of Ukraine). This is the reason why labor legislation predetermines the Standard Contract with a manager of an enterprise which is owned by the state [5].
At the same time the representatives of an individual employer are not mentioned in the Code of Laws on Labor of Ukraine. According to the statement that a private individual is first of all a subject of civil relationships if we recognize the incapability of an individual employer who uses hired work according to the law or, for example, the owner of an enterprise (if we talk about private property) then, to our mind, this may lead not only to termination but also to changes in labor relationships because, as it is well known, a guardian is designated for an incapable person, who acts in their name and on their behalf. According to Article 71 of the Civil Code of Ukraine, if the person under care is an owner of real estate or property which needs constant management, the guardian may with a permission of the guardianship authority manage the property or transfer it to another person via an agreement. Thus, a guardian in the name of an incapable owner of an enterprise may manage this enterprise. In order to provide stability in labor relationships (which the owner of an enterprise is actually interested in) a guardian shall bear all the responsibilities of the employer regarding salary payment, provision of proper working conditions etc. Such circumstances do not contradict the character of labor relationships in any way. When it comes to an individual employer, everything depends on the reason why they hired the workers (a worker). If there is no longer a necessity for a worker to execute their duties due to incapability of an employer, then it is rather appropriate to terminate labor agreement [6].

Secondly, while analyzing the labor legislation it turns out that the regulations of transfer of authorities to representatives within financial, procedural or processual legal relationships are already regulated by the norms of other areas of law. But the above said does not mean that representation as a legal category is not peculiar for labor law at all [7: 7]. Moreover, the subjects of the Labor Law of Ukraine are organizations the main aim and matter of activity of which is the representation of rights and legal interests of both employees and employers. Regarding the representation of the latter the Law of Ukraine “On Organizations of Employers, their Associations, Rights and Guarantees of their Activity” determines that organization of employers and their associations are formed and act in order to represent and protect the rights and legal interests of employers in economic, social, labor and other spheres including the relationships with other parties of social dialogue. Thus the main functions of an organization of employers and their associations are the representative and protective ones. The aim of formation of organizations of employers and their associations determined their main tasks among which are
provision of representation and protection of rights and legal interests of employers in the relationships with the executive authorities, local administration authorities, professional unions, other civil organizations, enterprises, institutions, organizations and their authorities.

Organizations of employers and their associations in order to achieve the maximum effective execution of their tasks regarding the protection and representation of the rights and legal interests of their members may be recognized as self-regulatory organizations according to the procedure determined by the law. In order to realize the aims and tasks of self-regulatory organizations, organizations of employers and their associations are seen as social businesses.

On September 21, 2002 the Federation of Employers of Ukraine was formed; since January 1, 2003 it has been a full member of the International Organization of Employers. It corresponds with the criteria of representation on the national level which gives the Federation the right to participate in collective negotiations on the drawing up of General Agreement, to delegate representatives to the National Three-Party Social and Economic Council, to the authorities of management of funds of compulsory state social insurance and other three-party authorities of social dialogue, participation in international events etc [8].

It is necessary to point out that in European Union, according to the principle of freedom of association determined by § 1, Article 12 of the EU Charter on Fundamental rights, employers and employees have the right of association in order to protect their social and economic interests. Each employer and each employee is free whether to join or not such organizations and shall not experience any professional or personal harm due to this [9]. This is why on the basis of the Law of the European Union European social partners were created. In particular the following organization were recognized as suprasectoral social partners on the side of employers Industrial Association of Europe – INICE, CEEP - the European Centre of Employers and Enterprises, the European Association of Craft, Small and Medium-sized Enterprises – UEAPME [10: 406].

Apart from that, collective labor relationships are not limited by relationships on social partnership. They also include relationships regarding settlement of collective labor disputes. Thus, the Law of Ukraine “On the Procedure of Settlement of Collective Labor Disputes (Conflicts)” [11: 227] determines that by order the interests of an employer in the collective labor dispute (conflict) on the level of enterprise may be represented by other
person, organization of employers and association of employers organization.

Regarding the peculiarities of the representation of employers in individual labor legal relationships we should point out that we agree with H. M. Nikolaichenko who emphasizes that via a drawn up labor agreement employees act as voluntary representatives of an enterprise; they either act on its behalf having correspondent authority (legal advisors, authorized persons etc) or act without an official authority (sales assistants, cashiers, clerks serving the customers via drawing up agreements). In the abovementioned cases a labor agreement is the ground for the occurrence of representation which possesses suprasectoral character [12: 821].

Thirdly, according to some scientists an organization possesses no other legal relationships with the third parties except for labor legal relationships as the latter are the employees. This is why it is not correct to talk about internal representation between an employer and an employee. To our mind this point of view is rather controversial and thus we agree with L.V. Zaitseva who emphasizes that besides labor legal relationships within an organization there are relationships of social partnership, participation of employees and their representatives in the establishment of working conditions, professional training, retraining etc. Some of these relationships require more than two subjects. These are relationships on social partnership when representatives of the parties are granted independent authorities, rights and obligations by the law and realize those rights and execute the obligation of those who they represent. These are relationships on settlement of collective labor disputes with similar conditions for the representatives of the parties which are in dispute. And if there is no third party in labor legal relationships and there is no replacement of the subject of legal relationship when employers fulfill their authorities, it does not mean that there are no relationships “employer - representative” [7: 7].

Thus the representation of rights and legal interests of employer is determined and allowed by regulations of both labor and civil legislation. Representation of an employer within individual labor relationships is executed by virtue of the legal nature of employer according to the norms of the civil law if we refer to employer-legal body or in other cases determined by the law if we refer to individual employer.

Representation of the employers within collective labor legal relationships is executed either by organization of employers and their associations, which were formed in order to represent employers, or by another person.
References


