

FLEXIBILITY OF LABOR LAW IN THE FIELD OF EMPLOYMENT AS AN ELEMENT OF THE WELFARE STATE

FLEXIBILIDADE DA LEGISLAÇÃO TRABALHISTA NO CAMPO DO EMPREGO COMO UM ELEMENTO DO ESTADO SOCIAL*

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Abstract: The article analyzes one of the types of atypical employment – remote work and the adopted amendments to Chapter 49.1 of the Labor Code of the Russian Federation. The authors consider remote work as a special form of employment that allows using labor resources during a pandemic and other emergencies more efficiently, reflecting the flexibility of legal regulation of labor relations in the Russian Federation. The authors analyzed certain provisions of labor legislation in the field of remote employment, and also used research methods such as historical, controversial, involved, deduction, identification-legal analysis. The importance of remote employment has been determined, which consists in the ability to work in the conditions of the modern distribution of the population, the use of innovative technologies, the development of the labor market, reflecting the improvement of the social role of atypical employment, the economic and technical development of the country. Authors analyzed the legal guarantees of remote workers in the performance of their work duties. Attention has been drawn to the positive and negative aspects of the legal regulation of remote employment. The article paid attention to the systemic problems in establishing the working conditions of remote workers. The article also revealed the problems of applying the hotel provisions of the Labor Code of the Russian Federation and substantiates the directions for overcoming them.

Keywords: Flexibility of labor law. Remote labor. Remote workers. Working conditions of remote workers.

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Resumo: O artigo analisa um dos tipos de emprego atípico - trabalho remoto e as emendas adotadas ao Capítulo 49.1 do Código do Trabalho da Federação Russa. Os autores consideram o trabalho à distância como uma forma especial de emprego que permite utilizar os recursos de mão-de-obra durante uma pandemia e outras emergências de forma mais eficiente, refletindo a flexibilidade da regulamentação legal das relações de trabalho na Federação Russa. Os autores analisaram certas disposições da legislação trabalhista no campo do trabalho à distância, e também utilizaram métodos de pesquisa como histórico, controverso, envolvido, dedução, identificação-análise legal. Foi determinada a importância do emprego à distância, que consiste na capacidade de trabalhar nas condições da distribuição moderna da população, no uso de tecnologias inovadoras, no desenvolvimento do mercado de trabalho, refletindo a melhoria do papel social do emprego atípico, o desenvolvimento econômico e técnico do país. Os autores analisaram as garantias legais dos trabalhadores à distância no desempenho de suas funções de trabalho. Foi chamada a atenção para os aspectos positivos e negativos da regulamentação legal do emprego à distância. O artigo prestou atenção aos problemas sistêmicos no estabelecimento das condições de trabalho dos trabalhadores à distância. O artigo também revelou os problemas de aplicação das disposições hoteleiras do Código do Trabalho da Federação Russa e fundamenta as orientações para superá-las.

Palavras-chave: Flexibilidade da legislação trabalhista. Trabalho à distância. Trabalhadores à distância. Condições de trabalho dos trabalhadores à distância.

1. INTRODUCTION

The current realities associated with the pandemic test the flexibility of labor law in the field of regulating labor relations in harsh conditions. They dictate to us the use of remote forms of implementation of labor relations in the field of hired labor. There has been a trend towards the peculiarities of the legal regulation of remote workers for several decades. Remote work was in demand for employees who did not assume long-term interaction with the employer. Currently, the popularity of attracting employees to work on the terms of concluding a remote work contract is growing. The contingent of people who want to work remotely, as well as intermediaries in this area, is expanding, which makes such employment a profitable business. It is fair to note that previously, de facto employers used a remote form of employment, but the legal vacuum in this area did not allow even the elements of remote work to be widely used.

2. METHODOLOGY

We consider the introduction of remote employment in modern labor relations, analyzing the content of this form of employment and the mechanisms of implementation. The article highlights the peculiarity of the legal regime of remote work as an element of the flexibility of labor law and its socialization. In this regard, we will analyze certain provisions of labor legislation in the field of remote employment, identify its shortcomings

and contradictions and formulate proposals aimed at improving them. We used such research methods as historical, logical, induction, deduction, comparative legal analysis and synthesis, analogy, and other methods of scientific cognition.

3. RESULTS

Reflecting current trends, the Labor Code of the Russian Federation (State Duma of the Federal Assembly of the Russian Federation, 2001) in 2013 fixes in its content Chapter 49.1, devoted to the legal regulation of the work of remote workers. Article 312.1 establishes the concept of remote work, the peculiarity of which is that the employee performs his/her duties outside the stationary location of the employer but under his/her control, which provides for interaction between the parties to the employment contract within the framework of the employee's performance of his/her labor functions. The purpose of this chapter of the Labor Code of the Russian Federation is to consolidate the features of the relationship between an employer and a remote employee, the possibility of applying general provisions of labor law to them, protecting the labor rights of remote workers. Thus, the new institute of Russian labor law has formed the basis for the legal regulation of the labor of employees who perform their labor duties remotely as remote workers.

The condition differentiating the employment contract for remote work and other related civil law contracts is the condition of the indispensable control over the labor process on the part of the employer as a qualifying condition. Control can be carried out in various forms, including the use of the Internet, which does not contradict the main provisions of Article 15 of the Labor Code of the Russian Federation on the emergence of labor relations.

Remote work involves a pre-planned model of labor relations, where the employee's distance from the employer's location is accompanied by the commission of certain significant legal actions through electronic document management (Bezbakh et al., 2018, p. 244). This is the employment contract itself, the order for hiring, changing labor relations, and various local acts of the organization, with mandatory confirmation of the employee's familiarization with them through a written record. The specified document flow acts as a technical and organizational method that ensures the interests of participants in labor relations.

Hence, participants in labor relations who perform their labor duties outside the employer's location use an independent legal regime that takes into account these features and is applicable in different circumstances. Realizing the social function, labor law should have the legal tools for the mass application of certain rules of remote work. However, there is a contradiction between Articles 312.1. and 67 of the Labor Code of the Russian Federation regarding the mandatory written form of an employment contract, where there is no clear indication of the form of its proper registration. Having legalized the remote performance of a labor function, the legislator did not include the electronic form of an employment contract in Article 67. In turn, the civil legislation recognizes an electronic document as a kind of written form (Article 434 of the Civil Code of the Russian Federation (State Duma of the Federal Assembly of the Russian Federation, 1994)). The need to maintain electronic document flow through an enhanced version of an electronic signature also introduces certain difficulties in regulating the procedure for concluding an employment contract of this type. Such gaps in legal regulation serve as an obstacle to the practical application of certain provisions of Chapter 49.1. of the Labor Code of the Russian Federation (Koncheva & Odintsov, 2018, p. 27).

Currently, we see a sharp expansion of remote work as the primary task of labor law, where labor duties are performed in the interests of the employer, under his/her control and subordination to the terms of the employment contract. The role of the employer in this issue is complicated by providing the employee with stable and effective information resources for the use of information and communication technologies, which will reflect the level of flexibility of the labor process in the form of flexplace – a flexible workplace or home-based work – work located at home, remote work – distant work (Stepanov, 2013, p. 11). Legislatively, the typology of the types of remote work is not fixed, it can be determined at the level of a local act of a particular organization, which will reflect the structuring of the management of the employee's labor duties by the employer. A modern broad example of the use of remote work is distance learning at all levels of education. However, it should be noted that the full application of distance learning in the educational sphere does not give the desired results and its application should be combined with traditional forms of education.

It follows from the above that when choosing a specific form of remote work, it is necessary to take into account the level of information and communication technologies and resources, the training and qualification of personnel, covering the costs of employees

in connection with performing work outside the organization, the intensity of such work, the motivation and content of remote work, and so on (Zakalyuzhnaya, 2019, p. 38).

It should also be noted that the content of Chapter 49.1. regulates individual labor relations, and entire labor collectives are forced to switch to remote work mode during the pandemic. The domestic labor law does not contain this specific feature of labor in the field of collective labor rights of wage labor participants. In this case, the problem regarding the implementation of these collective rights indicates a change in both the traditional approach to the concept of "labor collective", its properties and essence during the transition of the entire organization to the remote work mode, and the need for employee representation when solving issues of the development and functioning of the organization. It is necessary to take into account both international experience and the experience of foreign countries that have been using remote labor for a long time (Tarusina et al., 2017, p. 87). Moreover, the issues of the flexibility of labor relations become a priority, including the guarantee of certain security following general legal principles and social responsibility (Smirnov & Strus, 2015, p. 7). When implementing a remote work regime, it is necessary to provide not only issues of interaction between an employee and an employer, but also interaction between each employee among themselves, performing labor functions aimed at a single result. So far, the empirical base of such interaction is just beginning to accumulate and law enforcement practice is being formed, which has not answered the questions we have raised. In the future, there will be a lot of unresolved problems in the implementation of both distant work and remote work, which indicates the need to make additions and changes to the regulation of labor relations and the current Labor Code of the Russian Federation.

The ILO has repeatedly stressed in its decisions the need to improve the flexibility of the legal regulation of labor relations, but while respecting the inviolability of standard forms of the labor process. This inviolability acts as a legal guarantor of the labor rights of employees, and the introduction of more flexible forms of wage labor serves as an indicator of maintaining a balance of the interests and rights of employees and the interests of employers and the state. The expansion of the use of telecommunications technologies in labor relations allows a large number of employees to continue performing their work duties during the pandemic when it is impossible to work in the usual conditions (Baieva et al., 2017; Vasileva et al., 2016). New working conditions should be provided for when adopting acts of social partnership, realizing the economic public interests and private legal interests of employees and employers.

The mass application of telecommunications technologies in labor relations was an incentive for the legislator to adopt innovations and additions to the Labor Code of the Russian Federation. Objective economic and other reasons also served as a kind of the impetus for the use of new forms in the field of labor relations (Klyukovskaya et al., 2018, p. 262). However, in the conditions of the pandemic that began in early 2020, it was not immediately possible for all employers to successfully switch to remote work, which was caused not only by technical difficulties but also by the lack of legal mechanisms at that time.

4. DISCUSSION

Firstly, a draft federal law "On Amendments to the Labor Code of the Russian Federation regarding the regulation of remote work" was developed on June 16, 2020 (State Duma Committee on Labor, Social Policy and Veterans Affairs, 2020), which was widely discussed by the Russian public. However, the adopted amendments to the Labor Code of December 29, 2020 (State Duma of the Federal Assembly of the Russian Federation, 2020), made significant changes to the previously published draft. The current Labor Code of the Russian Federation has abandoned the category of "remote work" and work outside the workplace at the employer is regulated by the norms on remote and home-based work. The identity of the "distance work" and "remote work" concepts follows from Article 312.1 of the Labor Code of the Russian Federation.

This work meets such characteristics as – it is performed outside the place of work provided by the employer, regulated by the concluded employment contract, controlled by the employer, carried out through information and telecommunication networks, the Internet, and public communication networks.

The Labor Code of the Russian Federation provides for the performance of remote work permanently or temporarily. In turn, temporary remote work can be performed temporarily, but not more than six months, and periodically, alternating remote work with work at a stationary workplace. These relations are formalized by an employment contract or an agreement to it. Remote relations can also be established by local acts of organizations.

When concluding an employment contract on remote work, the employer is obliged to comply with the rules of Article 57 of the Labor Code of the Russian Federation, indicating the employee's place of work. In practice, the indication of the

employee's home address is applied to remote workers, which brings the performance of the labor function closer to homework. Following Article 209 of the Labor Code of the Russian Federation, a workplace is a place where an employee must be or where he/she must arrive in connection with his/her work and that is directly or indirectly under the control of an employer. A remote worker freely chooses a place of work and it is unlimited by the law, which means that it does not represent a workplace in the concept of Article 209 of the Labor Code of the Russian Federation. The clarification of the place of work for a remote employee also does not play a special role, as an additional condition of the employment contract. The legislator does not make any reservations for remote workers in the case of indicating the place of work, so employers use various mechanisms for determining it when registering labor relations.

We emphasize that there are no special conditions of an employment contract in Article 57 with a remote employee as requirements for providing an employee with telecommunications or other technical means. Article 312.6 is intended to eliminate this gap, where the employer is obliged to provide the necessary equipment and means of communication to the employee. It is logical to specify in Article 312.2, which regulates the conclusion of an employment contract with a remote employee, that it should include the amount, procedure, and terms of compensation payments for the use of equipment and software, and hardware belonging to the employee. After all, this labor legal relationship is precisely a labor one, realizing its main feature – the performance of the labor function by the employer's dependant, which should be subject to legal monitoring (Zhuzhgov et al., 2019, p. 2340).

It is also not entirely clear whether the use of public information and telecommunications networks by a remote worker is exclusive, or whether the possibility of cross-border remote work is allowed, which covers a much larger number of people who want to work remotely. The law has focused on the specifics of the order of interaction between a remote employee and an employer according to Article 132.3, but there is still a gap in this issue, which restricts remote work to computer homework. Probably, in specific cases, an employee can independently determine the place of work and this should be provided for in the concluded employment contract on remote work, as well as the conditions for the method of exchanging documents between its parties.

Facilitating the interaction of a remote employee and an employer is a condition of the law on the use of an enhanced unqualified signature by an employee and familiarization of the employee with local acts of the organization in any form.

In any case, remote work, including temporary work, is formalized by an employment contract or an additional agreement. The Definition of the Judicial Board for Civil Cases of the Supreme Court of the Russian Federation dated September 16, 2019, No. 5-KG19-106 (Supreme Court of the Russian Federation, 2019) considers that such a contract is legal with the actual admission of an employee to work with the knowledge of the employer. Therefore, not all employers conclude additional agreements with employees when transferring them temporarily to remote work. This practice should be excluded by the Labor Code since this Code regulates the most important social relations for society and the state (Navasardova et al., 2018, p. 189).

As for Article 312.4, which regulates the work regime of a remote employee, which is designed independently, the employee has the right to independently establish this regime, but it is better to stipulate this condition in the employment contract or an additional agreement to it, which will eliminate further disputes about unjustified calls to work or determining the hours of the interaction of the employee with the employer.

Analyzing Article 312.6, we see that it is necessary to include a condition on the amount of compensation, the procedure and terms of payment for the employee's use of his/her technical means and expenses related to the performance of labor duties outside the place of work in an additional agreement to the employment contract for the temporary transfer of an employee to teleworking. This is also quite rare in practice and leads to restrictions on the rights of remote workers. The general rule of the Labor Code of the Russian Federation on the use of the personal property of an employee Article 188 provides for compensation not only for the use but also for the depreciation of the employee's property and the costs of its use. The law leaves the specification of such compensations to local regulation, without providing for compensation for the depreciation of used equipment.

It is also surprising that the title and content of Article 312.5 of the law do not correspond. After all, the declaration that the salary cannot be reduced for a remote employee is not an additional guarantee for the remuneration of employees but simply fixes the already existing salary amount. In this case, we observe only the implementation of the concept of the state's social policy to employees (Baieva et al., 2017, p. 1451).

The positive aspect of the law is the inclusion of additional conditions for the termination of an employment contract with a remote employee, which excludes the latitude of the employer's discretion. This is a failure to communicate with the employer for more than two working days in a row and a change in the place of performance of the

labor function if it was fixed in the employment contract. The issue of the possibility of calling a remote employee to a stationary workplace in the organization, if it is necessary to solve professional issues or sign certain documents, has also been settled.

The norm on the peculiarities of labor protection of remote workers has also been independently constructed. Article 312.7 provides for concessions for employers who use the work of remote workers who have the right not to fully implement the requirements of Article 212 of the Labor Code. This indicates a certain value in the system of sources of labor law of collective agreements and contracts (Baieva et al., 2019, p. 2754). The law sets the task for employers and employees, when adopting local acts, to pay special attention to the regulation of the peculiarities of the performance of their labor function by a remote worker, regardless of the period for performing remote work.

Regulation of the mechanism of the temporary transfer of employees to remote work is devoted to Article 312.9, which allows such a transfer without the consent of the employee, but in the cases specified in the law. The mechanism is established by a local act, taking into account the opinion of the representative body of employees. The main thing is that the employee must be familiar with the local act and he/she is provided with all the guarantees that apply to remote workers. There is also a case of the impossibility of temporarily transferring an employee to remote work with the payment of downtime.

The law bypassed the most controversial issue of fixing overtime work for a remote employee, being satisfied with the indication that remote workers are subject to labor legislation during the performance of labor functions. It should be noted that the work is overtime, which is performed on the direct instructions of the employer and goes beyond the norm of working time. Therefore, the practical application of overtime pay to a remote worker is unlikely to find a place. After all, if there is no direct instruction from the employer about working outside of working hours, there is no overtime work (Korshunova, 2020, p. 118). We will have de facto overtime work when a remote worker performs labor duties, but it will be almost impossible to legally register this time as overtime work.

The concept of long-term socio-economic development of the Russian Federation until 2030 focuses on technological changes and innovations in the socio-economic sphere (Kasevich et al., 2019, p. 442). Here an important place is given to the effective functioning of the labor market, productive employment, innovations in the structure of employment of the population, and innovative directions in the field of employment, which corresponds to the improvement and flexibility of the current labor legislation.

5. CONCLUSION

Summing up our research, we can state that it seems that remote work will become habitual for us during the pandemic and future threats. Many employers will use this non-traditional form of employment using the accumulated experience. The amendments made to the current Labor Code implement the flexibility of labor law, the widespread introduction of population mobility, and effective forms of employment. Employment contracts with remote workers have their characteristics, which has distinguished them as a specific group of employment contracts that meet modern challenges of public well-being.

One of the main advantages of remote work is flexibility in employment, which corresponds to Article 68, but with the features set out in Chapter 49.1 of the Labor Code of the Russian Federation. The legislation includes mechanisms not only for permanent remote work but also for temporary and combined work. The norms of Chapter 49.1 mainly establish the dispositive nature of legal regulation, where the specification of the establishment of working conditions for remote workers is assigned to local acts in agreement with the representative body of employees. However, the regulation of remote work has not only its advantages but also some disadvantages.

More specific legislative provisions are needed on the establishment of working hours, clarifying the mechanisms for providing equipment, information security tools, compensation payments for use, depreciation, expenses related to the use of remote workers' equipment, and regulation of overtime work. Local regulation of these issues does not exclude labor disputes on these issues. Thus, separate improvements of the norms of Chapter 49.1 are required, which will necessarily show its practical application. Having norms in certain provisions seriously infringe on the rights of remote workers, concerning full-time employees working at stationary workplaces. The harmonization of labor legislation, the improvement of the norms of Chapter 49.1 will provide flexibility in the field of employment as an element of the welfare state.

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