

APPLICATION OF FLEXIBLE EMPLOYMENT FORMS IN LITHUANIA

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S u m m a r y

A number of reasons led to the attempts to resort to flexible forms of employment in Lithuania. Among them is the process of integration to the European Union, globalization of economics and related changes in labour market, the need to increase the level of employment, reconcile professional and family life, the need to secure equality of women and men.

By means of comparative and analytical methods the article focuses on legal regulation of employment in general and flexible forms of employment in particular, also recent amendments to the legal regulation and possible venues of its improvement.

The author does not seek to provide a comprehensive analysis of the issues mentioned; instead the major focus is on certain aspects of flexible forms of employment that the author considers essential in order to disclose the problematic aspects of current legal regulation.

Declaring the need to improve the living and working conditions of workers Community Charter of Fundamental Social Rights for Workers besides open-ended contracts suggests maintaining also other forms of employment such as the fixed-term contracts, part-time, temporary work and seasonal work contracts. Recently in the EU the number of workers working under the flexible forms of employment has improved significantly. The reasons for this phenomenon are numerous: the need to reduce the costs of production, increase the productivity, flexibility of employers on the market, changes in the nature of work, increase of a number of working women, etc. A reasonable question is whether Lithuania should implement the flexible forms of employment, which groups of the society would be affected by this and whether necessary political, economic and legal conditions are satisfied for this purpose. It is also important to foresee whether introduction of flexible forms of employment and their application would have negative consequences on such social benefits like health insurance, pensions, holidays, guarantees and compensations to be paid upon dismissal from work.

Laws of different countries provide for different flexible forms of employment. Flexible forms of employment include a possibility to freely choose whether to work or not to work; a

possibility to choose a part-time employment, flexitime schemes or so-called flexible working hours, annualisation of working hours, voluntary work, self-employment, assistance works, and others.

There is no uniform definition of flexible forms of employment. The Constitution of the Republic of Lithuania provides that "Every person may freely choose an occupation or business, and shall have the right to adequate, safe and healthy working conditions, adequate compensation for work, and social security in the event of unemployment" [1, Article 48]. The subject matter of the right to choose an occupation is comprised of the ability of a person to make a free choice concerning his occupation and agree to engage in certain work; a right to freely exercise his ability to work; freedom to choose the sphere of engagement and a person's position in that sphere [2, p.424].

Freedom of occupation for a person means a possibility to work either in white or blue-collar environment, receive certain agreed-upon remuneration for the work performed, or a possibility to engage in other activities that are not prohibited by law. Freedom to choose an occupation also encloses freedom of a person not to work. The principle of free choice allows a person to make unrestricted decisions whether to engage in permanent occupation or only temporary one, and whether to work full time or only part time.

Structural changes, privatisation, corporate bankruptcies [3, p.24] and other internal and external factors have influenced the decrease in employment and increase of unemployment rate. The employment rate in Lithuania has fallen from 89,7 percent in 1991 to 50,2 percent in 2000 [4]. Employees have moved from public to private sector: the employment rate in private sector has almost doubled [3, p.20]. The sector of services is the weakest sector in Lithuania: only 40.2 percent of all workers worked in the sector of services in 2000, compared with the average EU level of 1968 when 65.7 percent of EU workers were engaged in the sector of services. In Lithuania, the majority of workers by their status of employment were hired employees (79.3 percent). Self-employed persons and employers made up only 16.7 percent, whereas 61.2 percent of all employers were male [3, p.32].

Younger age workers represent a group that is most vulnerable to unemployment. In 2000, 62.6 thousand or 24.3 percent of all registered unemployed were under 25 years old [3, p. 34]. This data show that as the volume of industrial production decreases, and the sector of services is developing too slowly, the level of part-time employment also increases. For example, the level of employment in the sector of services in Japan has increased as the employment in agriculture has decreased. The number of part-time workers had substantially increased, especially among women [5].

Part-time employment

As the data of the Labour Exchange of Lithuania shows, the number of part-time workers, having fallen more than twice in 1996-1997, in 1998 as a consequence of the economic crisis in Russia has increased from 9.5 to 16.7 thousand. In the second half of 1999 the number of such workers began to fall and in 2000 it totalled only 10.5 thousand [3, p. 32].

In different countries the legal status of part-time workers varies. In all European countries more than half of all workers work less than 20 hours per week. Those working 10 hours and less per week are not given access to social security funds and may not enjoy unemployment benefits. The number of hours that part-time workers work in Japan is higher than in Europe. The minimum number of hours allowing access to Japanese social insurance is especially high, and those working less than 75 percent of the time worked by full-time workers are not entitled to either health or social insurance. Those working less than 22 hours per week are not entitled also to unemployment insurance [6].

In most cases part-time employment reflects a way to alleviate the burden of unemployment. Facing high levels of unemployment, states indirectly encourage part-time

employment by partially waiving part-time workers from different taxes and from application of certain laws governing the labour market, including the laws protecting from dismissal from work. The concept of part-time employment is not defined in laws, therefore varied interpretations of this concept are permitted. For example, it is claimed that the term part-time workers reflect a situation when the normal hours of work of an employed person are less than those provided by laws due to the shortcomings of the labour market. However, such a definition leaves it open to interpretation as to what the reasons of the shortcomings at the labour market should be – whether it is because of the difficulties at the production line or decreased demand and consequently the phenomenon of part-time employment is a temporary one, or whether the reason is a low labour demand as a consequence of which people have no other choice but to accept temporary and part-time positions.

The general principles and minimal requirements concerning the part-time work are set in the ILO convention 175 “On Part-Time work”. This convention has not yet been ratified by Lithuania, nevertheless as a member of ILO Lithuania must take its provisions into consideration. Of substantial importance is the EC directive 97/81/EC “Concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC” [14, p.9]. The purpose of those instruments is to facilitate the development of part-time work on the voluntary basis and to contribute to the flexible organization of working time in a manner which takes into account the needs of employers and workers (Clause 1(b) of the Framework Agreement on Part-time Work). In view of this purpose the Member States are obliged to identify and review obstacles of a legal or administrative nature which may limit the opportunities of part-time work and, where appropriate, eliminate them (Clause 5 of the Framework Agreement of Part-Time Work). Apart from providing for a worker’s right to request an employer to transfer him from full-time to part-time work, the directive also provides for a contrary possibility – to request to transfer from part-time to full-time work or to increase their working time. For the purpose of implementation of these provisions the employers are obliged to provide appropriate information about part-time working in the enterprise. Consequently the Government of the Republic of Lithuania from July 1, 1999 has imposed an obligation on employers or their empowered entities to inform the State Labour inspectorate [15, p.81] about part-time workers if their normal hours of work are shorter than a half of a shift or if their weekly work hours are less than usual full time hours and they work less than three days per week.

The law on employment contract provides for a possibility for a worker and employer to conclude a contract of permanent work, temporary work, seasonal work or part-time work [7, Article 8]. A more detailed regulation of part-time work is provided in the law on safety and health at work [8, Article 46], and Part 2, Article 2 of the European Social Charter of 1961 [13, p.15] by which the high contracting parties agree to provide for reasonable daily and weekly working hours the working week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit.

It seems that by providing for liberty of contract the laws do not create any problems concerning facilitation of part-time work. Furthermore, Article 46 para 2 of the already mentioned law on safety and health at work imposes an obligation on the employer to facilitate part-time work schedule if this is requested by a pregnant, breast-feeding women or women who have recently given birth, also women having an underage child under 14 years old or a disabled child under 16 years old; a single parent having a child under 14 years old or a disabled child under 16 years old, also guardian taking care of children of the same age, a disabled person, a person nursing a member of a family upon a provision of a physician’s certificate that a shorter day of work is necessary and also indicating the period when this limitation applies.

A part time work may allow employing more people. This is especially important in view of the present unemployment rate. In 2000 the officially registered unemployment rate has increased from 10 percent in the beginning of January till 12.6 percent in December and

reached the highest point after reestablishment of independence [3, p.33]. However it is not always easy to bring it to reality, because by-laws significantly limit the possibility to provide for a part-time employment. For example a governmental regulation No.683 of May 28, 1999 amending a governmental regulation on part-time work No.21 of January 9, 1995 [11, p.5] establishes that a part-time shift may not be shorter than half of a workday and part-time workweek may not be shorter than three workdays per week. Point 3.3 of this regulation established that the contract on the part-time work might stipulate a shorter work shift than normally, thus shortening the number of workdays per week. This provision became a subject of a constitutional dispute. On May 24, 2001 [16, p.130-135] the Constitutional Court established that the said governmental regulation was not in conflict with the Constitution or the law on safety and health at work because it was impossible to restrict freedom of contract by providing more favourable conditions than those established by law [16, p. 130].

Professor Nekrosius commenting this ruling emphasized that a law establishing a possibility to conclude an agreement concerning part-time work infers several issues: firstly, the very possibility to conclude an agreement, and secondly, to agree on the term of employment of a worker as well as on his hours of work. In the opinion of Professor Nekrosius, the law does not restrict the possibility to agree on the hours of work, and this is why point 3.3 of the governmental regulation does not restrict the provisions of the law, instead only provides for a more detailed regulation. However point 5 of the governmental regulation, providing for a minimal duration of a workday, is in conflict with Article 46 of the Law and Article 94 para 2 of the Constitution. Nevertheless, since the question referred to the Court did not raise this issue, the Court also did not analyse it [16, p.134].

Both ILO Convention No.175 and Directive No. 97/81/EC denounce discrimination. The approach to part-time workers may not be less favourable than the approach to full-time workers. This is why employers have an obligation to enhance possibilities of part-time workers to a vocational training. They should encourage part-time workers to be career-oriented and facilitate professional mobility, apply the principle of *pro rata temporis* or flexible hours of work. Both the Convention No.175 and the Directive No.97/81/EC establish that a worker's refusal to transfer from full-time to part-time work or vice versa should not of itself constitute a valid reason for termination of employment without prejudice for other reasons such as may arise from the operational requirements of the establishment concerned.

Article 46 para 4 of the law on safety and health at work provides that part-time work does not restrict the rights of a worker, i.e. the worker should be given the same length of holidays as a full-time worker, their certificates of sickness should be paid, the time of work at the establishment should be included in the total work duration of a worker and other statutory guarantees should be maintained. The part-time workers should be paid proportionately to the hours worked or work performed.

The survey performed in 1999 showed that a larger share of part-time workers is comprised of women than men. In countryside more people are engaged in part-time than full-time work. The majority of part-time workers consist of young persons (aged 15-24) and elderly (aged 50 and older), also those with a basic or lower education. Some influence is exerted by the seasonal nature of work etc. [12, p.133]. A survey of working conditions done in 1999 shows that 15.4 percent of private enterprises workers and 8.1 percent of public servants were willing to work shorter hours. Shorter hours would be more satisfactory to 14.9 percent of working women, 14.5 percent of workers aged 18-24 and 14.1 of workers aged 50 and more [12, p.146].

The legal regulation of work time is treated as a guarantee of the rights of a worker and as a measure allowing to avoid illegal employment. Also it is a measure facilitating safe and healthy conditions of work. However, instead of achieving these aims, limitations of working time restrict the rights of workers, violating the principle of freedom of contract. For example, a person finding himself in a materially difficult position would like to work more

and thus earn more, however he cannot do it, because the law does not allow it [8, Article 40]. Besides imposing limitations on employers, the laws imposed restrictions also on employees. It is natural that if a person wants to earn more, he should work more. However, the laws force this person to look for additional work in another workplace or to hide his extra work. The difficulties finding such work may be demonstrated by the data indicating the number of people looking for such work and the number of those who have it. The bigger the correlation between these numbers, the less those looking for such work find it. In 1990 13 percent had additional work, in 1994 – 8.3 percent, and in 1999 – 6.5 percent. Although the number of persons having additional work has decreased during the period under consideration, the number of those willing to have an additional work turned twice the one indicating those having it [12, p.33]. Taking into consideration an increased unemployment rate, it is apparent that it is more difficult to find an additional work.

The work time of residents in 1999 was as follows: one out of ten workers worked part time (less than 35 hours per week), seven out of ten worked full-time (36-40 hours), and two out of ten worked overtime (more than 40 hours) [12, p.131].

Having reviewed legislative practice of Lithuania and its relation with socio-economical and demographical situation, a conclusion follows that legal regulation of working time does not correspond to the expectations of the population seeking to improve their living and working conditions.

The character of a contract of employment

The imperative provision contained in Article 9 of the law on the contract of employment prohibits conclusion of a contract on temporary employment if the work is of permanent character. An exception is allowed only when such contract is requested by the worker himself or it is allowed by other laws [7].

As the data of a research on living conditions in Lithuania of 1999 demonstrates that in public institutions open-ended contracts of employment are concluded in 60.6 percent of cases whereas in private enterprises this is done in 57.6 percent of cases. Temporary contracts are more often (21.1 as compared with 11.6 percent) concluded in private enterprises than the public sector. Although it is prohibited by law, some enterprises have employed persons under a verbal contract (3.5 percent). The data classified by age of workers show that temporary contracts of employment are more often concluded with young persons (aged 18-24) (30.7 percent) and with persons aged 25-49 (17.7 percent). A tendency is observed that a temporary contract of employment is more often concluded with public servants and workers than with the persons working in higher or medium management links [12, p.140-141].

Nobody has yet defined the concept of a “permanent character of work”. This provides a basis for varied interpretations. A permanent work is described as work on the basis of an employment contract that does not provide for a term of employment [10, p.77], whereas permanent workers are persons employed without indicating the period of their employment. Such a description of permanent work and a permanent worker is both inaccurate and it also does not represent the characteristic features of permanent work. It should be considered that the character of permanent work usually represents the activities of the enterprise, its aims, and primary functions, and is generally indicated in its Articles of Association. The work usually lasts full time (idle times and other abstentions, including part-time work are usually marked separately).

A request of an employee to conclude a temporary contract of employment often does not represent the true will of an employee. It is merely a formality necessary for the employer who seeks justification to conclude a temporary contract of employment and wishes to avoid paying benefits upon termination of a contract.

The relationships of employment are marked by the principle of freedom of contract.

Its restrictions, and artificial limitations are harmful both for the employee and an employer, and also for the competitiveness of Lithuanian enterprises.

Economic decline and drawbacks of legal regulation of work relations that was either too detailed or left gaps in regulation of important issues, led the Government to a decision to liberalize work relations and to encourage the reform of labour and employment law. In 2000-2001 a draft labour code was submitted for adoption to the Parliament. The Code allows for a wider differentiation of work conditions, in view of temporary and seasonal character of work. Flexible forms of employment would be facilitated most by temporary contracts of employment, for example, contracts concluded for two months. It should be considered that appropriate regulation of conditions of work for temporary workers and their legal status (pay rates, social security, holidays, temporary unemployment benefits, etc.) both workers and employers might become interested in concluding contracts on temporary employment.

A new recent development is that some people do “voluntary work” without being paid for it. The basic regulation of such work is provided by Article 17¹ of the law on employment contract. The Government has not yet adopted detailed regulation of such work, consequently a number of problems arise in practice. The number of people working on a different legal basis than employment contracts has been increasing in most European states recently. A new concept of “self-employment” is developing. There is a substantial difference between “voluntary work” and “self-employment” (translator’s note: in Lithuanian the two concepts are written and pronounced in a similar way). These categories of work should be described using certain criteria, for example, “self-employment” is regulated by a contract of services or some other civil law contract. Such work is performed by self-employed advocates, notaries and others. A contract on voluntary work is not concluded, there is no agreement as to remuneration, and volunteers do not have any legal guarantees.

It is quite often that assistance work is treated as illegal work. This work is usually performed in agriculture or households when one neighbour or a friend invites another to assist with certain works. However as long as there is no definition of such work it is difficult to avoid exploitation and abuse of such situations. To avoid this situation it would be sufficient for the government to establish the rules and conditions when natural persons upon mutual agreement could assist each other with agricultural and household works.

Implementation of flexible working conditions would be facilitated by differentiation in view of the number of employees at a certain enterprise. Small enterprises should have a more favourable regime, for example, certain laws that might complicate functioning of such enterprises and undermine their competitiveness, lead to bankruptcies, should not be applicable on such enterprises. The employment laws should provide for a possibility to apply smaller guarantees of employment for workers of such enterprises. For example, when a worker of such an enterprise is dismissed due to operational difficulties, or due to a restructuring of a company, a part of the compensations payable upon the dismissal from work should be paid by the government from the Guarantee Fund instead of solely the employer. It is not reasonable to apply certain legal provisions for seasonal workers, like legal regulation of work and time-offs, termination of employment and others.

The laws provide a form of work organization when certain workers or agencies of companies are allowed (with certain limitations) to set the time of the beginning of the work day, its duration and the end independently. A right to make such a decision is granted to an employer who has to consult the trade union; this may also be done upon an agreement of a worker and an employer. This form of work organization may not be applied without an agreement of a worker.

Flexible time schedule is usually regulated by a flexible work schedule. These schedules may usually indicate a flexible time of beginning and end of shift – a worker is free to decide when to begin and finish the work. It may also indicate a fixed time of work, i.e. the time when all workers must necessarily be at work. This period of time should be the

most important and should reflect the nature of the work performed and be necessary for the performance of functions of work and maintenance of business contacts. Application of flexible working hours demands precise registration of time worked. Such form of work organization might facilitate friendlier conditions to work for women having underage children, students and elderly workers.

Conclusions

A conclusion follows that legal regulation of labour relations is neither adequate nor sufficient for promotion of flexible forms of employment and their application does not ensure protection of either social or political rights of workers. Furthermore, the employers and workers do not make use of the possibilities to apply annualization of working hours, possibilities to work at home, to work part-time. Trade unions representing workers object to application of flexible working hours because in their opinion that would allow employers to get rid of old workers and hire new ones. Employers would prefer a more liberal regulation of conclusion of temporary contracts of employment, because they may not be sure whether in market conditions they may constantly secure work to a certain number of workers.

Developing flexible forms of employment it is reasonable to improve legal regulation governing labour relations and provide for more flexible forms of work contracts and work organization as well as secure relevant protection of the right to occupation and social rights of workers. For this purpose it is necessary to encourage workers and employers to conclude collective agreements envisaging proper possibilities to apply flexible forms of employment in certain enterprise, or a branch of industry.



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