

10. LABOR AND EMPLOYMENT

Resolution of Individual Labor Disputes: a Comparative Analysis of the Draft Labor Code and the Code of Labor Laws of Ukraine

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The procedure for the resolution of individual labor disputes is regulated by Chapter XV of Code of Labor Laws of Ukraine # 322-VIII dated December 10th, 1971, as amended (the “CLLU”). Draft Labor Code # 1108 dated December 10th, 2009 (the “Draft Labor Code”), which was submitted to the Verkhovna Rada of Ukraine for consideration in the second reading, contains Volume IX devoted to individual labor disputes.

Definition and Subject Matter of Individual Labor Dispute

Applicable labor laws do not define the concept of an individual labor dispute. As the Draft Labor Code defines this term, an individual labor dispute means differences between an employer and an employee in relation to executing, performing, amending or terminating an employment agreement as well as complying with labor laws. A tentative list of differences which may constitute the subject matter of an individual labor dispute is provided in Article 425 of the Draft Labor Code. In particular, the subject matter of an individual labor dispute may include differences regarding establishing and changing working conditions, complying with labor laws, collective agreements, a collective bargaining or employment agreement, and any other agreements between an employer and an employee.

Bodies Authorized to Consider Individual Labor Disputes

In accordance with the CLLU, labor disputes shall be considered by courts and

Labor Disputes Commissions (the “LDC”). The LDC is a mandatory primary authority to consider labor disputes, which deals with all categories of disputes, other than those falling within the exclusive competence of courts (Article 224 of the CLLU). However, according to Article 124 of the Constitution of Ukraine, justice in Ukraine shall be administered exclusively by courts. Therefore, upon the adoption of the Constitution of Ukraine in 1996, the parties may refer any labor disputes directly to courts without previously submitting them to the LDC.

The list of labor disputes, which may be settled by the LDC, is not limited by the Draft Labor Code as opposed to the currently effective CLLU. In this connection, the Draft Labor Code contains an unclear provision stating that the courts shall consider individual labor disputes upon application of an employee if the disputes are not to be considered by the LDC.

In addition, the LDC’s legal status has been drastically changed: from the [mandatory] primary authority to consider individual labor disputes, the LDC has been transformed into a conciliation authority to be set up to “*settle individual labor disputes by finding mutually acceptable solutions and conciliating parties to such disputes.*” In accordance with the Draft Labor Code, court shall be the only authority competent to consider individual labor disputes while the LDC shall perform conciliation functions only.

Settlement of Labor Disputes by the LDC

As provided by the Draft Labor Code, the LDC may be set up at all companies, regardless of their staff number, by agreement between an employer and a trade union representative. It should be reminded that the effective labor legislation stipulates that the LDC may be set up only at those companies where the total staff number is at least 15 people.

The Draft Labor Code has changed the procedure for setting up the LDC. Thus, according to Article 429, employees and an employer shall be equally represented at the LDC, while, as specified in the CLLU, the number of employees represented at the LDC shall be at least a half of the LDC's members. The number of LDC's members shall be determined by mutual consent between an employer and a trade union representative.

It should be highlighted that, pursuant to the Draft Labor Code, an employer shall nominate its representatives to the LDC by issuing its order while the employees' representatives to the LDC shall be elected by the general meeting of the labor collective or by a primary trade union organization.

Similarly to the effective CLLU, the Draft Labor Code obliges the employer to provide the **organizational and technical** support to the LDC.

According to Article 225 of the CLLU, an employee may apply to the LDC within three months after he/she has or should have found out about the infringement of his/her right and, in the case of salary disputes, an employee shall not be limited in time. It should be stressed that the LDC may restore the set period of time if such period of time is not met for valid reason. The Draft Labor Code does not set the time period for applying to the LDC. Thus, an employee may apply to the LDC for the protection of his/her rights within any time whatsoever.

At the same time, according to Article 431 of the Draft Labor Code, before applying to the LDC, an employee should first apply directly to his/her employer (provided that the existing differences between the employee and the employer have not been settled within two weeks).

In accordance with the effective CLLU, an LDC's meeting shall be valid only if attended by at least two thirds of the LDC's elected members. According to Article 433 of the Draft Labor Code, an LDC's meeting shall be valid only if attended by at least one-half of the LDC's members.

As provided by the Draft Labor Code, the period of time for LDC to consider individual labor disputes has not been changed and is 10 [presumably calendar] days; if a dispute is complicated, the LDC shall be authorized to extend this term but no more than to 15 calendar days.

As contemplated by the Draft Labor Code, the LDC shall take its decision upon consent of all commission members participating in a session, but not by a majority vote of all members present thereat as it is provided by the effective CLLU. Should at least one LDC's member disagree with the decision proposed to be rendered, such decision shall be deemed to be failed (part one, Article 435 of the Draft Labor Code). Since the LDC's objective shall be to conciliate the parties to the labor dispute, the LDC's decisions may not be adopted by a simple majority vote. Thus, reaching a consensus between all commission members is a pre-requisite for taking a decision, which will enable to ensure high level of voluntary performance of the LDC's decisions.

If the LDC's decisions are not performed on a voluntary basis, the applicable labor legislation provides for the enforcement of such decisions. Thus, according to Article 230 of the CLLU, if an owner or its authorized agency fails to perform the LDC's decision within the prescribed period, the LDC shall issue a certificate to an employee, which certificate shall have the effect of a writ of execu-

tion. The LDC's decision shall be enforced on the basis of such certificate submitted to the state enforcement service no later than three months of its issuance date.

In accordance with Article 438 of the Draft Labor Code, the LDC's decisions shall be binding upon the parties to an individual labor dispute and shall be performed by an employer on a voluntary basis within the period prescribed by such decisions. Thus, the Draft Labor Code provides only for a voluntary performance of the LDC's decisions by an employer.

At the same time, necessary amendments have not been made to the Law of Ukraine "On Enforcement Proceedings" and, thus, if such Draft Labor Code is adopted, the LDC's certificate shall continue to be an enforcement document. Only an employee shall have the right to appeal against the LDC's decision in accordance with the Draft Labor Code of Ukraine (as opposed to the currently effective CLLU). The latter may be treated as an additional argument in favor of a point about an exclusively voluntary procedure for performance of the LDC's decisions in the Draft Labor Code. In other words, the reason why an employer is deprived of a right to appeal against the LDC's decisions is because such decisions are not subject to enforcement.

Individual Labor Dispute Resolution Procedure

Under the Draft Labor Code, the general limitation period for individual labor disputes has been extended from three months to three years. The limitation period for filing a statement of claim for illegal dismissal has not changed and remains set at one month. The Draft Labor Code provides the same limitation period for filing claims regarding transfer to another job or unlawful denial of employment. Meanwhile, it is a positive thing, in our opinion, that the Draft Labor Code states specifically that limitation period will not apply only to claims for payment of accrued but delayed wages and salaries,

and not to any claims originated from remuneration for labor (part 2 of Article 440 of the Draft Labor Code).

Just like the current labor laws, the Draft Labor Code exempts employees from payment of state duties and court costs.

The Draft Labor Code does not limit the paid period of forced absence in a situation where an employee is illegally dismissed. Thus, an employer will have to pay an employee his or her average wage or salary for the entire period of forced absence (or a difference in earnings for a lower-paid job period) should the respective court proceedings end in favor of the plaintiff. It should be mentioned in this context that part 2 of Article 235 of the CLLU provides that for illegally dismissing an employee, the employer must pay such employee his or her average wage or salary for the period of forced absence or a difference in his or her earnings for a lower-paid job period, but not more than for one year (except when the case has been pending for more than one year through no fault of the employee). Meanwhile, under the existing court practice, courts often rule that employees should be paid their average earnings for entire period of forced absence without any period limitation.

In contrast to the current CLLU, the Draft Labor Code does not provide for the employer's obligation to pay dismissed employees their average earnings for the entire period of delay in the return of their work record books. Meanwhile, a work record book is one of the necessary documents that need to be provided by an employee when entering a new job. An employee is thus unable to secure employment in line with the requirements of applicable laws due to his previous employer's wrongful failure to duly return his or her work record book.

Like the current CLLU, the Draft Labor Code provides that if respective final judgment are delayed for a dismissed employee through the employer's fault or if the employer fails

to timely comply with a judgment to reinstate a dismissed employee in his or her job, the employer must pay such employee his or her average earnings for the entire period of delayed judgments (clause 3 of Article 127 of the Draft Labor Code).

Like the current CLLU, the Draft Labor Code provides for the financial liability of a company's officer for damages caused to an employee by illegal dismissal or illegal transfer to another position (payment of the employee's average earnings for the period of forced absence or for the period of a lower-paid job).

It should be noted in this context that the Prosecutor General's Office of Ukraine has recently launched an initiative to impose a greater liability on the officers for gross violations of labor laws, including for illegal dismissals. Thus, in November 2010, the Prosecutor General of Ukraine addressed the President of Ukraine seeking to submit the draft law authored by the Prosecutor General's Office of Ukraine for consideration by the Verkhovna Rada of Ukraine. This draft law provides that any dismissal of an employee for personal motives and any other gross violation of labor laws will be punishable with a fine of up to UAH 8,500 or with imprisonment for up to two years.

Just like the current CLLU, the Draft Labor Code provides that employers may be under an obligation to compensate their employees for moral damages.

A totally new provision of the Draft Labor Code in the context of labor dispute resolution is set out in part 3 of Article 442 of the Draft Labor Code. It provides that *"further to a motion by the employer and subject to consent from the employee, the court may, rather than re-instate such employee in his or her job, decide that such employee should be paid a compensation in the amount to be agreed between the parties, but in any event at least in the amount of his or her average earnings for a period of 12 months"*. Therefore, this provision allows a settlement agreement between the parties with respect to some claims and a judgment with respect to the other claims. In our opinion, however, it will be rather difficult to apply this provision in practice from a procedural standpoint.

Under the Draft Labor Code, just like under the current CLLU, a judgment to re-instate an employee, who has been illegally dismissed or moved to another job, is subject to immediate execution. The Draft Labor Code also prohibits reversal of judgments issued in labor disputes, except when the reversed judgment is based on false information or forged documents provided by the plaintiff.

Labor Disputes: Proposed Legislative Amendments

	CLLU	Draft Labor Code
LDCs		
Legal status	Jurisdictional authority	Conciliation authority
Establishment requirements	Companies with a total staff of at least 15 employees	All companies, regardless of their staff numbers
The number of the employer's and the employees' representatives in Labor Disputes Commissions	At least half of the members should be the employees' representatives	Equal number
Limitation periods for applying to Labor Disputes Commissions	3 months	Not prescribed

Quorum	At least 2/3 of the representatives	At least 1/2 of the representatives
Time frames for hearing a labor dispute	10 days of the filing date of the application	10 days of the filing date of the application
Decision-making procedures of Labor Disputes Commissions	A majority of votes	Upon consent of all commission members
Opportunities for challenging commission decisions in court	Commission decisions can be challenged both by the employer and the employee	Commission decisions can be challenged only by employees
Procedure for the performance of commission decisions by the employer	Both voluntary and enforced performance	Voluntary performance
Courts		
An employee's obligation to pay state duties and court costs	No	No
Limitation period under labor disputes	3 months	3 years
Limitation period for claims regarding dismissal	1 month	1 month
Limitation period for claims regarding transition to another job, denial of employment	3 months	1 month
A judgment to re-instate an employee in his or her job or move an employee to another job is subject to immediate execution	Yes	Yes
Reversal of a judgment	Forbidden, with several exceptions	Forbidden, with several exceptions
Employer's Liability		
Compensation for the period of forced absence	The employee's average earnings for the entire period of forced absence, but not more than for one year	The employee's average earnings for the entire period of forced absence
Compensation for failure to return the work record book to a dismissed employee	The employee's average earnings for the entire period of delay	No
Compensation for failure to make timely final judgments with a dismissed employee	The employee's average earnings for the entire period of delay	The employee's average earnings for the entire period of delay
Compensation for a delay in the execution of a judgment to re-instate an employee in his or her job	The employee's average earnings for the entire period of delay	The employee's average earnings for the entire period of delay
Compensation for moral damages caused to employees	Yes	Yes

The recruitment market: summing up the results for the year

In 2010, the labor market overcame its crisis. During the year we saw new foreign companies enter the Ukrainian market and open new offices (particularly in the FMCG and B2B segments). Mass reductions and lay-offs were a thing of the past. Most companies formed new development strategies based on the current market situation. In order to meet challenges and implement future plans they needed high-class professionals.

As far as went the major market recruiting trends in 2010, recruitment agencies were very active, especially when compared with the period from the end of 2008 and through 2009. Most orders mainly came from the FMCG market. Companies from the B2B segment contacted agencies very carefully. Pharmaceutical industry entities consistently cooperate with us in the same way they did before the crisis. Many banks have finally started to recruit through agencies, although generally they tried to search for personnel on their own. In the fourth quarter of 2010, however, banks opened recruiting tenders. This means that they are ready to restore pre-crisis levels of active interaction with agencies next year.

Demand structure

Natalia Lukyanenko, head of the B2C department and senior consultant with the recruiting company Brain Source International, notes that in the first quarter of 2010 the number of resumes far exceeded the number of vacancies. "In the third quarter of 2010," Natalia says, "activity among candidates decreased and the number of CVs decreased by 20%. This was a function, first of all, of the holiday period and candidates' desire to start job searches and 'new lives' in the fall. Conversely, employer

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activity increased. Companies continued to work steadily and thrive throughout the year. Some companies prepared for an autumn market revival beforehand, opening vacancies in advance so that employees began work in late summer or early autumn."

It is worth noting that there were vacancies for top managers in 2010 in both the B2B and B2C markets. In addition, primary among the positions that started to gain popularity this year were marketing vacancies (brand managers, trade marketing specialists). Vacancies for HR managers/directors were in second place, as were those for narrowly focused professionals in the banking sector. These positions were reduced during the crisis, but in 2010 companies again began to fill those posts.

Still, just as last year, FMCG specialists and different categories of IT professionals were in demand. For comparison, in the same period in 2008 companies were mostly looking for professionals from finance (banks and insurance and investment companies), the construction sector, and manufacturing.

Industry focus

In the crisis period companies reduced budgets, a trend that extended to personnel departments. Companies were forced to lay off HR professionals, so many managers and HR directors had to be universal workers, which significantly increased the range of their functions. Unfortunately, this year few companies changed this situation. However, as we already noted above, HR positions finally started to become available. Companies reduced costs on personnel searches through recruitment agencies. Today, however, the number of orders at recruitment agencies and the costs of their

services have almost returned to pre-crisis levels. This trend will no doubt continue in 2011. A number of recruitment agencies, however, mostly those that are not members of major networks, are still working for minimum rates because they have no other competitive advantages.

The question of motivation, loyalty, and retention of key employees given minimal budgets was also important for companies in 2010.

Closer to the end of 2010 companies began to conduct personnel evaluations. Olga Besha, a human resources management consultant from Brain Source International, notes in particular the following: "After the evaluation companies realized they need to change their methods of motivation. The new motivation system in the next year had to be structured around a business strategy. But due to a volatile economic and political situation, companies have been and will be disinclined to set long-term goals. Therefore, early next year, as in the second half of 2010, a half-year motivation system will prevail. Regardless of this, companies should work on improving productivity. This can be used in a performance management system, where there is a clear description of

goals (both short and long-term) and control of achievement and feedback on the part of a manager. There must be a clearly established dialogue between a manager and an employee. The variable portion of a salary, one of the main components of motivation systems today, will be tied closely to an employee's willingness and attempts to accomplish pre-planned results. The second component will be non-material motivation. Its purpose is to increase an employee's interest in his work, which will be reflected in an increase of productivity and consequently of company profits. However, in addition to a formal approach that uses non-financial motivation to increase profits only, managers will also use it to raise corporate spirit and improve employees' self-assessments."

Nostalgia about the pre-crisis period should be a thing of the past. We all have to realize that we now face new conditions and that to be successful we need to put in more effort than we did before. We must define approaches that are needed here and now.

Flexibility, creativity, innovation: these help us stand out from the crowd, and today they require even more dedication if the maximum results are to be achieved.

Is it profitable to recruit temporary staff?

Temporary staff gives a customer at least seven advantages, while the temporary employee gets at least one.

Without unneeded words

Temporary staff service (staff leasing¹) means providing a client with employees without their being permanently registered as members of the client's regular office staff.

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This service arose because of a growing need for companies to be more flexible and to support their own processes with a temporary labor force. In Ukraine staff leasing was born at the end of the 1990s in addition to agencies offering staff search and selection services. Up to now many agencies have offered it as an additional ser-

¹ Staff leasing — this terminology is widely used in Europe.

vice. Presently, however, many of them are offering staff leasing as one of their main specializations. Historically this service has been known in Ukraine as “staff leasing,” but there is a more accurate name for it: professional employer services². This is a much broader service, as it means two different types of service:

- “staff leasing” means that a contractor provides a client with its own staff or searches for and selects candidates according to customer requirements.
- “outstaffing” differs from leasing in that personnel that works for a customer is officially registered as part of the contractor’s regular staff but actually continues to work for the customer’s company.

These works are executed according to an agreement on rendering services between a customer and company-contractor.

According to recent research by the world’s top HR companies, such as Hewitt Associates, one of the main trends on the world job market is overinflated expectations on the part of employees about employers. Today is clearly the time to change the term from the utilitarian “staff leasing,” which is more applicable to non-human resources, to “professional employer.” The term “professional employer” puts the accent more on workers, which is more consonant with the actual HR strategies of strong companies.

Using that term makes the meaning of the service more obvious, and it is clear what the service consists of. Service is ordered simultaneously by two parties: the enterprise that orders and pays for it and the temporary employee that is registered as contract staff. The company-contractor (a legal entity and professional employer) must provide an identical client-oriented approach for a company-client and temporary employee at all stages of service.

² “Professional employer organization” is also used in the abbreviation “PEO.”

The best employer

A “Best Employers” research project for Central and East Europe, conducted by Hewitt Associates (“Best Employer” research), shows that for the first time in history Ukrainian companies have entered the ranks of the top 30 best employers of Central and Eastern Europe. The research indicates that Ukrainian companies have showed that as economic indicators improve, so does the risk of losing talented employees. Also, the level of employee attraction grew, and companies used it as a good competitive advantage on the market.

Various people are needed

What types of temporary staffers exist?

As a rule, companies divide temporary staff into two categories:

- a) Low-skilled employees, so-called blue-collar workers;
- b) Various types of managers, so-called white collar workers.

Blue-collar workers are temporary staffing’s pioneers, given the specifics of the flow of goods and services in a modern economy. Success comes to companies that can find another effective method of increasing the speed of circulation of goods, tightly connecting it with upsurges in consumer activity. To react immediately to demand fluctuations, companies have implemented the practice of signing contracts to provide temporary workers periodically. Such flexibility is sought in many industries and is not rare on the Ukrainian market. For example, supermarkets sign contracts to obtain additional personnel for days off and holidays; airlines need temporary staffers during summer vacations and agriculture needs staffers to sell their products during the harvest season.

Temporary staffing on the Ukrainian market looks like this:

- production (large factories and so on that use blue-collar workers) — 54.5%
- offices and representative offices of western companies (white-collar workers) — 27.3%
- services (blue-collar workers) — 18.2%

Killing seven rabbits

Our experience with rendering professional employer service and monitoring demand and supply shows that the popularity of this service remains low among Ukrainian management teams. Even if they order this service, clients would rather seek employees with low qualifications. The switch towards using blue-collar workers is not completely casual. The matter is simply that, when they sign contracts with professional employers, Ukrainian companies focus on the benefits of hiring temporary staff when they desperately need to fulfill additional tasks. Western companies search first of all for a party to which to transmit the responsibility for these employees and the work they do.

As a whole, attracting a partner that provides temporary staffers brings new possibilities, which gives an enterprise at least seven benefits. They cannot be obtained via independent search, selection, employment, and administration of temporary employees.

So what benefits have Ukrainian business not yet gained?

- The ability to react rapidly to changing a business climate via an ability to increase and reduce temporary labor force volumes.
- Guarantees that business processes will not freeze in unexpected situations (due to lack of staff or other issues)
- Transparency: working with a professional employer is the most transparent way to address such matters; everything is done in accordance with the law.
- The ability to reduce and optimize department quantity (the accounting, HR,

IT, legal, and labor protection departments) according to the actual volume of business. This is done by transferring certain of these departments' tasks to a professional employer.

Staff leasing gives a company the chance to use its labor force more flexibly. A company can have the exact number of employees it needs to perform the actual amount of work.

- Maintaining a company's image by minimizing risks of lawsuits from personnel and risks connected with labor protection.
- Optimizing the skilled labor pool by selecting for the permanent labor pool the best specialists that the contractor provides (with an unlimited trial period). At the same time, the client can concentrate on its own staff development.
- Improving financial and economic indexes, such as: increasing employees' income by diminishing the quantity of workers and redistributing expenses (salary-payment of services). This is important for companies that are planning to attract investment capital via IPOs.

Changes begin

Because of these benefits the demand for temporary staff is increasing in the business world. Demand for white-collar workers is thus also increasing. It is no secret that in countries with developed economies agencies specializing in leasing white-collar workers are common.

As a rule, white-collar workers come as a temporary staff most frequently in four cases:

- As administrative personnel (during vacations or periods of illness)
- To fill very narrow professional niches; they are invited for company projects for between a month and a year (SAP specialists are an example of this group);
- As top managers of international companies in cases of their dynamic rotation to different countries of the world;

- As employees of foreign companies without official representative offices in a country or sometimes as employees of official representative offices when companies can have only limited staffs.

A professional employer can often give a temporary staffer work that is practically permanent. White-collar workers thus understand the advantages of being selected for a professional employer's staff pool. A freelancer employed by a professional em-

ployer gets an official salary from a stable company. Additionally, a temporary employee is recommended to various projects at all of the professional employer's client companies.

A professional employer service is attractive not only to the client, but also to the temporary employee. It should not be surprising if some day the employee suggests this variant of employment to a future employer.