

UDS 349.23/24

***Oksana Rudanetska*** –

*doctor of law, docent of department economic and legal law*

*Lviv State University of Internal Affairs*

*(9 Zamartinivska Street Lviv 79000 Ukraine)*

## **Issues of Legal Guarantee Security upon Entry into Employment under the Labor Code Draft of Ukraine**

*Гарантії права на працю при виникненні трудових правовідносин захищають особу, яка шукає роботу від необґрунтованої та незаконної відмови в прийнятті на роботу. У разі порушення цієї гарантії особі гарантується право на правовий захист. У статті визначаються правові проблеми забезпечення юридичних гарантії при прийомі на роботу за проектом Трудового кодексу України.*

**Ключові слова:** *гарантії права на працю, трудові правовідносини, юридичні гарантії, правовий захист.*

*Гарантии права на труд при возникновении трудовых правоотношений защищают человека, который ищет работу от необоснованного и незаконного отказа в приеме на работу. В случае нарушения этой гарантии лицу гарантируется право на правовую защиту. В статье определяются правовые проблемы обеспечения юридических гарантий при приеме на работу по проекту Трудового кодекса Украины.*

**Ключевые слова:** *гарантии права на труд, трудовые правоотношения, юридические гарантии, правовая защита.*

*Guarantees of the right to labor in the event of employer-employee relations protect a person that seeks employment from groundless and illegal refusal to hire. In the event that this guarantee is violated, the person is guaranteed the right to legal protection.*

*With intent to strengthen the legal guarantee, namely: legal protection against unjustified refusal to hire, consider it necessary to develop procedural guarantees that will help to realize the right to work. This category of cases must be resolved by courts of general jurisdiction because, in accordance with the legislation of Ukraine, a citizen has the right to apply to a court in case of violation of his/her right or freedom.*

*It is expedient to provide in the Labor Code of Ukraine an indicative list of requirements regarding the business and professional qualities of employees, as well as ways of their assessment.*

*The legal regulation of the discrimination prohibition is carried out by a large number of international legal documents, as well as by national legislation. The article substantiates that determination of the 'discrimination in the workplace' concept should be accompanied by an exhaustive list of features that should be considered discriminatory, which excludes the possibility of unreasonably broad interpretation of the concept. An unreasonable refusal should be understood as a refusal upon the availability of a vacant place for motives that are not related to the business qualities of the applicant. It is proposed in terms of legislation entrench an obligation, which requires the employer to inform by paper form the reasons for refusal to hire.*

**Keywords:** *guarantees of the right to labor, employer-employee relations (labour relations), legal guarantees, legal protection.*

**Introduction.** The need to enact a new Labor Code of Ukraine (hereinafter referred as the LC draft of Ukraine) is due to radical changes in the whole system of social relations taking place in Ukraine in connection with the formation of market relations and socio-economic transformations that are to some extent related to labor. There is a number of problems of different certainty, which should be

solved by means of labor law. And the labor legislation, which is based on the Soviet code of labor laws, which, however, has undergone many changes, is not always able to provide an adequate level of regulation of labor relations, which eventually negatively affects the guarantees level of workers' labor rights.

### Analysis of research and publications.

Problems of workers' labor rights guarantees and the search for ways to improve them have always been the focus of jurists. Significant contribution to the study of this problem have made: N.B. Bolotina, N. Hetmantseva, Yu.A. Dzhepa, V.V. Yeromenko, T.M. Zavorotchenko, I.V. Inshyn, V.S. Peresunko, P.D. Pylypenko, V.I. Prokopenko, P.M. Rabinovych, V.G. Rotan, O.A. Sytnytska, O.F. Skakun, V.M. Skobielkin, O.V. Smirnov, V.V. Khromei and others.

**The problem** is security and implementation of legal guarantees of workers' labor rights.

**The purpose of the work** is a fundamental research of legal guarantees of workers' labor rights in order to improve their legal regulation, which will ensure the full and effective implementation of employees' rights and identify the right issues for providing legal guarantees when applying for a job under the Labor Code draft of Ukraine.

**Main body.** The Universal Declaration of Human Rights implies that everyone has the right to work, free choice of employment, fair and favorable working conditions and protection against unemployment [1]. Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) clarify that States participating in it recognize the right to work, which includes the right of every person to have the opportunity to earn a living by work freely chosen or freely agreed upon, and will take appropriate steps to ensure this right [2]. There are a number of other international legal acts that establish and regulate fundamental socio-economic human rights, among which a special place takes the right to work.

At the national level, the right to work is recognised in the Constitution of Ukraine. Article 43 states: "Everyone has the right to work, which includes the possibility of earning a living for work that person freely chooses or freely agrees to" [3].

V. Kniaziev points out that after the adoption of the Constitution of Ukraine the issues of creating a mechanism for the implementation of its provisions, including those related to the implementation of the rights, freedoms and responsibilities. It seems certain that under such mechanism one must understand the accumulation of various guarantees and actions, the process by which a person, who has certain rights, freedoms and responsibilities, achieve the goals and benefits set by the Constitution of Ukraine [4, p.21].

Effective legal guarantees are necessary to ensure the most favorable conditions for the implementation of constitutionally enshrined human rights, they are transferring means of set by the Constitution possibilities into real life. Guarantees play a significant role in any field of law regulating subjective rights. Without the guarantee of subjective rights, it is difficult to talk about the full, free and secure use of such rights.

The Verkhovna Rada of Ukraine was trying to change the current labor legislation for a long time, and finally, in early November 2015, parliamentarians approved in the first reading a new LC draft of Ukraine. 258 deputies voted for the decision.

The purpose of the LC draft of Ukraine is to determine the basic principles and mechanisms for implementing labor rights and guarantees of workers, creation of appropriate working conditions and the protection of the counterpart interests within a market economy, in considerations of international legal document provisions on labor issues [5].

The new LC draft of Ukraine contains a number of rules that conceptually define the mechanism of labor relations legal regulation between the employer and the employee. It will enable to solve urgent problems of labor relations that existed in the country for years.

Concerning right to labor legal guarantees upon entry into employment, LC draft duplicate the same guarantees which are enshrined in the Labor Code of Ukraine, but certain adjustments have been made.

The prohibition of discrimination is a general legal guarantee, i.e. it ensures the realization of all labor rights. The LC of Ukraine contains a separate article 3, which provides for the prohibition of discrimination in the field of labor [5]. Comparing the list of discriminatory features that are enshrined in the Labor Code of Ukraine, it should be noted that in the LC draft this list is supplemented with the following features: age, medical condition, disability, suspicion or presence of HIV/AIDS-related disease, marital status, family obligations. This list is also not limiting and may be supplemented by other features that are not related to the nature of the work or the conditions for its implementation (Part.1 Art.3) [5] From our point of view, the possibility of establishing "other" feature will contribute to the ambiguous and controversial application of this article in actual practice, and

therefore weaken the effectiveness of the relevant norm as legal guarantee. To ensure task fulfilment of this guarantee, it is necessary to establish a limiting and specific list of discriminatory features.

The effectiveness of struggle against any discrimination practises in the field of work on the part of employer largely depends on penalty for failure to comply with this legal guarantee. In our opinion, legislative body successfully secured in Part 3 of Article 3 of the LC draft of Ukraine for persons, who believe that they had suffered discrimination, the right of court for restoration of violated rights, compensation of losses and moral harm.

The employer, with the aim of organizing a successful business, has the right to select the personnel most relevant to a specific job or position capable of performing their duties properly. In contradiction to Labor code of Ukraine, in LC draft sole articles are devoted to this question, in particular: Art. 26 “The right of the employer to select employees”, art. 27 “Establishing requirements for employees” [5].

Part 2 of Article 26 of the LC draft of Ukraine impose prohibition against an employer to claim for any requirements of a discriminatory nature, including in advertisements, as well as to claim persons seeking employment for information about their civil status, private life and other information that is not related to professional activities [5]. The given legal guarantee without proper corresponding penalty reinforcement will have only the character of the declarative norm, designed for honest employers. Prohibition against an employer to claim persons seeking employment for information about their civil status corresponds to the requirement of the Constitution of Ukraine, which prohibits anyone to interfere in the personal and family life of another person (Part 1, Article 32) [3].

The LC draft of Ukraine settles on the right of the employer to conduct testing when selecting employees. But at the same time it does not establish any guarantees for employees during the testing. Therefore, it is necessary to provide workers with specific guarantees that will act at this stage.

When the parties have reached agreement on hiring, the next step is the filing of documents. Part 2 of Art. 51 of the LC draft of Ukraine provides an exhaustive list of documents to be submitted during the hiring process [5]. This norm sets a ban on requiring documents and information about the person that is not enshrined in it. At the same time,

the applicant is granted the right on his/her own whim, to submit characteristics, recommendations, and other documents that evidence previous employment, CV, information sheet on obtaining special knowledge etc. A noteworthy detail is that the documents must contain information solely on the business and professional qualities of the person.

The next stage in the event of labor relations is conclusion of employment agreement. According to the LC draft of Ukraine the contract of employment is concluded in writing in two copies of equal legal force (Part.1 p. 34) [5]. This norm improves legal guarantees since only a written agreement, in which states employee and employer commitments and liability for breaching, will be able to fully guarantee to the parties the absence of various deviations from their will, expressed at the time of conclusion of the contract.

The draft also introduce the prohibition of changing the terms of an employment contract without the consent of the employee. That is, the employer will not have the right to require the person to perform another job, change the working conditions and determine a smaller salary.

Equally important stage, which requires legal regulation, is a probation. These issues are regulated by Articles 39-42 of the LC draft and do not differ from the current provisions of the Labor Code of Ukraine. At the same time, provision is provided for the protection of the rights of an employee in the event of non-fulfillment by the employer of the conditions for the provision of employment - the employment relationship is recognized as having arisen and the wages are reimbursed in the amount of the tariff rate (salary) before the day of commencement of work. It also establishes the employer's obligation, at the request of the employee, to give him/her a recommendation and the right of the employee to present it to the employer when hiring.

Additional special guarantees are set during the hire and dismissal of pregnant women and women with young children. In particular, it is prohibited to refuse women to hire and reduce their wages for motives related to pregnancy or the presence of children under the age of three, and for single mothers in the presence of a child under the age of 14 or a disabled child. Refusing to hire women for these categories the employer is obliged to inform the reasons for the denial in writing. Such refusal may be appealed to the court. According to the

project norms, the dismissal of pregnant women and women who have children under the age of three years or invalid child is prohibited, except for cases of liquidation of a legal entity-employer without legal succession, termination by an individual functions of the employer. It is prohibition to dismiss single mothers with children under the age of 15, except for cases when the legal entity is liquidated without a legal succession, as well as on the basis of failure to perform or improper performance of their labor duties. For such women in cases of their dismissal in the event of liquidation of a legal entity (termination by the individual functions of the employer), as well as in connection with the expiry of the employment contract period, establishes an increased amount of severance benefit - in the amount of at least three months average wages.

In summary, the project needs to be thoroughly reviewed including amendments and modifications to current labor legislation and innovations reflected in the draft Labor Code developed by the Ministry of Social Policy of Ukraine as well as the implementation of the

provisions of the Directives of the European Union Council. As the main purpose of labor legislation is to protect workers, to ensure the full realization of their labor rights by consolidating effective legal guarantees of these rights.

**Conclusions.** The effectiveness of the right to work depends on the development and adoption of a market socially oriented Labor Code by Parliament, which would introduce quality mechanisms of interaction between society, the individual and the state on labor issues. At the same time, modernization of the normative framework of existing relations between employers and employees through the adoption of the relevant Labor Code will help maximize the implementation of the labor potential of the population, expand opportunities and, accordingly, raise the level of incomes of citizens, solve employment problems and, finally, build a socially oriented market economy in our state.

#### References:

1. General declaration of human rights is from 10.12.1948p. № 93. *Official Announcer of Ukraine*. 2008. Century 3103.
2. International pact about economic, social and cultural rights: Pact of the UNO from December, 16 in 1966 № 4. *Announcer of Constitutional Court of Ukraine*. 2006.
3. Constitution of Ukraine: adopted in 28.06.1996 254к/of 96-BP № 30. *Bulletin of the Verkhovna Rada of Ukraine*. 1996. Century 141.
4. Knyazev V. The Constitutional guarantees of rights, freedoms and duties of a human and citizen in Ukraine. *Law of Ukraine*. 1998. № 11. Pp. 29.
5. Project of the Labour code of Ukraine from. 27.12.2014 № 1658. URL: [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=53221](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53221).