



Employment

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ASOCIATII

Attorneys at law



Employment Guidebook

TUCA ZBARCEA
/ASOCIAȚII

2008

Attorneys at law

Published by Țuca Zbârcea & Asociații.

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Printed in Romania.

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This guidebook is intended to be an instrument for the employers for purpose of dealing with labour-related legal matters and avoiding litigation with employees.

The aim of this guidebook is not however to give a comprehensive account of the Romanian legal framework and practice in the labour field, but rather to emphasise those aspects that have to be focused on by employers with respect to some of the most relevant employment issues commonly encountered.

Consequently, the information and opinions provided by this employment guidebook should be treated neither as a comprehensive study nor as a substitute for specific advice concerning specific situations.

The employment guidebook speaks as of its date and does not reflect any changes in Romanian law or practice after such date.

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Introduction

Over the past years, the labour environment in Romania has faced substantial changes. Efforts were made to finalize the transition from the legal framework inherited from the communist regime to a modern system, in accordance with the rules and principles applicable in most of the European Union member states.

The Labour Code enacted in 2003 gathers under a single legal enactment most of the rules and requirements applicable to the employment relationships, such as those regarding the form, content and regime of the individual employment agreement, the rights and obligations of the employers and of the employees and the termination of employment.

Beside the Labour Code, specific tailored legal enactments regulate other employment related aspects, such as labour safety and health, insurances for labour accidents and professional diseases, labour conflicts and disputes.

Finally, the collective bargaining agreements were introduced under the new legal labour framework, providing for binding rules and obligations to be complied with by the employers.

Individual Employment Agreements

Employers' Obligation to Conclude Individual Employment Agreements

Pursuant to the provisions of the Labour Code, the employers have the obligation to conclude individual employment agreements with each of their employees, prior to the commencing of the employment by the latter.

The individual employment agreements must observe the written form and the Romanian language requirements.

Nevertheless, it should be noted that the employees are not prevented from claiming their rights under the law and applicable collective bargaining agreements, in case the employers refuse to conclude individual employment agreements.

Content

As a matter of principle, the individual employment agreements have to be in line at least with the minimum content required in accordance with Order No. 64/2003 issued by the Ministry of Labour and Social Security.

Other rights and obligations of both the employers and the employees, in addition to the standard form regulated by Order No. 64/2003, can be provided by the individual employment agreements.

We mention that, in practice, the labour inspectorates are sometimes reluctant in registering individual employment agreements that differ from the aforementioned standard form.

Nevertheless, it should be underlined that there are no legal provisions preventing the employers from submitting with the labour inspectorates any forms of individual employment agreements, as long as the minimum content of the standard form is covered.

Employees' Rights Under the Individual Employment Agreements

Although the rights and obligations of the parties stipulated under the individual employment agreements are commonly limited to those provided by the Labour Code and the standard form provided by Order No. 64/2003, it has to be retained that the employers will still be held to observe the requirements set forth by other relevant legal enactments in the labour field and by the applicable collective bargaining agreements.

Any provisions aiming to limit the rights of the employees under the law and the applicable collective bargaining agreements will be deemed null and void, even if such waiver is expressly given by the employees through the individual employment agreements or by any other further statements or agreements.

As a general tendency recorded in the last two years, the legal environment in the labour field faced an amelioration of the employers' status as regards the relationships with the employees.

Salary Related Rights

Employees are entitled to receive a salary that cannot be under the level of the minimum nationwide gross salary, as determined by government decision from time to time.

Several mandatory bonuses established by the collective bargaining agreements concluded at national level or, as the case may be, by other applicable collective bargaining agreements, will also have to be observed by the employers, irrespective that such bonuses are not expressly provided by the individual employment agreements.

Any other salary related rights to be paid to the employees cannot be under the level established by the labour legislation or by the applicable collective bargaining agreements.

Special Clauses

Beside the minimum content to be observed pursuant to Order No. 64/2003, the parties may agree upon certain special clauses to be included in the individual employment agreements.

Thus, non-competition clauses can be set forth in favour of the employers within the individual employment agreements. Such non-competition clauses will become applicable after the termination of the individual employment agreements and they will be valid for a period of up to two years after termination.

A monthly indemnification shall be granted by the employers to the employees for the entire non-competition period following the termination of the employment, which can not be less than 50% of the employees' average gross salary calculated by reference to the last six months of employment.

Pursuant to the general provisions of the Labour Code, the employees have a general loyalty obligation towards their employers, which prevents them from competing therewith throughout the duration of employment.

It should be underlined that no special clause should be inserted in the individual employment agreements in view to secure such loyalty obligation of the employees for the duration of the employment and that no indemnification has to be paid to the employees in this respect.

Besides the non-competition clause, other special clauses may be agreed upon by the parties and included in the individual employment agreements, such as the mobility and the confidentiality clauses.

As regards the confidentiality clause, specific amount of damages can be stipulated to be paid by the employees in case of breach, as compensation for the damages incurred by the employers.

Termination

General

The individual employment agreements entered into by the employers and the employees can be terminated (i) by law, (ii) by mutual consent, (iii) upon the employers' initiative or (iv) upon the employees' initiative,

subject to the observation of the specific and limitative norms of the Labour Code.

Termination by mutual agreement

The individual employment agreements may be terminated by mutual consent of the parties, by way of concluding termination agreements. Pursuant to entering into such agreements, the individual employment agreements are terminated as of the date stated therein.

In practice, besides the consent upon termination and the termination date chosen by the parties, the termination agreements also contain provisions regarding (i) the employees' waiver of any claims they may have against the employers arising out of the employment, (ii) the employees' obligation to return to the employers all items (cars, telephones, computers etc) they were entrusted with during the employment, (iii) the compensations (similar to severance payments) paid by the employers to the employees.

Termination by mutual agreement proves to be the most advantageous choice for the employers. Thus, despite the fact that, in many cases, the employers have to pay compensations to the employees in exchange of their consent for termination, the express waiver usually included in the termination agreements will be beneficial to the employers and protect them from further claims of the employees.

Termination upon employees' initiative

The individual employment agreements may be unilaterally terminated by the employees, by way of resignation.

Pursuant to the Labour Code the employers are entitled to receive a resignation notice that can not exceed 15 calendar days, in case of the employees in non-management positions, or 30 calendar days, in case of the employees in management positions.

The resignation notice term can not be validly extended by individual employment agreements, collective bargaining agreements or other agreements entered into between the employers and the employees.

Termination upon employers' initiative

General

The individual employment agreements can be unilaterally terminated by the employers only for the reasons expressly provided by the Labour Code and by observing the procedural requirements stated thereunder.

Termination may be without cause (elimination of a position) or for a cause, as follows: (i) if that employee has perpetrated a serious misconduct or repeated misconducts breaching the work discipline regulations or those set by the individual labour agreement, the applicable collective bargaining agreement, or the internal regulations, as a disciplinary sanction; (ii) if the employee has been placed under police custody for a period exceeding 30 days, under the terms of the Criminal Procedure Code; (iii) if, following a decision by the competent medical examination authorities, the physical and/or mental incapacity of that employee has been found, which prevents him/her from accomplishing the duties related to his/her current position; (iv) if that employee is not professionally fit for his/her current position; (v) if an employee meets the standard age limit terms for retirement and has made his/her full social security payments and has not applied for retirement under the law.

The employer can not validly terminate the individual employment agreements under any of the following circumstances:

- throughout the duration of the temporary disability of the employees, ascertained by a medical certificate according to law;
- throughout the duration of the quarantine leave;
- throughout the period when the female employee is pregnant, to the extent that the employer had knowledge about the pregnancy before issuing the termination decision;
- throughout the duration of the maternity leave;
- throughout the duration of the leave for raising a child up to the age of 2, and, in case of a disabled child, up to the age of 3;
- throughout the duration of the leave for looking after a sick child up to the age of 7 or, in case of a disabled child, for inter-current diseases, up to the age of 18;
- throughout the duration of the military service;
- throughout the term of office related to a position in a trade union body and 2 years as of the expiry date of such term of office, except for the termination based on disciplinary reasons;
- throughout the duration of the rest leave.

Termination without cause

The employers may proceed with terminating the individual employment agreements also in case that the job positions occupied by the employees are suppressed due to reasons such as: economic difficulties, technological changes, reorganisation of the economic activity.

Mention should be made that, pursuant to the amendments to the Labour Code introduced by Government Emergency Ordinance No. 55/2006, the employers are not limited anymore to the restructuring reasons exemplified above, the termination of the individual employment agreements being possible based on any reasons not pertaining to the employees.

The only condition that has to be observed by the employers with respect to the dismissal reasons is that such reasons have to be real and serious.

The employees dismissed for reasons not pertaining to their person shall benefit from severances paid by the employers as per the relevant provisions set forth under the applicable collective bargaining agreements.

Thus, according to Collective Bargaining Agreement No. 2895/2006 concluded at national level for years 2007-2010, in case of termination of the individual employment agreements due to reasons that cannot be imputed to the employees, the employers shall pay to the latter a compensation amounting at least one monthly salary, in addition to the rights due up to the date.

Termination for cause

Out of the reasons aforementioned provided by the Labour Code for termination for cause, the most frequent cases are termination for professional unfitness and termination for disciplinary reasons.

Termination for professional unfitness

The employers may unilaterally terminate the individual employment agreements in case it is proved that certain employees are not professionally fit for their job.

Once the employers become aware about the employees' professional unfitness, a preliminary investigation must be carried out in this respect, in accordance with the mandatory provisions under the Labour Code and under the Collective Bargaining Agreement No. 2895/2006 executed

at the national level for the years 2007-2010.

The preliminary investigation shall be conducted by commissions appointed by the employers for the purpose of examining the professional fitness of the employees. The investigation commissions will also include representatives of the trade unions.

The investigation commissions will have to inform the employees in writing about the conduct and the facts based upon which the professional fitness is examined, the date, place and hour of the investigation, as well as about the means by which the examination will be carried out.

The convening notice has to be sent to the employees at least 15 days prior to the date when the investigation will take place.

It should be retained that the employees' professional fitness can be assessed taking into account only the employees' attributions as per their job descriptions and the tasks the employees have pursuant to such attributions.

Any other tasks received by the employees exceeding their job descriptions cannot be subject to investigation for the purpose of assessing the professional fitness.

During the preliminary investigation, the employees must be given the opportunity to defend themselves and provide explanations with respect to the conduct and the facts subject to the investigation. The professional fitness can also be assessed by means of theoretical or practical examination.

If following the investigation/examination, the employees are considered professionally unfitted for the job positions they are employed in, the commissions will issue written decisions in this respect. Such decisions can be challenged by the employees within 10 days from the communication date thereof.

If the employees do not challenge the decisions issued by the investigation commissions or if, pursuant to the re-examination of the professional fitness, the investigation commissions maintained the initial decisions, the employers may choose to terminate

the individual employment agreements with the professional unfitted employees.

In such cases, the employers must offer the employees vacant job position, to the extent that such job position are available and if the employees are professionally fit for the respective job positions.

Termination for disciplinary reasons

Termination based on disciplinary reasons represents the most severe sanction that the employers are entitled to unilaterally apply to the employees in case of misconducts.

Any disciplinary action against the employees must be taken within 30 days since the employers became aware of the facts that represent a reason for disciplinary action (misconducts) and no later than 6 months after such facts occurred.

A preliminary investigation procedure has to be followed in accordance with the mandatory provisions of the Labour Code. The termination of the individual employment agreements will be deemed null and void if the employers fail to comply with any of such provisions.

The preliminary investigation shall be conducted by the persons appointed by the employers for this purpose. The employees will be convened by a written notice, mentioning the facts that they are subject to the investigation, as well as the date, hour, and place where the investigation will take place.

During the preliminary investigation, the employees must be given the opportunity to defend themselves by producing evidence and providing all the explanations they deem as being in their favour, as well as the right to be assisted by representatives of the trade unions.

Mention should be made that the facts subject to the preliminary disciplinary investigation will have to be assessed based on the employees' obligations under the individual employment agreements and the applicable bargaining agreements, and, especially taking into account the rules of conduct set forth under the internal regulations issued by the employers.

If following the preliminary investigation the employers decide to terminate the individual employment agreements on disciplinary grounds, individual dismissal decisions will have to be issued and delivered to each of the employees.

The dismissal decisions issued by the employers will include the mandatory provisions provided by the Labour Code under the sanction of absolute nullity - i.e. (i) a description of the facts representing misconducts; (ii) the provisions stated under the internal regulations or under the applicable collective bargaining agreements that were breached by the employees; (iii) the reasons for which the arguments provided by the employees during the preliminary investigation were rejected; (iv) the legal grounds for termination; as well as (v) the term and the competent court to which the employees may address for challenging the dismissal decisions.

Special Forms of Employment

Fixed Term Employment

The concept of “fixed term employment” refers to those employment relationships entered into between the employers and the employees where the end of the validity period of the individual employment agreements is expressly determined, pursuant to certain objective grounds provided by law.

According to the Labour Code, the individual employment agreements can be concluded for a fixed term only in the following cases:

- replacement of other employees if the latter's individual employment agreements are suspended, except for the case when such employees participate in a strike;
- a temporary increase of the employers' activities¹;
- carrying out of certain seasonal activities²;
- if concluded based on certain legal provisions issued with a view to favouring certain categories of unemployed persons, on temporary basis;
- hiring of persons who, 5 years after the hiring date, meet the conditions for age limit retirement;
- if an eligible position is filled in within the trade unions' bodies, employers' organizations or nongovernmental organizations, for the duration of the term of office;
- hiring of retired employees who are allowed to cumulate the pension and the salary, according to the law;
- in other cases expressly provided by special laws³ or by collective bargaining agreements concluded at branch or national levels with a view to carrying out works, projects, and programmes.

1 A temporary increase of the employers' activities may result from special market requests, irregular distinct activities or certain urgent works imposed by security threats.

2 The seasonal activities may include cyclic works which repeat themselves at relatively fixed periods of time due to climatic, leisure, social or cultural reasons.

3 Such as in case of the substitute teachers, sailing personnel etc.

The individual employment agreements for fixed term may be concluded only in writing. In case the employers fail to comply with the written form requirement, the employment relationships will be deemed as entered into for an unlimited period.

The duration of the fixed term individual employment agreements can be stated by making reference to a certain period or to the expiry date⁴.

According to the Labour Code, the employers are allowed to conclude fixed term individual employment agreements for a period of no more than 24 months⁵.

The validity period of the agreements may be extended after the expiry thereof, based on the parties' written consent, but only for a term not exceeding the 24 month-validity period and no more than two consecutive times.

The employers are allowed however to enter into new fixed term employment agreements, even after the expiry of the 24 month-validity period, in the following cases:

- for replacing a missing employee, if a new cause for suspending the latter's individual employment agreement occurs;
- for carrying out certain urgent exceptional works;
- for the reasons expressly stipulated by special laws;
- for carrying out works, projects or programmes, if provided by the collective bargaining agreements concluded at branch or national levels;
- if the previous fixed term individual employment agreements were terminated on the employees' initiative, or on the employers' initiative for serious or repeated misconducts by the employees.

Part Time Employment

From a legal perspective, the "part time employment" refers to those employees whose normal working hours calculated on a weekly/monthly

4 If the fixed term individual employment agreements are concluded with a view to replacing employees whose individual employment agreements are suspended, the duration reference will be made to the date when the reasons having caused such suspension will have ceased to exist.

5 Successive agreements can be however concluded within the 24 month-period.

basis are less than the normal working hours provided by law for the full time employees having the same type of employment and carrying out the same or similar activities⁶.

Pursuant to the provisions of the Labour Code, the employers can hire part time employees either under permanent employment or under fixed term employment.

The part time individual employment agreements will be concluded in writing and will include:

- the duration of work and distribution of work schedule;
- the terms under which the work schedule may be modified;
- the interdiction to work extra hours, except for a force majeure event or other urgent works meant to prevent accidents or to remove the consequences thereof.

If the above elements are not stated, the employment agreements shall be deemed as concluded under full time employment.

Civil Agreements

The civil service agreements were extensively used by the employers before the Labour Code came into force in 2003, especially with a view to avoiding to pay the social charges related to ordinary employment agreements. Law No. 130/1999 regarding certain protection measures for the employees expressly provided that civil service agreements can also be used for carrying out work, in case of cyclic activities not exceeding 3 hours per day. Such legal provisions have been repealed by further enactments amending Law No. 130/1999.

One of the opinions issued by the legal doctrine to which most of the labour authorities subscribed is that, pursuant to the provisions of the Labour Code, work can be currently performed only under individual employment agreements.

Nevertheless, it should be noted that the Fiscal Code still recognizes civil service agreements, by regulating the taxation regime thereof.

⁶ Other comparison criteria, including seniority and qualification/skills, will also be considered. If no comparable full time employees are employed with the same company, the comparison shall be made by reference to the applicable collective bargaining agreements or to the legal provisions in force.

Moreover, such civil agreements are still used in practice by the employers, for the same purpose of avoiding the payment of social charges.

Mention should be made that, in such cases, the labour authorities have the power to assess whether the “services” provided for the benefit of the employers are actually substituting employment relationships and to apply sanctions for not concluding employment agreements.

Collective Bargaining Agreements

Legal Background

Collective bargaining plays a key role in dealing with human resources and employment matters in all European Union member states or candidates, though national systems differ very widely in terms of level, coverage, content and nature of bargaining.

Romania is rather one of the States with a strong collective bargaining system, especially in industry branches inherited from the previous regime, where very influent unions are still active.

The execution, content and effects of the collective bargaining agreements are regulated by Collective Bargaining Agreement Law No. 130/1996, as well as by the Labour Code.

Execution

In case of companies with more than 21 employees, the Labor Code and Law No. 130/1996 establish that it is mandatory to negotiate collective bargaining agreements, on an annual basis. The negotiations take place between the companies' management and the trade unions or, as the case may be, the employees' representatives.

However, it is worth mentioning that, pursuant to the provisions of the Labor Code and of Law No. 130/1996, it is mandatory only to negotiate the collective bargaining agreements and not to conclude them as well.

Therefore, the employers will comply with the legal requirements on the above matters by initiating annual negotiations with the trade unions with a view to reaching an agreement. The collective bargaining agreement will be concluded only to the extent both parties agree on the content thereof.

The collective bargaining agreements have to be concluded for a duration of at least 12 months. Should the agreements be concluded for a longer period, negotiations will be conducted however once a year at least in relation to the following issues: salaries, working time, working schedule and working conditions.

Employers' failure to comply with the obligation to initiate the annual negotiations for concluding the collective bargaining agreements may be sanctioned with a fine ranging from RON 300 to RON 600⁷.

Collective bargaining agreements may also be concluded at the level of groups of companies, industry branches and at a national level.

Content

As a matter of principle, there are no legal constraints on the content of the collective bargaining agreements.

Usually, the collective bargaining agreements cover issues such as salaries, other benefits and salary-related rights, leaves and days-off, severances, professional training, health and labour security etc.

A collective bargaining agreement concluded at a lower level cannot include clauses providing for fewer rights than the limits set forth by the applicable collective bargaining agreements concluded at higher levels.

In a similar respect, the individual employment agreements may not provide rights below the limits undertaken by the applicable collective bargaining agreements.

All employees' rights established by legal provisions or by the applicable collective bargaining agreements concluded at higher levels have to be considered minimal, a level wherefrom the negotiations for a collective bargaining agreement to be concluded at an inferior level usually start.

It is recommendable that the employees' rights under the collective bargaining agreements are regulated, to the extent possible, only by making reference to the applicable legal provisions, instead of fully

⁷ Moreover, pursuant to the provisions set forth under Law No. 108/1999 on establishing and organizing the Labour Inspection, the labour inspectors have the authority to order the employers to take measures in order to remedy any non-compliance with the legal provisions in force. Failure to comply with such remedies may be sanctioned with a fine ranging from RON 3,000 to RON 10,000.

describing such provisions. This way, the employers may benefit from norms adopted from time to time that could be more favourable to them. An eloquent example relates to the alleviation of the terms of the collective lay-off procedure. By means of an enactment adopted in September 2006, which amended the Labour Code, the delays to be observed in the procedure were significantly reduced.

Employers, whose collective bargaining agreements provided that lay-off procedure is to be implemented “according to the law”, benefited from the new reduced terms.

To the contrary, where a collective agreement was restating exactly the terms provided by the law before the adoption of the enactment of September 2006, the respective employer remained obliged to observe the former terms until the expiration of the collective bargaining agreement.

Effects

The provisions set forth under the collective bargaining agreements are compulsory for the parties and will apply to all the employees of a company, irrespective of their membership to the trade unions acting within such company.

The collective bargaining agreements will be considered the “law of the parties” and will be applied accordingly, to the extent that they are in compliance with the requirements set forth under the law and under the other applicable collective bargaining agreements.

Collective Dismissals

Legal Background

The legal provisions regulating collective dismissals will become applicable in case of the dismissals carried out by employers within a period of 30 days, for one or more reasons not pertaining to the concerned employees, where the number of redundancies is:

- at least 10 employees, if the employer that performs the dismissals has more than 20 and less than 100 employees;
- at least 10% of the employees, if the employer that performs the dismissals has at least 100, but less than 300 employees;
- at least 30 employees, if the employer that performs the dismissals has at least 300 employees.

Procedural Stages

In case of collective dismissal, the Labour Code provides for certain mandatory stages to be followed so that the termination of the individual labour agreements may duly take place.

Stage 1

If the employers are contemplating collective dismissals, they have to initiate consultations with the trade unions or, as the case may be, with the employees' representatives. The consultations agenda will cover at least (i) the methods and modalities for avoiding the collective dismissals or for reduction of the number of employees to be dismissed, and (ii) the appropriate means for mitigating the consequences of the collective dismissals by resorting to social measures aimed at, inter alia, providing support for re-qualification and professional re-conversion of the dismissed personnel.

As the Labour Code requests the employers to offer the employees the possibility of making constructive proposals, the employers will have to notify in writing the trade unions or, as the case may be, the employees' representatives, on all relevant information regarding the procedure.

The information provided to the trade unions/employees' representatives shall include at least the following:

- the number and categories of employees normally employed;
- the reasons for the planned redundancies;
- the number of categories of employees to be made redundant;
- the period over which the planned redundancies are to be effected;
- the criteria contemplated with a view to establishing the priority sequence upon dismissal, according to labour law and the applicable collective labour agreements;
- the contemplated measures for limiting the number of dismissals;
- the measures meant to mitigate the consequences of the dismissals and the severance payments to be granted to the dismissed employees, according to labour law and the applicable collective labour agreements;
- the term within which the trade unions/employees' representatives may submit proposals for avoiding lay-offs/reduction of the number of dismissed employees.

A copy of the notice sent to the trade unions/employees' representatives shall also be submitted with the Territorial Labour Inspectorate, as well as with the Territorial Employment Agency.

Mention should be made that, pursuant to the provisions of the Collective Bargaining Agreement concluded at national level for years 2007-2010, the consultations with the trade unions/employees' representatives will be initiated (i) 15 days before the issuance date of the notice regulated under art. 71¹ of the Labor Code, in the case of employers having less than 100 employees, (ii) 20 days before the issuance date of the notice regulated under art. 71¹ of the Labor Code, in the case of employers having between 101 and 250 employees, and (iii) 30 days before the issuance date of the notice regulated under art. 71¹ of the Labor Code, in the case of the employers having more than 351 employees.

The notice regulated under art. 71¹ of the Labour Code shall be submitted with the Territorial Labour Inspectorate, the Territorial Employment Agency and to the trade unions/employees' representatives,

at least 30 days prior to the issuance date of the individual dismissal decisions.

Stage 2

The trade unions or, as the case may be, the employees' representatives will have a 10 day term as of the receipt date of the notice sent by the employers, to analyze the received information and the technical and economic substantiation of the dismissals and to produce any proposals they deem appropriate in order to avoid the collective dismissals or to reduce the number of dismissed employees.

The employers have the obligation to reply in writing, by providing arguments to any proposals received, no later than 5 days.

Stage 3

After finalizing the consultations with the trade unions or, as the case may be, with the employees' representatives, if the employers decide to proceed with collective dismissals, they will issue a second notice.

The second notice shall reiterate all the elements included in the first notice, as well as the outcome of the consultations with the trade unions or, as the case may be, with the employees' representatives.

This second notice shall be submitted with the Territorial Labour Inspectorate, the Territorial Employment Agency and it shall also be sent to the trade unions/employees' representatives, at least 30 days prior to the issuance date of the individual dismissal decisions.

Stage 4

The employers will issue individual dismissal decisions for each of the employees. Each decision will include the mandatory items provided by the Labour Code: (i) reasons for the dismissal; (ii) duration of the prior notice term; (iii) criteria for the establishment of the dismissal sequence; (iv) the list of all vacant positions in the unit, if applicable, and the term within which the employees have to express their intention to occupy a vacant position (if there are no vacant positions, a specification in this sense shall be made).

The dismissal decisions shall produce effects as of the date of their communication to the employees, which may be the date when the decisions are communicated by registered mail with acknowledgment of receipt, the date when the employees signed for having been officially

informed thereof, the date when the decisions are communicated by means of a bailiff, etc.

Stage 5

The employees to be dismissed shall benefit from a 20 business day' prior notice term.

Upon the expiry of the prior notice term, the employment relationships between the employers and the employees who were subject to the collective dismissal procedure shall cease.

Specific Issues

Dismissal sequence

Collective Bargaining Agreement No. 2895/2006 concluded at national level for years 2007-2010 requires that a certain sequence should be observed upon the termination of individual employment agreements further to the elimination of positions. Such sequence will be applicable to the employers upon implementation of the collective dismissal procedure, as follows:

- the individual employment agreements of the employees that cumulate two or several positions, as well as of the employees that cumulate pension with salary;
- the individual employment agreements of the employees that comply with the age limit retirement conditions (retirement for age limit) and did not apply for pension;
- the individual employment agreements of the employees that meet the retirement conditions at their request (early retirement).

Minimal criteria

Collective Bargaining Agreement No. 2895/2006 concluded at national level for years 2006-2010 provides for certain minimal criteria that should be taken into account when taking the measure regarding the termination of individual employment agreements, criteria that shall be complied with during the collective dismissal procedure, respectively:

- if the measure affects two spouses working in the same unit, the individual employment agreement of the spouse with the lowest income shall be terminated, without being possible to terminate thereby the individual employment agreement of an employee occupying a position which was not envisaged by the redundancy;

- the measure shall first affect the employees that do not have children in care;
- the measure shall affect, last of all, the women having children in care, the widowers or divorced men having children in care, the sole family providers and the employees, men or women, having maximum 3 years up to retirement at their request.

Prohibitions

The Labour Code and the Collective Bargaining Agreement No. 2895/2006 concluded at national level for years 2007-2010 prohibits the employers that proceeded with collective dismissals to employ new staff in the positions formerly occupied by the dismissed employees for a period of 9 months as from the date the collective dismissals took place.

If the dismissed employees refuse to re-occupy the vacant positions, the employers will be entitled to hire new personnel for the respective positions.

Transfer of Business

Legal Background

Several legal provisions are currently in place, having regard to the rights of the employees in the event of changes at the level of the employers.

The Labour Code provides for several protection rules in the event a “transfer of a company, unit or parts thereof (...) to another employer, under the law” occurs.

The rules stated under the Labour Code refer to the transfer between companies of assets and activities, and of the employees who carry out work in relation to such assets and activities (“Transfer of Business”).

Special regulations on the employees' rights in relation to the Transfer of Business are also provided by Law No. 67/2006 regarding the protection of the employees' rights in case of a transfer of an undertaking, business, or part of an undertaking.

Law No. 67/2006 was enacted with a view to implementing the Council Directive No. 2001/23/CE⁸ and it came into force on the date Romania joined the European Union.

As a consequence, after 1st of January 2007, the employees' protection regime in case of a Transfer of Business is regulated by Law No. 67/2006 and the Labour Code.

⁸ Council Directive No. 2001/23/CE was published in the Official Journal of the European Communities No. 82 of 22nd of March 2001.

Steps to Be Followed Prior to the Transfer of Business

Pursuant to the provisions of the Labour Code, the transferor employer is under the obligation to inform and consult the trade unions, as regards the legal, economic, and social consequences on the employees deriving from the Transfer of Business. The obligation to inform the trade unions with respect to the Transfer of Business is stated under general terms, no specific procedure being provided for in this respect by the Labour Code (for as long as no collective dismissal is implemented).

Unlike the Labour Code, Law No. 67/2006 comprises detailed regulations with respect to the term and content of the notice to be sent to the trade unions.

Article 11 of Law No. 67/2006 provides that “in case the transferor or the transferee envisages measures on its own employees it will consult the employees' representatives with a view to reaching an agreement, at least 30 days prior to the transfer date”.

Article 12 of Law No. 67/2006 establishes an additional obligation of “the transferor and the transferee to inform in writing the representative of its own employees”, at least 30 days prior to the Transfer of Business, with respect to (i) the (proposed) transfer date; (ii) the reasons for transfer; (iii) the legal, economical and social consequences of the transfer on the employees; (iv) “the measures” to be taken with respect to the employees; and (v) work conditions at the new place of work.

Nevertheless, Law No. 67/2006 does not explain in any way what kind of “measures” it refers to, and whether such measures include dismissal of personnel.

Moreover, it is not clear if the obligation to “consult the employees' representatives for the purpose of reaching an agreement” compels the transferor employer and the transferee employer to reach an agreement with the employees' representatives, as a condition precedent to the Transfer of Business, or if such obligation is limited to merely consultation procedures.

Pursuant to the provisions of Articles 11 and 12 of Law No. 67/2006, it appears that the same 30 day term will be applicable for both

procedures of consulting the employees' representatives and informing the employees with respect to the envisaged measures. This overlap does not seem to have any sense, as the transferor employer and the transferee employer would have to consult first the employees' representatives on the measures to be undertaken and, after such consultation, to inform once again the latter on the same measures.

As Law No. 67/2006 has been recently implemented, one cannot make an assessment with respect to the practice and interpretation that Romanian courts and administrative authorities will give to the provisions thereof.

Nevertheless, it is recommendable that, prior to the implementation of the Transfer of Business, both the transferor employer and the transferee employer take the following steps in order to avoid as much as possible further contestations by the trade unions:

- to consult the trade unions earlier than the 30 day term provided by Article 11 of Law No. 67/2006 (for example: 45 days prior to the Transfer of Business), with respect to any envisaged measures;
- to inform the trade unions in accordance with the provisions of Article 12 of Law No. 67/2006, within the term provided thereof (at least 30 days prior to the Transfer of Business); the information will include the measures to be undertaken in relation to the Transfer of Business that were subject of consultation with the trade unions under Article 11.

The obligation to consult the employees' representatives stated in Article 11 of Law No. 67/2006 should not be interpreted as establishing the necessity for obtaining the employees' agreement with respect to the measures to be undertaken in relation to the Transfer of Business, although the consultation procedures have to be followed for the purpose of reaching such an agreement.

As mentioned above, Law No. 67/2006 does not provide any details on what kind of measures are to be subject to the consultation/notification procedures.

Nevertheless, there is a risk that the trade unions might argue that any restructuring process must be considered as part of the measures mentioned by Law No. 67/2006. Therefore, it is recommendable to include the "restructuring measures", if envisaged, in the consultation/

notification procedures to be followed by the transferor employer and the transferee.

Transfer of Business Implementation

Procedure

Several alternatives could be taken into account with respect to the employees in implementing the Transfer of Business:

- the employees maintain their initial employment with the transferor employer in the same job position they had before the Transfer of Business;
- the employees maintain their initial employment with the transferor employer in a different job position;
- the employees terminate their initial employment with the transferor employer and are employed with the transferee employer in the same job position as they had with the transferor employer before the Transfer of Business; and
- the employees terminate their initial employment with the transferor employer and are employed with the transferee employer in a different job position.

If the employees maintain their initial employment with the transferor employer in the same job position they had before the Transfer of Business, no form or procedure will have to be followed neither by the transferor employer, nor by the transferee employer.

On the contrary, if the employees maintain their initial employment with the transferor employer but in a different job position, an addendum to the individual employment agreement between the transferor employer and each of the employees will be executed and registered with the Territorial Labour Inspectorate.

The employees can be transferred to the transferee employer only based on their express consent. In such case, irrespective whether the job position is maintained or modified, the individual employment agreements between the transferor employer and the employees are subject to termination by mutual consent, in accordance with the provisions of Article 55(b) of the Labour Code.

Termination forms are to be submitted to the Territorial Labour Inspectorate.

At the same time, new individual employment agreements will be executed between the transferred employees and the transferee employer, subject to the same registration formalities.

Restrictions

Both the Labour Code and the Law No. 67/2006 establish a protection regime applicable to the employees transferred to the transferee employer.

Pursuant to the provisions of the said legal enactments, the transferee employer is bound to observe the rights of the employees under the initial individual employment agreements and under the collective bargaining agreement applicable to the transferor employer.

The transferred employees cannot be granted rights that are inferior to those they had under the collective bargaining agreement with the transferor employer.

Any modifications of the labour conditions (type of work, job position, salary, benefits etc) are subject to the prior approval by the employees and must be expressly stated in the new individual employment agreements concluded with the transferee employer.



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