

MAY 12, 2011

NUMBER 1

**Law no. 40/2011 amending and supplementing Law no. 53/2003 –
Labour Code**

Law no. 40/2011 amending and supplementing the Labour Code, in force from May 1, 2011, brings a series of significant amendments to the Labour Code. The main practical issues are briefly set forth below:

The form of the individual labour agreement (« ILA »)

The written form becomes mandatory for the valid execution/existence of the agreement. In the absence of an ILA concluded in writing, the parties will no longer be able to prove the contractual provisions and the performance of the contract. Under such circumstances, the presumption regarding the unlimited period of the agreement that was not concluded in writing is eliminated.

The Employer shall hand the employee a copy of ILA prior to the commencement of the activity.

Content of the ILA

According to the new regulations, ILA shall include the job description, specifying the job duties.

The ILA shall contain the assessment criteria for the employee's professional activity, as applicable at the level of the

employer (which are to be detailed also within the internal regulations).

Any amendment to the items contained by the ILA during its performance shall require the execution of an addendum within 20 business days from the occurrence of the amendment (previously the addendum was signed within 15 days from the date of the written notification addressed to the employee with respect to the intended amendment).

Medical certificate for employment purposes

The provision allowing the submission of the medical certificate subsequent to the execution of the ILA was eliminated.

Trial period

The maximum duration of the trial period has been increased from 30 to 90 calendar days for operational positions and, respectively, from 90 days to 120 days for management positions.

During the trial period, the ILA may be terminated by sending a written notification, at the initiative of either party, without a prior notice and without being required to state the reasons for such decision.

The first 6 months after the professional debut of higher education graduates shall be deemed as internship (in Romanian: *stagiu*), to be regulated by a special law.

The period during which the employer may successively employ several persons for the same position, for trial purposes, has been set at maximum 12 months (the former regulations provided the interdiction to successively employ more than 3 persons, during the trial period, for the same position).

Employees' general register

The employees' general register will additionally contain mandatory information on the salary, the benefits and their amount, the term and the suspension causes of the ILA, the secondment period.

Other employee's/employer's rights and obligations

The employer is granted the right to settle the responsibilities for each employee, the individual performance goals and the assessment criteria for their achievement.

In terms of **employees** holding more than one position (with different employers), the obligation to declare to each employer where they exercise their primary position has been repealed.

Delegation

The possibility to successively extend the delegations is confirmed. Moreover, employee's refusal to extend a delegation will not represent grounds for disciplinary sanction.

Suspension of ILA

The main element of novelty consists in the possibility that, in case of a

temporary decrease of activity (due to economic, technological, structural or similar reasons) for a period exceeding 30 working days, the working schedule is decreased from 5 to 4 working days per week, with a corresponding decrease of the employees' salaries, up to the remedy of the circumstances determining the decrease of the activity.

Such measure may be taken only with the prior consultation of the company-level trade union that has appropriate representation powers or of the employees' representatives, as the case may be. During the temporary decrease of business, the employees will be at the employer's disposal, the latter being entitled to resume the activity at any time.

Other amendments refer to the clarification of the principle according to which the cases of *de jure* termination of the ILA occurring during the suspension period shall prevail/lead to the termination of the ILA.

De jure termination may operate, as per a new case, from the expiry date of the permits, authorizations or certifications required for professional purposes.

A new case of ILA **suspension at the employer's initiative** was added, for the duration of the suspension period by the competent authorities of the permits, authorizations or certifications required for professional purposes.

Termination of ILA

New circumstances were added to the automatic termination of the ILA including:

- death of the employer (natural person)/resolution of the court regarding the

death of the employer (natural person) or adjudication for incapacity;

- dissolution of the employer (legal person) or employer's closing down;
- the date when the pension decision is communicated, in case of disability pension/partial early retirement pension/early retirement / old age pension with the reduction of the standard retirement age;
- the employee's failure to renew, within six months, the approvals, permits or certificates required for the purpose of exercising the profession.

Collective redundancy

The order in which the employees are dismissed will be determined taking into account, first and foremost, the degree of fulfilment of the employees' performance goals.

The provision according to which the employer cannot make new employments on vacant jobs for 9 months as of date of collective redundancy is eliminated.

However, a re-employment priority (without examination, contest and trial period) is set for persons dismissed in case the position becomes available in the same activity within 45 days. The employees are held to answer to the employer's reemployment offer within 5 calendar days.

At the same time, the current amendments set forth that the provisions

regarding collective redundancies shall no longer apply to employees of public institutions and authorities.

Dismissal notice period

The minimum notice period in case of employee's dismissal becomes, including at Labour Code's level, of 20 working days (instead of 15 days).

Resignation

The express obligation of the employer to register the employee's resignation is set up. The resignation notice period may be set under the ILA or under the collective bargaining agreements ("CBA") within the maximum term of 20 working days for employees with operational position and respectively 45 working days for managing positions.

ILA for limited period

The maximum period for which a limited period agreement can be concluded has been increased to 36 months (instead of 24 months).

The agreement's term may be extended also after the expiry of the initial period for a period necessary to complete a project/program/work.

In case of conclusion between the same parties of successive agreements for a limited period, their number remains of maximum 3, and the duration of each successive agreement may not exceed 12 months.

The agreements concluded within 3 months as of the termination of a limited period agreement shall be deemed as successive agreements.

The cases in which an ILA for a limited period may be concluded were extended

with a new hypothesis - the temporary change of the structure of employer's activity.

The employer's obligation to conclude an agreement for an unlimited period at the termination of the third limited period ILA or at the expiry of the 24 months period, where the employer has concluded limited period agreements for the same position, is removed.

Temporary work

Employment agency agreement

The present regulations provide, in a simplified manner, that the beneficiary may use the temporary work for the accomplishment of a specific and temporary task (therefore, the necessity to fall under the limitative cases previously set forth is eliminated).

The maximum assignment period is extended to 24 months (instead of 12 months) and it is also provided the possibility to successively extend it up to a 36 month-period (instead of 18 months previously regulated), period which includes the initial duration of the assignment.

In addition to the existing requirements, the employment agency agreement should also include the conditions under which the beneficiary may refuse a temporary employee made available by the temporary agent.

Temporary employment contract

The temporary-work agent is offered the possibility to conclude with the temporary employee an individual labour agreement for an unlimited period. In this case, during the period between two missions, the temporary employee shall

be assigned to the temporary-work agency.

For each assignment a new temporary employment agreement must be concluded, not only a simple addendum to the initial temporary employment agreement, as provided before the amendments.

The salary of the temporary employee shall be set by direct negotiation with the temporary-work agency and in compliance with the gross national minimum wage.

The trial period shall range between 1 and 30 working days, depending on the duration of the temporary employment agreement.

It is also provided a new termination case for the temporary employment agreement. i.e. the case when the beneficiary waives the employee's services before the duration of the assignment is completed, according to the conditions provided under the employment agency agreement.

Charging the temporary employees by the temporary-work agency in order to recruit them or for concluding a temporary employment agreement is strictly forbidden.

Duration of work

The reference period for calculating the weekly average working hours shall be of 4 calendar months (instead of 3 calendar months, as previously regulated).

Its extension becomes possible, according to the provisions of the applicable CBA, up to maximum 6 calendar months (instead of 12 months as previously regulated): the CBA may provide, under certain

conditions, longer reference periods which shall by no means exceed 12 months.

As for the overtime work, the limit term within which it shall be compensated with remunerated non-working hours becomes 60 days (instead of 30 days). Moreover, the employer may compensate by anticipation the overtime work for the next 12 months with paid non-working hours granted in the periods with low activity.

Night work

By way of exception, the working hours for the night employees whose activity takes place in special/ uncharacteristic working conditions may exceed 8 hours within any 24 hours period as per the applicable CBA. Under this hypothesis, the employer must grant compensatory time off *in lieu* or compensatory extra pay for the night hours worked over the 8 hours duration.

The night employees have the right to an extra pay of at least 25% of the base salary, if the work provided represents at least 3 hours of night shift from the ordinary working hours.

Work quotas

For developing the work quotas, if there are no relevant regulations in force, the employer's obligation to obtain the consent of the trade union/representatives of the employees is no longer required, their consultation being sufficient in this regard.

Leaves

The supplementary leave granted to employees working in difficult/dangerous/ unhealthy

conditions, to visually impaired persons, other disabled persons and the young people under the age of 18 years is of minimum 3 working days, as set forth under the applicable CBA.

The period of uninterrupted annual leave which must be granted by the employer in one calendar year is shortened from 15 to 10 working days.

In order to reject the request concerning the unpaid professional training leave, the simple consultation with the trade union/representatives of the employees is sufficient.

Wages

The minimum wage will be set under the applicable CBA, while the individual wage will be set under the ILA.

The salary may be paid by transfer into a bank account, whether or not this possibility is provided for in the applicable ILA/CBA.

Vocational training

As regards the vocational training initiated by the employer, all distinctions for granting salary rights according to the employee's degree of removal from his activity as well as the possibility for ILA to be suspended have been eliminated:

- All expenses related to the participation to vocational trainings shall be borne by the employer, if the trainings have been initiated by the same.
- During the participation to vocational trainings, the employee shall benefit from all salary rights and shall enjoy length of service at that

workplace, this particular period being considered period of contribution to the public social security system.

- The termination of ILA of the employees who have benefited from a vocational training may not be initiated for a period of time provided by an addendum (not only for a 3 year-period from the graduation as so far provided), irrespective of the duration of the vocational training (previously the provision was applicable only in case of vocational training of minimum 60 days).

Social dialogue

Most of the provisions concerning trade unions, federations, confederations and employers' organizations have been repealed and they shall be subsequently regulated by a special law.

Also, there is a series of detailed amendments of the regulations concerning the employees' representatives, but their impact and configuration have to be analyzed within the wider context created by the new law of social dialogue.

Collective bargaining agreements

The CBAs concluded subsequent to the entry into force of Law no. 40/2011 and up to December 31, 2011 may not provide a validity period spanning beyond December 31, 2011; after this date, their legal regime shall be established exclusively by special law.

The above mentioned stipulations shall not affect the ongoing CBAs at the approval date of the Law 40/2011 and

they shall produce effects until the expiry of the term they were concluded for.

Disciplinary liability

The employer may no longer suspend ILA as disciplinary penalty.

The disciplinary penalties shall be automatically cancelled within 12 months after being applied, if the employee is not applied another disciplinary sanction within that period. The cancellation operates automatically and shall be ascertained by written decision issued by the employer.

Employee's liability for material damage

The employer is entitled to require from the employee the recovery of damages through a findings and assessment written note, by mutual consent of the parties, within at least 30 days as of the communication of the note.

The value recovered by mutual consent may not exceed the amount of 5 gross national minimum salaries.

Employers' liability for breaching the provisions of the Labour Code

The Law no 40/2011 extends the misdemeanours committed by the employers and increases, in certain cases, the applicable limits of civil penalties. For instance, the fact of accepting up to 5 persons to work without an ILA is considered a misdemeanour; the civil penalty is between RON 10, 000 and 20,000 for each identified person.

The natural person accepting to work without signing an ILA is sanctioned by the payment of a civil penalty between RON 500 to RON 1,000.

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The Law amending Labour Code also extends the area of the employers' criminal liability; as an example, we mention that accepting more than 5 persons to work without an individual labour agreement, irrespective of their citizenship, represents a crime and shall trigger between 1 and 2 years of time served in prison or the payment of a criminal fine.

It is also provided a series of complementary penalties, such as: (i) the total/ partial loss of the employer's right to benefit from public services, aid or

subsidies, including EU funds managed by the Romanian authorities, for a period of up to 5 years or (ii) the temporary/ definitive closedown of the working unit(s) where an offence has been committed or temporary or definitive withdrawal of an operating license if justified by the gravity of the offence.

Labour Disputes

In case of disputes arising from unfair dismissal, if the employee does not request to be reinstated, the ILA shall cease automatically once the court judgment becomes final and irrevocable.

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