

# THE CRIMINAL OFFENCE OF EMPLOYING MORE THAN FIVE PERSONS WITHOUT ENTERING INTO AN EMPLOYMENT CONTRACT

- Art. 264 (4) of the Labour Code -

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## **Abstract:**

*The criminal offences regulated by special laws include the one stipulated by art. 264 (4) of Law no. 53/2003 - Labour Code.*

*This law text currently reads as follows:*

*The employment of more than 5 persons, irrespective of their citizenship, without entering into an individual employment contract is a criminal offence and is sanctioned with imprisonment from 3 months to 2 years or with a fine.*

**Keywords:** *offences, Labour Code, special laws, fine, employment contract.*

## **§1. Short history**

In its initial form<sup>1</sup>, the Labour Code did not provide this criminal offence, the criminal liability for acts related to labour relations being regulated by Title XI – Legal Liability, chapter 5 – Criminal Liability, articles 277 to 280 included, and the offences incriminated therein did not include the one of employing more than five persons without entering into an employment contract.

The act was classified as a criminal illegality by Law no. 130/1999<sup>2</sup> regarding certain measures for the protection of employees. In that normative document, this criminal offence had a less accurate definition on account of its generality: *The act of a person who repeatedly uses persons who carry out remunerated activities without complying with the legal provisions regulating the entering into an individual employment contract is a criminal offence, sanctioned with imprisonment from 1 to 2 years or with a criminal fine.*

After the abrogation of Law no. 130/1999 by Government Emergency Ordinance no. 123 of December 28, 2010<sup>3</sup>, the criminal liability for the employment of more than five persons without signing an employment contract was introduced in the Labour Code by Law no. 40 of March 31, 2011 amending and supplementing Law no. 53/2003 - Labour Code<sup>4</sup>.

The incrimination was initially found in art. 279<sup>1</sup> (4) of the Labour Code, which, after the renumbering of the texts, the republishing<sup>5</sup>, and the amendment operated based on Law no. 187/2012<sup>6</sup>, has become art. 264 (4).

Having presented this short history of the criminal incrimination of the act, we will now proceed to analyse this offence from the point of view of the criminal law science.

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<sup>1</sup> Law no. 53/2003 - Labour Code was published in Official Gazette no. 72/February 5, 2003.

<sup>2</sup> Published in Official Gazette no. 355/July 27, 1999

<sup>3</sup> Published in Official Gazette no. 888/December 30, 2010

<sup>4</sup> Law no. 40/2011 was published in Official Gazette no. 225 of March 31, 2011.

<sup>5</sup> In Official Gazette, Part I, no. 345/May 18, 2011

<sup>6</sup> Published in Official Gazette no. 757/November 12, 2012

## §2. Analysis of the constitutive elements of the criminal offence

### 1. Conditions precedent

#### 1.1. Legal matter

The specific legal matter of the analysed criminal offence mainly consists of those social relations meant to protect the employees by means of an individual employment contract signed according to the Labour Code.

However, we think we can also speak of a subsequent specific legal matter, namely those social relations regarding the formation of the state budget, of the local budgets, of the social security budget and of the off-balance sheet special funds etc.

Certainly, it is undeniable that, by including this criminal act in the Labour Code, the legislator intended, above all, to protect the social relations centering upon the workers, but this shouldn't keep us from noticing that the incrimination of this act also brings protection to the other categories of social relations mentioned above, thus reducing their damage.

It is obvious that some employers' failure to enter into employment contracts with the persons whose work they benefit from results in their failure to pay their financial obligations to the above-mentioned budgets, such as: payroll tax, contributions to the national social health insurance fund, unemployment, etc.

#### 1.2. Material object

In the case of this criminal offence, the material object is missing.

#### 1.3. Subjects of the criminal offence

**The active subject** of the criminal offence is a qualified one, i.e. the *employer* in the work relationship. Whether the employer is a natural or a juridical person is of no consequence.

Supposing the employer - a party to the individual employment contract - is a juridical person, it is still possible that the active subject of the criminal offence is a natural person, such as the employer's employee in charge of concluding individual employment contracts. If the company was willing to enter into employment contracts with the employees, but this has not been done because of the negligence of the person in charge, the criminal liability lies with the latter.

**Criminal participation** is not excluded in any of its forms, the only requirement being to meet the legal conditions for the active subject of the criminal offence.

**The passive subject** is the person who carries out labour for the benefit of an employer, but without legal forms, i.e. without having signed an individual employment contract. In other words, only a natural person can be the passive subject of this criminal offence.

The employee's citizenship is of no importance, they can be either a Romanian or an alien citizen.

### 2. Constitutive elements

#### 2.1. The objective side

**The material element**, as a first component of the objective side, consists in inaction, namely not entering into an individual employment contract for more than 5 employed persons.

In the juridical literature, there was expressed the opinion<sup>7</sup> that the material element of this criminal offence would be an action, namely the employment.

Conversely<sup>8</sup> it was shown that the obligation of entering into a written employment contract lies with the employer, as per the provisions of art. 16 of the Labour Code. In other words, the

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<sup>7</sup> R. R. Popescu, Dreptul penal al muncii (Criminal Labour Law), Editura Wolters Kluwer, Bucharest, 2008, p. 119

employer fails to meet their legal obligation, which is a condition for the validity of the agreement, namely to enter into an individual employment contract.

Consequently, the material element consists in an inaction, as the criminal nature of this act is not given by the employment (the action), but precisely by the lack of a formality required for the beginning of a legal work relation.

Having established the material element of this criminal offence, the employment must be understood as the carrying out of work by a person without having signed an individual employment contract, *although the law requires it*.

Our emphasis is meant to underline the fact that it is not always mandatory to enter into a written employment contract.

We are referring to the special situation of the day-labourers, who, under certain circumstances, may work without entering into a written employment contract.

Day-labourers' work is regulated by Law no. 52 of April 15, 2011<sup>9</sup> on the carrying out of occasional activities by day-labourers, as subsequently amended, which stipulates that, in certain business fields<sup>10</sup> the employers may benefit from the work of day-labourers without having to enter into written employment contracts with them.

Among others, a major day-labourer is required to have a limit of 12 hours per day and of no more than 90 cumulated days during a calendar year.

If the employer benefited from the work of natural persons beyond these limits stipulated by Law no. 52/2011, the signing of an employment contract was mandatory, therefore, the lack of such a contract is a material element of the criminal offence stipulated by art. 264 (4) of the Labour Code.

## **2.2. The subjective side**

The criminal offence exists irrespective of the form of guilt with which it was committed, as the entering into an individual employment contract is a legal obligation of the employer, even an *ad validitatem* condition for the creation of the work relation.

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<sup>8</sup> Tudor Vlad Rădulescu, O analiză a infracțiunilor privind încheierea contractului de muncă, prevăzute de Codul muncii, în *Analele Științifice ale Universității „Al. I. Cuza” Iași Tomul Lviii, Științe Juridice*, 2012, nr. I

<sup>9</sup> Published in Official Gazette no. 276/April 20, 2011

<sup>10</sup> These fields are:

- a) Agriculture, hunting and related services, except for breeders of animals in semi-free, traditional and transhumance systems;
- b) Forestry, except for logging;
- c) Fishing and aquaculture;
- d) Collection, treatment and disposal of non-hazardous waste;
- e) Material recovery;
- f) Retail trade of unprocessed agricultural products and live animals;
- g) Exhibits, fairs and congress organisation activities;
- h) Advertising;
- i) Artistic performance activities - shows, support activities for artistic performance - shows, and showroom management activities;
- j) Research & development activities in social and humanistic sciences (archaeological digs);
- k) Activities carried out in greenhouses, green areas, parks and zoological gardens;
- l) Hotels and other accommodation facilities (camps organised by the Ministry of Youth and Sports directly or through the subordinated units);
- m) Activities of sport facilities;
- n) Activities of sport clubs;
- o) Cargo handling and cleaning and maintenance activities are delivered only in the business fields stipulated at letters a to n.

### 3. Forms and sanctions

#### 3.1. Attempt and perpetration

The attempt is not punished.

The criminal offence is perpetrated when a sixth person is employed without conclusion of an individual employment contract.

Up to the fifth person, included, the employer's juridical liability is limited to the liability arising from a civil offence, as per art. 260 of the Labour Code.

As far as the perpetration of this criminal offence is concerned, according to the specialised literature<sup>11</sup> it makes no difference how many more persons are employed after the first six, as there will not be multiple offences for each such relation.

We feel that the number of persons employed after the first six is, indeed, of no importance, but only if all of them were hired based on the same criminal intent. In this hypothesis, the number of employed persons would matter only as circumstantial evidence for the punishment.

However, if the perpetrator, after having employed six or more persons based on a criminal intent, makes a new decision to employ six more persons in the same conditions, we think this would qualify as multiple offences, with the well-known consequences.

#### 3.2. Sanction

The punishment consists in imprisonment from 3 months to 2 years or in a fine.

Regarding the sanctioning regime of this criminal offence, in the case law this was analysed by comparison to the sanctioning regime of the civil offence consisting in the employment of less than 5 persons<sup>12</sup> and it was even submitted to the Constitutional Court for analysis.<sup>13</sup>

The criticism referred to the fact that the special minimum fine set for the act regulated as civil offence<sup>14</sup> was higher than the one set in art. 264 (4) of the same law for an act of the same nature, but which represents a criminal offence<sup>15</sup>, thus presenting a higher social danger.

The Court showed that<sup>16</sup> the two types of fines - civil and criminal - had different natures, and the sanctioning treatment for the criminal offence of employing more than 5 persons without entering into individual employment contracts was not any softer than the one for the civil offence stipulated by the criticised legal provisions. More specifically, in the case of the criminal offence, the main punishment alternative to the criminal fine is the sanction of imprisonment for 3 months to 2 years (as per art. 127 point 2 of Law no. 187/2012 for the enforcement of Law no. 286/2009 on the Criminal Code, published in the Official Gazette of Romania, Part I, no. 757 of November 12, 2012), with all the legal consequences of committing a criminal offence, such as the registration of the criminal offence in the criminal record, consequences which do not exist in the case of committing a civil offence.

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<sup>11</sup> Tudor Vlad Rădulescu, *idem*, p. 164.

<sup>12</sup> Art. 260 (1) e) of Law no. 53/2003 - Labour Code, republished in the Official Gazette of Romania, Part I, no. 345 of May 18, 2011, provides the following:

"(1) The following acts represent civil offences and are sanctioned/ (...)

e) Employing up to 5 persons without entering into an individual employment contract, as per art. 16 (1), with a fine between 10,000 lei and 20,000 for each identified person."

<sup>13</sup> The unconstitutionality exception of the provisions of art. 260 (1) le) of Law no. 53/2003 - Labour Code was raised by S.C. "R&G Investment" - S.R.L. in Cluj-Napoca in File no. 14.754/211/2012 of the Court of Cluj-Napoca - Civil Section, and it made the object of File no. 622D/2013 of the Constitutional Court.

<sup>14</sup> Fine between 10,000 lei and 20,000 lei

<sup>15</sup> The criminal fine ranges between 100 lei and 50,000 lei, as per art. 61 (2) of the Criminal Code in force since February 1, 2014, published in the Official Gazette of Romania, Part I, no. 510 of July 24, 2009.

<sup>16</sup> Both in Decision no. 166/2014, published in the Official Gazette of Romania, Part I, no. 365 of May 19, 2014, and in Decision no. 548 of December 17, 2013, published in the Official Gazette of Romania, Part I, no. 110 of February 13, 2014

### **§3. Short conclusions**

The introduction for the first time in the Labour Code, in 2011, of the criminal offence of employing more than 5 persons without entering into individual employment contracts was the consequence of a social reality, which determined the establishment of more severe criminal and civil policy norms.

As the juridical literature also pointed out, the number of employees without contracts (more than 5 persons, irrespective of their citizenship<sup>17</sup>) is precisely what differentiates this criminal offence from the similar civil offence regulated by art. 260 (1) e) of the Labour Code, and what gives it the nature of a special social danger.

In spite of this harsher incrimination, the persons in charge of control within the Territorial Labour Inspectorates find numerous situations where more than six persons have been employed without having signed employment contracts.

Besides, at the European level, the measures against this social scourge have become even more consistent in the past 10 years.

For example, the communication of the Commission to the Council, European Parliament, European Economic and Social Committee and Region Committee of October 24, 2007, entitled „Stepping up the fight against undeclared work” [unpublished in the Official Gazette]<sup>18</sup> states, among others, that undeclared work remains one of the major obstacles to economic and employment growth in Europe. Moreover, this diminishes tax revenues and affects the funding of social security. At the companies' level, undeclared work tends to distort competition and to limit productivity.

Considering the above, we hope that this juridical analysis of article 234 (4) of the Labour Code will contribute to a better understanding of the contents of this criminal offence, as well as to the correct application of the incriminating text by all the legal practitioners for the purpose of diminishing work „under the table” in Romania.

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<sup>17</sup> Alexandru Țiclea – *Tratat de dreptul muncii (Labour Law Treaty)*, 7<sup>th</sup> edition, reviewed and supplemented, Editura Universul Juridic, Bucharest, 2014, pages 993-994.

<sup>18</sup> [http://europa.eu/legislation\\_summaries/employment\\_and\\_social\\_policy/job\\_creation\\_measures/c10166\\_ro.htm](http://europa.eu/legislation_summaries/employment_and_social_policy/job_creation_measures/c10166_ro.htm), accessed on 25.09.2014