

Labour compliance

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COVID-19 has challenged and changed our ideas about working conditions. In 2021, "remote work" or working "from home" became common, while periodic quarantines encouraged searching and regulation of new work formats.

We devoted the final UNIC's 2021 digest to an overview of recent innovations in Ukrainian labor legislation. The GOLAW, one of the UNIC's Members, shares detailed explanations and recommendations for employers on "remote work" and "working from home," electronic work record books, electronic sick lists, changes related to quarantine.

Congratulations on the upcoming Holidays! We wish that all your efforts in building and strengthening compliance will bring results and become the powerful basis of your business reputation in the New Year.

Enjoy reading!

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PREAMBLE

The year 2021 has been the year of significant changes in the field of labour law.

Thus, for the first time the notions of “remote work” and “home-based work” were introduced into the Labour Code of Ukraine (hereinafter referred to as the LC of Ukraine), which is primarily caused by the quarantine restrictions and wide application of the remote work format. Also, the latest vaccination-related changes affect the rights and duties of employees and workers.

An important innovation is the change in the approach to registration of relationship with heads of limited liability companies and additional liability companies. From now on not only labour, but also civil law contracts may be concluded with them.

The labour relations have also been affected by the introduction of the paperless format by the state: electronic employment record books and electronic sick leave certificates have been introduced and regulated.

1. REMOTE WORK AND HOME-BASED WORK

On February 27, 2021 the Law of Ukraine *On Amending Certain Legislative Acts of Ukraine to Improve Legal Regulation of Remote Work, Home-Based Work and Flexible Working Mode* (hereinafter referred to as the Law) came into effect.

The main novelty of the Law was legal regulation of remote and home-based work as two specific labour organization forms.

So, what is the difference between remote work and home-based work?

The major difference is the place of work performance. In case of remote work, the employee independently determines his/her workplace beyond the employer’s office. The Law does not limit the employee in the workplace choice – that may well be a café, a co-working place, a park, or any other place where the employee can perform the work using information and communication

technologies.

The place for home-based work is the employee’s place of residence or any other premises having everything in place for work performance (work area, technical means, etc.). And the place of home-based work performance is fixed and cannot be changed without the employer’s approval.

How can the employer register the remote or home-based work in the right way?

The Law presupposes obligatory written labour agreement conclusion both in case of remote and home-based work.

However, there is an exception here: over the period of the threat of epidemic, pandemic spread, the need for the employee’s self-isolation, home-based and remote work can be introduced by the employer’s order with no written agreement conclusion and with no

warning of the employee of such changes 2 months ahead, as required by p. 3, Art. 32 of the LC of Ukraine. And the employee shall be familiarized with the above order prior to the remote or home-based work introduction.

The typical form of labour agreement on remote work and the typical form of labour agreement on home-based work were approved by Order of the Ministry of Economic Development as of May 05, 2021 No. 913-21.

Should the employer provide the employee with the means necessary for work (computer, laptop, etc.)?

In case of home-based work, the employer has the duty to provide the employee with all the means necessary for work performance, if not otherwise envisaged by the labour agreement.

At the same time, in case of remote work provision of employees with the equipment and means necessary for work performance shall be determined by the labour agreement, so it may well be the responsibility of both employees, and the employer.

Besides that, the Law presupposes full material responsibility of the employees working under the labour agreement on remote work or home-based work, in case they are provided with equipment and means for work performance to be used by them.

Shall the employer's internal code of conduct be valid for the employees working in the remote or home-based mode?

In case of remote work, the employee shall distribute his/her working hours at his/her

own discretion, the rules of internal code of conduct shall not be valid for him/her, if not otherwise envisaged by the labour agreement.

In case of home-based work, the employees shall follow the general working pattern of the enterprise, institution, organization, if not otherwise envisaged by the labour contract.

Thus, the labour agreement may envisage for the indicated categories of employees that the internal code of conduct is valid or not valid for the employee, and the employee's working pattern may be settled.

However, both in case of remote and home-based work, the amount of working hours may not exceed the established norms (according to the general rule — no more than 40 hours a week), therefore, the employer shall ensure reliable working hours accounting.

Can employees combine remote or home-based work with office work?

Upon approval between the employee and employer, performance of remote work can be combined with office work performance by the employee – the so called *blended working*. The peculiarities of combining remote and office work shall be laid down in the labour agreement in which the parties to labour relationship may envisage when the employee performs work in the office, and when (s)he works remotely.

As far as home-based work is concerned, the place of its performance is fixed, therefore legislation does not presuppose an opportunity to combine home-based work with office work.

Recommendation: In case the remote or home-based work mode is established, written agreements between the parties to labour relationship become of utmost importance.

Therefore, it is recommended to conclude written labour agreements with employees, regardless of the right of the employer for the period of epidemic spread threat to establish remote or home-based work mode with no obligatory labour agreement conclusion. The special features of remote and home-based work performance can also be envisaged by the internal regulation (policy, instruction) on the remote and home-based work, approved by the employer's

order and brought to the employees' notice.

It is in the above documents that it would be expedient to regulate the following issues: validity of the internal code of conduct for the employee, the schedule and working hours of employees; the procedure and deadlines for work performance by employees, the means of communication with the employee, the procedure of task setting and control over their performance; whose responsibility it is to provide the employee with the equipment and means necessary for work; the size, procedure, and deadline of paying reimbursement to the employees for the use of equipment and means owned by them, etc.

2. NEW RULES IN REGISTRATION OF RELATIONSHIP WITH THE DIRECTOR

On August 14, 2021 the Law of Ukraine *On the Stimulation of Digital Economy Development in Ukraine* came into effect, and it introduced amendments to Article 39 of the Law of Ukraine *On Limited Liability and Additional Liability Companies* (hereinafter referred to as the Law on LLCs).

The amendments presuppose new rules for the registration of relations with directors of limited liability and additional liability companies (hereinafter referred to as the LLCs and ALCs).

What has changed in the registration of relationship with the director?

LLCs and ALCs have got an opportunity to conclude a civil law contract with the director.

This means that starting with August 14,

2021 the director of a LLC or an ALC may work under the labour agreement (contract) or manage the company under the civil law contract.

What is the difference between a contract and a civil law contract?

Contract stands for a special form of labour agreement aimed to regulate labour relationship between the employer and the employee. In its turn, in case a civil law contract is concluded, no labour relationship is established by the LLC or ALC with the director.

The procedure of conclusion of a civil law contract with the director is simpler than contract conclusion, since there is no need to

register the director as the employee, viz.:

- to issue an order on appointment of the person to the director's position;
- to make a record in the employment record book;
- to inform the tax authorities about employee hiring.

In case of contract conclusion the employer shall provide the employee with adequate and safe working conditions, labour remuneration not lower than the one set by the law as well as its timely payment, and other social guarantees. Besides that, the employer shall follow the norms set for working hours mode, employee's labour right guarantees.

And LLCs and ALCs shall not have to perform the indicated duties in case a civil law contract is concluded with the director.

Are the provisions of the LC of Ukraine valid for termination of relationship with the director under the civil law contract?

Since labour relations do not arise between the LLC or ALC and the director under the civil law contract, provisions of the LC of Ukraine shall not be valid for the termination of such relationship.

The procedure and the grounds for termination of relationship with the director under the civil law contract are not envisaged by the Law on LLCs. This means that in the conclusion of such contract one shall be guided by the requirements of the civil legislation of Ukraine.

Thus, taking into account the principle of freedom of contract, the parties shall be entitled to independently set the procedure and the grounds for the termination of relationship under the civil law contract. At the same time the content of the civil law contract may not run counter to the Civil Code of Ukraine, other civil legislation acts.

Can material responsibility under the civil law contract be allocated to the director?

Material responsibility stands for a special type of employee's responsibility for the damages incurred by the enterprise, institution, organization as the result of violation of the labour duties laid on him/her.

Since the director is not an employee under the civil law contract, respectively, (s)he may not have any material responsibility under the requirements of the LC of Ukraine.

According to the rules set in the civil legislation of Ukraine, the civil contract may predetermine the procedure and the grounds for property damage reimbursement.

Recommendation: Due to the fact that the norm on the possibility of concluding a civil law contract with the director aims to simplify legal relationship with the executive body, LLCs and ALCs are advised to reconsider their policies as regards the procedure of registration of relationship with the director. In case a decision is passed that it is necessary to conclude the civil law contract with the director, respective amendments should be introduced to the charter of the company so far as the form of the contract concluded with the director is concerned.

It should be indicated that the Law on LLCs does not prohibit indicating several versions of registration of relationship with the

director in the articles of association, both in the labour agreement (contract) form, and as a civil law contract.

3. ELECTRONIC SICK LEAVE CERTIFICATES AND ELECTRONIC EMPLOYMENT RECORD BOOKS

In 2021 a number of amendments were introduced to the legislation, aiming to introduce the paperless mode, viz.: electronic sick leave certificates and electronic employment record books were introduced. Digitalization of the above documents aims to reduce the time spent on paper work, to simplify access to information both for the employer, and for the employee, as well to minimize the risks of such document loss.

Electronic sick leave certificates

Development and issuance of electronic sick leave certificates became possible thanks to the Procedure of Organizing Maintenance of the Electronic Register of Medical Disability Certificates and Provision of Information from It, approved by Resolution of the Cabinet of Ministers of Ukraine as of April 17, 2019 No. 328 (in the version as of March 31, 2021 No. 323) and order of the Ministry of Health of Ukraine as of June 01, 2021 No. 1066 *Some Issues in the Development of Medical Opinions concerning Temporary Incapacity for Work and Their Verification*.

Thus, since October 01, 2021 all the health care institutions of Ukraine shifted to the registration of electronic sick leave certificates. Nevertheless, it will still be possible to register paper sick leave certificates till February 01, 2022, but only in exceptional cases (for example, if it is necessary to prolong or to close the paper medical disability certificate issued before October 01, 2021).

If it is necessary to register a sick leave certificate for an employee, the doctor shall create an electronic medical opinion about temporary incapacity for work, of which fact the employee shall be informed via the e-health system. On the basis of the above opinion the electronic sick leave certificate is developed in the E-Register of Medical Disability Certificates. Information about such document generation will also be obtained by the employee in a notice, but already coming from the Pension Fund of Ukraine (hereinafter referred to as the PFU). Besides that, developed the e-sick leave certificate becomes accessible on the date of its generation in the personal employee's cabinet on the web-portal of e-services of the PFU.

How does the employer get the information about the employee's electronic sick leave certificate?

Employers get the necessary information about the employees' electronic sick leave certificates in the personal electronic cabinet of the insurer (employer) on the PFU's web-portal.

However, implementation of the above procedure does not yet mean that the employee shall not inform his/her employer about the reason for his/her absence at work. After the electronic sick leave certificate is opened, the employee shall inform his/her employer about the temporary incapacity for work in any way convenient for both of them.

Electronic employment record books

On June 10, 2021 the Law of Ukraine *On Amending Certain Legislative Acts of Ukraine on Electronic Employee's Labour Activity Accounting* came into effect. The Law introduces electronic employment record books that will reflect all the available information about the employment record, records about employee hiring, transfer and dismissal.

What are the timelines for employment record digitalization?

The process of employment record digitalization should be carried out within 5 years. After transfer of the data from them to the Register of Insured Persons of the State Register of Compulsory State Social Insurance (hereinafter referred to as the State Register), the paper version of the employment record book will no longer be mandatory. However, upon the employee's request, the employer shall have to maintain the paper employment record book in parallel with its electronic version.

Who may introduce information from the paper employment record book into the PFU's web-portal of electronic services?

The data about the employee's labour activity may be introduced on the PFU's web-portal of e-services by employees and/or their employers. It is of importance that scanned or digitalized copies of documents must be

certified with a qualified e-signature.

How have electronic employment record books changed the procedure of hiring and dismissal?

From now on a new employee should provide the employer with the employment record book (if any) or the data about labour activity from the State Register. If a person is hired for the first time, (s)he may demand registration of its paper employment record book within five days after being hired.

During employee dismissal the employer shall submit the respective data only to the State Register, however, upon the employee's request, the records may also be introduced to the paper employment record book. The duty to issue a duly drawn up employment record book also exists in relation to the employees hired before June 10, 2021 and in relation to whom the procedure of data inclusion to the State Register has not been completed as yet.

Recommendations: Changes in the labour legislation are aimed at the digitalization of specific aspects of labour relationship, which definitely simplifies and optimizes its implementation. And in order to avoid mistakes in the electronic data, we recommend the employees to check the data of their labour activity, that will be accessible in their personal cabinets on the PFU's web-portal of e-services.

4. QUARANTINE-RELATED CHANGES

Since the date the quarantine was established in the Ukrainian territory, a number of amendments were introduced to the labour legislation due to quarantine

restrictions, in particular, the list of employees subject to mandatory vaccination was determined; new grounds for employee

suspension from office were set; changes were introduced into the timeline for going to court in labour disputes.

What categories of employees shall be subject to mandatory vaccination?

On October 04, 2021 the Ministry of Health of Ukraine with its Order No. 2153 (hereinafter Order No. 2153) approved the list of professions, production facilities and organizations the employees of which are subject to mandatory preventive vaccination.

Under the list of November 08, 2021 the following employees are subject to mandatory vaccination against COVID-19:

- employees of central executive authorities and their territorial bodies;
- employees of local state administrations and their structural units;
- employees of higher, post-diploma, professional pre-higher, vocational, general secondary education institutions, including institutions of special, pre-school, non-formal education, institutions of specialized education and research institutions regardless of their type and form of ownership.

The above list was expanded by Order of the Ministry of Health of Ukraine No. 2393 as of November 01, 2021, under which the following employees are subject to mandatory vaccination against COVID-19 starting with December 09, 2021:

- employees of enterprises, institutions and

organizations that belong to the field of management of the central executive authorities;

- employees of institutions providing social services, institutions providing social care for children, rehabilitation institutions;
- employees of enterprises, institutions and organizations included to the List of State Property Objects that are of strategic importance for the state's economy and security, approved by Resolution of the Cabinet of Ministers of Ukraine as of March 04, 2015 No. 83.

In case there are absolute counter-indications for undergoing preventive vaccination, the employee shall be exempt from mandatory vaccination.

May an employee be suspended from office if (s)he is not vaccinated against COVID-19?

If the employee subject to mandatory vaccination refuses or evades it, such employee must be suspended from office.

Only the employees having absolute counter-indications for vaccination against COVID-19 and having provided their medical opinions issued by a health care institution to the employer or a certificate of counter-indication availability may be allowed to work in case they are not vaccinated against COVID-19.

As far as labour remuneration is concerned, suspension shall take place with no salary preservation.

The suspension shall be established for a certain period, viz.: until the grounds causing it are removed, that is until the employee vaccination.

Is there any responsibility for admission of a non-vaccinated employee who is subject to mandatory vaccination against COVID-19 to work?

In case a non-vaccinated employee is allowed to work, the head of the body, institution, enterprise or organization mentioned in Order No. 2153 may be brought to administrative (Art. 44-3 of the Code of Ukraine on Administrative Offences) or criminal liability (Art. 325 of the Criminal Code of Ukraine).

For example, administrative liability lies in imposition of a fine on such manager in the amount that as of 2021 made from 34,000 to 170,000 thousand UAH.

How has the timeline for applying to court for labour dispute settlement changed?

In order to prevent COVID-19 spread during the quarantine, the timeline for applying to court for labour dispute settlement shall be prolonged

over the period of such quarantine.

Thus, following the general rule, the period of employee's applying to court with an application on the labour dispute settlement will make three months, and in cases about dismissal – one month. However, during the quarantine the employee is not limited by the indicated timelines and may apply to court up till the end of the quarantine.

Recommendations: The employer should inform the employees from the list indicated in Order No. 2153 about the need to get mandatory preventive vaccination against COVID-19 as well as the legal consequences resulting from rejection or evasion of mandatory vaccination. In order not to allow ungrounded suspension of employees from office, before the order on suspension is issued it is necessary to check whether the employee shall really be subject to suspension, for example, to ask the respective employee for the vaccination document or a document on absolute counter-indications availability.

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