

Features of Prosecutor's supervision over observing the citizens' labor rights in the context of the spread of new coronavirus infection (COVID-19)

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ОСОБЕННОСТИ ПРОКУРОРСКОГО НАДЗОРА ЗА СОБЛЮДЕНИЕМ ТРУДОВЫХ ПРАВ ГРАЖДАН В УСЛОВИЯХ РАСПРОСТРАНЕНИЯ НОВОЙ КОРОНАВИРУСНОЙ ИНФЕКЦИИ (COVID-19)

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Аннотация: В настоящей статье автор анализирует проблемные аспекты прокурорского надзора за соблюдением трудовых прав граждан в части регулирования дистанционной (удаленной) работы и временного перевода работника на дистанционную (удаленную) работу по инициативе работодателя в исключительных случаях. В период распространения новой коронавирусной инфекции (COVID-19) правовое регулирование дистанционного труда работников составляет один из важнейших аспектов, требующих особого внимания. Удаленная работа формирует на практике ряд сложностей, одной из которых является обеспечение дисциплины труда работников. Автор высказывает мнение относительно места дистанционного работника, выделяет характерные правила привлечения сотрудника к дисциплинарной ответственности, раскрывает средства регулирования трудовой дисциплины дистанционного работника. Описывает, что только контроль со стороны работодателя может обеспечить дисциплину труда сотрудников. Озвучивается позиция Верховного Суда Российской Федерации относительно рассмотрения гражданских дел по искам о восстановлении на работе в период дистанционной занятости. Анализируется состояние законности в сфере трудовых отношений. Приводится авторская точка зрения на неурегулированные вопросы при применении норм трудового законодательства и осуществлении прокурорского надзора в указанной сфере.

Ключевые слова: прокурор, дистанционный режим работы, прокурорский надзор, работник, надзорные мероприятия, работодатель, трудовой договор, локальный нормативный акт, укрепление законности и правопорядка

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FEATURES OF PROSECUTOR'S SUPERVISION OVER OBSERVING THE CITIZENS' LABOR RIGHTS IN THE CONTEXT OF THE SPREAD OF NEW CORONAVIRUS INFECTION (COVID-19)

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Abstract: The author analyzes the problematic aspects of the prosecutor's supervision over the observance of the labor rights of citizens involved in remote work and the temporary transfer of employees to remote work at the initiative of the employer in exceptional cases. During the spread of coronavirus infection (COVID-19), the legal regulation of teleworking is one of the most important aspects requiring special attention. In practice, remote work is connected with such difficulties as the discipline of workers. In the article, the author gives considerations regarding the workplace of a remote worker, highlights the rules for bringing an employee to disciplinary responsibility, and shows the means of regulating the labor discipline for teleworking employees. The author emphasizes that it is through the efforts of the employer that it is possible to increase the discipline of employees in remote work. The article describes the position of the Supreme Court of the Russian Federation regarding civil claims for reinstatement at work during the period of working remotely. Also, the author analyzes the state of legality in the field of labor relations. The article provides the author's point of view concerning the application of labor legislation and the implementation of prosecutorial supervision in this field.

Keywords: prosecutor, remote work, prosecutor's supervision, employee, supervisory measures, employer, employment contract, local regulatory act, strengthening of law and order

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Introduction

The spread of coronavirus infection (COVID-19) in 2020 has affected many areas of human life, including the development of labor and other labor-related relationships.

The Prosecutor's Office of the Russian Federation supervises the observance of the Constitution of the Russian Federation, the implementation of laws, and the observance of human and civil rights and freedoms.

The protection of citizens' constitutional right to work is regulated by the order of the Prosecutor General of the Russian Federation of March 15, 2019 No. 196 "On the organization of prosecutorial supervision over the observance of the labor rights of citizens". Paragraph 2.1 states that prosecutors must, on an ongoing basis, assess the state of compliance with the rule of law in the field of labor relations.

Legal regulation and protection of labor rights

In 2020, prosecutors revealed 524 225 violations of the law on the labor rights of citizens, in 2019 this figure was 573 234 (-8.5%); 41 011 protests were drawn up, in 2019 – 37 790 (8.5%), wherein 38 895 were canceled due to their illegality, in 2019 – 36 251 (7.3%); 149 697 claims were sent to the court, in 2019 – 205 129 (-27.0%) for a total amount of 5 289 731 thousand rubles, in 2019 – 7 269 558 thousand rubles (-27.2%); 74 443 submissions were made to eliminate violations of the law, in 2019 – 71 922 (3.5%); at the request of the prosecutor, 54 893 persons were brought to disciplinary responsibility, in 2019 – 55 355, at the initiative of prosecutors 51 320 persons were brought to administrative responsibility, in 2019 – 53 597 (-4.2%); 10 336 persons were warned about violations of the law, in 2019 – 9 455 (9.3%); according to clause 2 of part 2 of Art. 37 of the Code of Criminal Procedure of the Russian Federation, prosecutors initiated 1372 criminal cases, in 2019 – 1304 [Statistical reporting in the form of ON..., 2020].

The figures above indicate the effectiveness of prosecutorial supervision.

At the same time, new business entities are registered every year, and many of business owners do not fully understand their responsibilities towards employees.

Considering the Decree of the President of the Russian Federation of April 2, 2020 No. 239 "On measures to ensure the sanitary and epidemiological well-being of the population in the territory of the Russian Federation in connection with the spread of the new coronavirus infection (COVID-19)", many employers had to transfer from offices to work from home.

Prosecutors promptly respond to all cases of violation of the labor rights of citizens. Thus, the Prosecutor's office of the Akbulak district of the Orenburg region investigated the case received on the hotline and established that citizen N. worked in the "Akbulak passenger motor transport" municipal unitary enterprise as a driver. According to the oral instructions of the management, citizen N. carried out the transportation of medical workers involved

in the provision of medical assistance to citizens who had been identified or previously diagnosed with COVID-19 infection. At the same time, the required employment contract was not signed, and payments for assisting citizens who were diagnosed with COVID-19 were not paid to N. The district Prosecutor's office sent a statement of claim to the court to establish the fact of labor relations and to recognize the right to receive incentive payments. The requirements of the Prosecutor were satisfied by the court [Review of the practice of prosecutors' participation..., 2020].

The COVID-19 pandemic forced to create new legal instruments for state regulation in all areas and laid the foundations for labor procedures of the future. In this situation, not all employers were legally ready to transfer employees to remote work. Considering certain difficulties in transferring to remote work, as well as some inconsistencies in the current legislation, there was an urgent need to amend the Labor Code of the Russian Federation.

Definition of workplace

Federal Law No. 407-FZ of December 8, 2020 amended the Labor Code of the Russian Federation aimed at regulating remote work and issues related to the temporary transfer of an employee to remote work at the initiative of the employer in exceptional cases.

Article 312.1 of the Labor Code of the Russian Federation states that remote work means working outside the employer's location, including its branches and units located in another area and outside the stationary workplace, territory, or object, either directly or indirectly under the control of the employer, when workers use public information and telecommunication networks, including the Internet, for performing his/her labor function and interacting between the employer and the employee on issues related to its implementation.

A remote worker signs the employment contract or an additional agreement to the employment contract and performs labor activities in accordance with the relevant regulatory act; also, the employee is subject to labor legislation and other acts containing labor law norms, taking into account the specifics established by Chapter 49.1 of the Labor Code of the Russian Federation.

According to the amendments made to the Labor Code of the Russian Federation, the concept of "employment contract for remote work" is excluded, and the parties have the right to amend the previously signed labor contract in the manner established by Art. 72 of the Labor Code of the Russian Federation, except for cases provided for by Art. 312.9 of the Labor Code of the Russian Federation.

Art. 57 of the Labor Code of the Russian Federation states that the clause about workplace is mandatory for inclusion in the employment contract.

The Labor Code of the Russian Federation does not disclose the content of the concept of "place of work". In judicial practice, a place of work is understood to be a specific organization, located in a certain area (settle-

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ment), its representative office, branch, and other separate structural units. In cases when the organization and its separate structural branches are located in different localities, then, in accordance with Art. 57 of the Labor Code of the Russian Federation, the place of work of the employee is specified to this structural unit [Review of the practice of courts..., 2014].

Taking into account the above, it turns out that the employment contract must contain information about the place of work at which the remote worker directly performs the duties assigned to him/her by the employment contract.

According to Art. 209 of the Labor Code of the Russian Federation, a workplace is a place where the employee must be or where to he/she must arrive due to his/her work and that is under the employer's direct or indirect control.

Judicial practice states that "the place of residence of an employee cannot be considered as controlled by the employer, since this violates the principle of inviolability of the home enshrined in Art. 2 of the Constitution of the Russian Federation" [Chiranova, Potapova, 2019. P. 30].

As we can see, there is no workplace for remote workers in the sense that it is understood by Art. 209 of the Labor Code of the Russian Federation. This means that remote workers are practically not limited in both the choice of the place of work and how they perform the work function assigned to them. At the same time, they must comply with the orders of the employer required by the employment contract.

Work schedule

It should be noted that work schedule should be as specific as possible in the employment contract. A clearly defined schedule should remove questions of ambiguity from both the employee and the employer.

For example, in the practice of the General Prosecutor's Office of the Russian Federation, the consideration of civil cases by the Supreme Court of the Russian Federation on claims for reinstatement at work, there is a case when the courts considered unsubstantiated the claims of the plaintiff about existing agreement with the employer on the remote nature of work and refused to satisfy the claim for reinstatement at work where absence at work was the reason for dismissal.

However, using Part 1 of Art. 16, Part 1 of Art. 56, Art. 57, 61, 67, and 72 of the Labor Code of the Russian Federation, as well as the Federal Law of April 5, 2013 No. 60-FZ "On Amending Certain Legislative Acts of the Russian Federation", the Judicial Board recognized the decisions of lower courts as unfounded.

The current labor legislation allows an employee to perform remote work (outside the employer's location), which should be noted in the employment contract.

An agreement without a written form is considered signed if the employee started working and informs the employer or employer's representative about it or if an

employee starts working by order of the employer or employer's representative.

The norms of substantive law, regulating the peculiarities of remote work, were not applied by the courts to the disputed legal relations; as a result, the essential circumstances were not clarified: where was the plaintiff's workplace; whether he was allowed by the employer to perform the work function remotely; whether this work was performed outside the employer location, including at the time of dismissal.

Art. 67 of the Civil Procedure Code of the Russian Federation was also violated since the courts did not consider the evidence presented by the plaintiff for the approval of transfer to remote work with the retention of position and salary under the program for optimizing jobs and unjustly rejected the testimony.

Thus, the plaintiff's absence has not been established, as well as other circumstances listed in Art. 192 of the Labor Code of the Russian Federation has not been clarified, the possibility of applying a less strict type of disciplinary sanction has not been studied.

The judicial board noted that the court formally approached the case related to the violation of the employee's labor rights, the prosecutor considered the court decision legitimate and justified, which is unacceptable in resolving the dispute of this category (definition No. 5-KG19-106) [Review of the practice of the Supreme Court..., 2020].

Considering the fact that additional grounds for terminating employment contract with a remote worker are provided for by Federal Law No. 407-FZ, it is necessary to note that employment contract with a remote worker may be terminated at the initiative of the employer if the employee does not interact with the employer for more than 2 working days in a row from the date of receipt of the relevant request from the employer without a valid reason, or if the employee has changed the location of working.

Temporary transfer to remote work

When deciding on the organization of the work schedule, providing for the temporary transfer of workers to remote work in the cases established by Part 1 of Art. 312.1 of the Labor Code of the Russian Federation, the employer must comply with the time period for such a transfer, which does not exceed six months.

At the same time, there are no restrictions on the number of time periods for temporary involvement of an employee to perform his/her duties remotely within a six-month period.

Since the duration and frequency of the employee's temporary performance of the labor function remotely within a six-month period is of a contractual nature (except for the cases established by Article 312.9 of the Labor Code of the Russian Federation), the involvement of an employee in remote work is possible by agreement of the parties through the execution of additional agreements to the employment contract.

Art. 312.9 of the Labor Code of the Russian Federation provides that the temporary transfer of an employee to remote work can be carried out at the initiative of the employer. When choosing remote work, the specified norm does not contain any restrictions for the employer.

Obligatory documents governing the interaction between the employer and the employee in remote work are the employment contract and the supplementary agreement to the employment contract (if any). If an employee is transferred to remote work in the manner provided for by Art. 312.9 of the Labor Code of the Russian Federation, such a document should be the local regulatory act of the employer.

Compensation for remote work

As the International Labor Organization pointed out in its Practical Guide, "Remote Work During and After the COVID-19 Pandemic: A Practical Guide" (adopted on July 16, 2020), workers should not incur additional costs when working from home. Employees have the right to receive equipment and tools from the employer to enable them to work as if they were in their normal workplace, without any negative impact on their productivity, efficiency, and well-being. The list of equipment can be supplemented to ensure the conditions necessary for the effective performance of the work function by a remote employee.

The important point here is that the employee's performance of the work function remotely is not the reason for reducing wages. Also, when setting the salary range for the same positions, we should be aware of the employer's obligation to provide such employees with

equal wages. Salaries for similar positions should be the same, and the so-called extra part of wages (allowances, bonuses, and other payments) may vary among different workers, including depending on the qualifications, complexity of work, quantity, and quality of work. At the same time, we believe that it is possible to establish different titles or levels of positions (professions) within one group of positions.

Overtime work for a remote worker can be paid based on the time reports provided by the employee. This method is suitable if the work schedule has not been prescribed in the employment contract, and the employee must inform the employer about it.

If such information requires a special program in which the employee must be authorized during his/her entire work shift, then it is necessary to include in the employment contract information that the employee must use such a program. This method is possible by entering data into the timesheet according to the regime established in the employment contract if the employment contract clearly stipulates which days and hours a remote employee needs to work and which days are considered as days off.

Conclusion

The changes in the labor legislation force us to take a fresh look at the work in the field of prosecutorial supervision. Undoubtedly, the proper organization of prosecutorial supervision aimed at strengthening the rule of law in the sphere of work requires well-trained prosecutors with new knowledge in the field of labor rights of citizens.

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