

ASPECTS OF THE LEGAL EFFECTS WHICH IT PRODUCES INDIVIDUAL EMPLOYMENT CONTRACT AFTER TERMINATION

Lecturer **Ana VIDAT**¹

Abstract

Execution of the individual employment contract – from the end and until terminated – put into play a complex set of legal rules, have certain traits that customizes to civil contracts that are similar. In fact, the cause of the individual labor contract is through its execution.

*Actual execution of the individual employment contract occurs during its existence. However, individual employment contract, even if terminated owing to any reason provided by law, may produce legal effects and after this time the following assumptions: *ex lege*; under a non-compete clause; under a confidentiality clause.*

Keywords: *the individual employment contract; non-compete obligation; obligation of confidentiality; non-compete clause; confidentiality clause.*

JEL Classification: K12, K31

1. Introductory issues

Actual execution of the individual employment contract occurs during its existence.

However, individual employment contract, even if terminated owing to any reason provided by law, may produce legal effects and after this time the following assumptions: *ex lege*; under a non-compete clause; under a confidentiality clause.

2. Aspects of the legal effects which it produces after the termination of the individual labor contract *ex lege*

A) Confidentiality extends its legal effects after the termination of the individual employment contract *ex lege* – according to art. 36 para. 2 of Law no. 182/2002 on the protection of classified information².

a) The right to access public information is guaranteed by law.

The main objectives of protection of classified information – according to art. 4 of Law no. 182/2002 – are:

- protection of classified information against espionage, compromise or unauthorized access, alteration or modification of their content and against sabotage or unauthorized destruction;
- building security systems and transmission of classified information.

Arising from enforcement measures are intended: to prevent unauthorized access to classified information; identify the circumstances and the persons who, by their actions, may endanger the security of classified information; ensure that classified information is distributed solely to the persons entitled by law to know; to ensure the physical protection of information and personnel necessary for the protection of classified information (art. 5 of Law no. 182/2002).

People who have access to information classified as state secret are checked in advance on honesty and professionalism regarding the use of this information (art. 7 par. 1 of Law no. 182/2002).

Protection of classified information aimed – according to art. 9 of Law no. 182/2002: legal protection; procedural protection measures; physical protection; protection of personnel with access to classified information or is designated to ensure safety; generating sources of information protection.

¹ Ana Vidat - Bucharest University of Economic Studies, Law Department, Lawyer, member of the Bucharest Bar Association, ana.vidat@yahoo.com.

² Published in the “Official Gazette of Romania”, Part I, nr. 248 of 12 April 2002.

Protection of state secret information is an obligation on persons authorized to issue them, manage them or in their possession (art. 16 of Law no. 182/2002).

In the category of state secret information are included – as art. 17 of Law no. 182/2002 – those representing or relating to:

- the country's defense system and its basic elements, military operations, manufacturing technologies, the characteristics of weapons and combat equipment used exclusively in the national defense system elements;
- plans and military devices, personnel and tasks forces engaged;
- state and other cipher encryption elements established by the competent public authorities, as well as activities related to achievement and their use;
- organizing protection systems and defense objectives, sectors and special and military computer networks, including their security mechanisms;
- data, schemes and programs relating to communication systems and computer networks and military special, including their security mechanisms;
- intelligence work carried out by public authorities established by law for the country's defense and national security;
- the means, methods, techniques and work equipment and specific information sources used by public authorities which carries information;
- maps, topographical plans, and records thermograms aerial flight performed at scales larger than 1: 20,000, which has the objective content items or classified state secrets.
- studies, geological and gravimetric density of more than one point per square kilometer, which assesses national reserves of rare metals and minerals, precious and disperse radioactive and reserves data and information on materials that are jurisdiction of the National Administration of State Reserves;
- systems and plans to supply electricity, heat, water and other agents necessary for the operation objectives classified state secrets;
- scientific activities, technological or economic and investment related to national security or national defense or are of special importance for the economic and scientific-technical Romania;
- scientific research in the field of nuclear technology, outside the core, and programs for the protection and security of nuclear materials and facilities;
- issuing, printing notes and minting coins, models monetary issues of the NBR and security features of banknotes and coins to detect fakes, not for advertising and printing and printing securities nature of government securities, treasury bills and bonds;
- external relations and activities of the Romanian state, which, by law, not for publicity and information of other States or international organizations to which treaties or international agreements, the Romanian government has pledged protection.

b) Secret information is determined by the head of the legal person (art. 31 par. 1 of Law no. 182/2002).

This information will bear on each page and the words "personal" when certain persons are intended strictly determined (art. 31 para. 2 of Law no. 182/2002).

In accordance with art. 31 para. 4 of Law no. 182/2002, negligence in keeping secret information service attracts criminal law liability of persons guilty.

The heads of public authorities and institutions, economic agents or partially owned by the state and other legal entities of public or private are required to establish the information which is secret service and their protection rules, coordinate and control activity measures concerning the secrecy of service, according to the competencies, in accordance with rules established by Government decision (art. 32 of Law no. 182/2002).

It is forbidden – according to art. 33 of Law no. 182/2002 – classifying as secret service information which by its nature or content, are intended to provide information to citizens on issues of public interest or personal, to facilitate or cover circumvention law or obstruction of justice.

Access to state secret information and service is permitted only with written authorization issued by the head of the legal entity that holds such information, upon prior notification to the

National Registry Office for Classified Information (according to art. 28 par. 1 in conjunction with art. 31 par. 3 of Law no. 182/2002).

3. Aspects of the legal effects which it produces after the termination of the individual labor contract *ex contractu*

A) Art. 8 of the Labour Code establishes for the first time, explicitly – as a principle of legal relations work³ – good faith must manifest itself in the form:

- loyalty, at the conclusion of the individual labor contract and collective agreement;
- loyalty and cooperation during the execution of the individual employment contract or collective agreement⁴.

Obligation of loyalty⁵ – a component of labor discipline⁶ – is only expressly specified in art. 39 para. 2 letter d of the Labor Code. Distinct but related, art. 39 para. 2 letter f of the Code provides for the obligation of the employee to comply with secrecy.

Since no labor code or other regulations do not cover in full what is meant by "obligation of fidelity" in labor law doctrine⁷ stated that the main task of the employee during the execution of the individual employment contract include: compete, consisting of obligation employee not to compete him his employer during the execution of the individual employment contract and confidentiality that the employee duty not to disclose secret information of the employer.

Distinct, the Labour Code stipulates the possibility of contracting parties to insert the individual employment contract non-compete clause (art. 21-24) and/or privacy (art. 26).

Basically, we have to distinguish between the legal obligation of fidelity – that lies imperative based on the laws – and the non-compete clause, namely that privacy – which is the result of the will of the contracting parties.

The legal obligation exists only compete during the execution of the individual employment contract, while the contractual obligation is synonymous incident, only after expiry of the contract, for a period of time.

The legal obligation of confidentiality requires the employee to secrecy of classified information and on the job. Privacy clause establishes the employee – part in the individual employment contract – information which is held contractually to not disclose.

B). a) At the conclusion of the individual employment contract or during its execution, the parties may negotiate and include in the contract a non-compete clause by which the employee is obliged after termination does not provide, for their own or a third party, an activity that is done to compete with the employer in exchange for a monthly non-compete compensation which the employer is obliged to pay the entire period of non-competition (according to art. 21 par. 1 of the Labour Code).

Non-compete clause takes effect – according to art. 21 para. 2 of the Labour Code – only if the content of the individual employment contract are set out in particular:

- *activities that are prohibited employee after the termination date.* Clause may have the effect of prohibiting absolutely the Occupation employee or specialization that holds – in which

³ And art. 57 of the Constitution provides: "Romanian citizens, foreign citizens and stateless persons shall exercise their rights and liberties in good faith, without violating the rights and freedoms of others".

⁴ See extensively Ion Traian Ștefănescu, *Tratat teoretic și practic de drept al muncii*, third edition, revised and enlarged, Universul Juridic Publishing House, Bucharest, 2014, p. 87.

⁵ Neither the Labour Code of 1950 nor that of 1973 did not contain any reference to the obligation of loyalty or its components.

⁶ See extensively Ion Traian Ștefănescu, *op. cit.*, p. 337.

⁷ Refer to, in this regard, Ion Traian Ștefănescu, *Obligația de fidelitate*, in Ion Traian Ștefănescu, Monica Gheorghe, Irina Sorică, Aurelian Gabriel Uluitu, Brândușa Vartolomei, Ana Vidat, Veronica Voinescu, *Dicționar de drept al muncii*, Universul Juridic Publishing House, Bucharest, 2014, p. 262; Raluca Dimitriu, *Obligația de fidelitate în raporturile de muncă*, Tribuna Economică Publishing House, Bucharest, 2001, p. 14-15; Alexandru Athanasiu, Luminița Dima, *Dreptul muncii*, All Beck Publishing House, Bucharest, 2005, p. 64; Ion Traian Ștefănescu, Ovidiu Macovei, Brândușa Vartolomei, *Corelația dintre obligația de fidelitate și clauza de neconcurență inserată în contractul individual de muncă*, in „Dreptul” no. 11/2005, p. 89; Ion Traian Ștefănescu, *op. cit.*, p. 338; Alexandru Țiclea, *Tratat de dreptul muncii, Legislație. Doctrină. Jurisprudență*, eighth edition, Universul Juridic Publishing House, Bucharest, 2014, p. 391.

case there would be about a non-compete clause, but an exclusivity clause inadmissible under Romanian law because defeat unacceptable labor freedom⁸.

- *amount of monthly allowance compete* – expenditure incurred by the employer and deductible in calculating taxable income, taxed at the individual beneficiary under the law (art. 21 par. 4 of the Labour Code). Non-compete indemnity payable monthly salary of the employee is not being negotiated and is at least 50% of the average gross wages of the employee in the last 6 months prior to the termination of the individual employment contract or, if the duration of the individual labor contract was less than 6 months, the average monthly gross wages due him during the contract (art. 21 par. 3 of the Labour Code).

- *the period for which becomes effective non-compete clause*. According to art. 22 para. 1 of the Labour Code, the non-compete clause can be effective for a period not exceeding two years from the date of termination of the individual employment contract⁹.

- *third parties in whose favor the provision prohibiting the activity*;

- *And the geographical area where the employee may be real competition with the employer*.

b). In accordance with art. 23 para. 2 of the Labor Code, upon notification by the employee or territorial labor inspectorate, the competent court may mitigate the effects of non-compete clause.

Failure to comply with guilt, employee non-compete clause may have to refund the allowance and, where necessary, appropriate injury damages which he produced the employer (art. 24 of the Labour Code).

C). Confidentiality extends its legal effects after the termination of the individual employment contract ie contract as a result of the confidentiality clause – whereby the parties agree that the duration of the individual employment contract and after its termination, do not transmit data or information which they have knowledge during execution of the contract, conditions of internal regulations in collective agreements or individual employment contracts.

Confidentiality clause, as we have shown, aiming at a broader range of information than that envisaged by the legal concepts of "*classified information*" and "*secret service*"¹⁰.

The wording of the legal text that confidentiality clause inserted in the individual employment contract legal effects for both parties – unlike the non-compete clause which imposes obligations solely to the employee.

Confidentiality clause take effect after the termination of the individual employment contract. But, unlike the non-compete clause, the confidentiality – to take effect when termination - must necessarily exist before this time¹¹.

Violation of this clause by either party draws an order of defaulting on payment of damages (art. 26 par. 2 of the Labour Code).

4. Conclusions

The immediate effect of any contract is to exist, to modify or extinguish rights and obligations.

Valid contract has the force of law between the contracting parties – the *pacta sunt servanda* principle.

⁸ Refer to, in this regard, Raluca Dimitriu, *Contractul individual de muncă – Prezent și perspective*, op. cit., p. 178-179; Ovidiu Macovei, *Conținutul contractului individual de muncă*, op. cit., p. 335-340, Ion Traian Ștefănescu, op. cit., p. 341-342.

⁹ According to art. 22 para. 2 of the Labor Code, these provisions are not applicable in cases where the termination of the individual labor contract law has occurred, except as provided in art. 56 para. 1 point c (the date of fulfillment of the conditions cumulative standard age and minimum contribution period for retirement, the date the decision of the pension if the disability pension, partial early retirement, early retirement, retirement pension with reduced standard retirement age); point e (due to the request for reinstatement to the position occupied by an employee of a person unlawfully dismissed or groundless, the date of the final judgment reintegration); point f (as a result of execution of a sentence of imprisonment, from the date of the final judgment); point g (from the withdrawal by the authorities or bodies of the permits, authorizations or certificates required by the profession); point i (to the date the individual labor contract concluded fixed-term) or intervened by the employer for reasons not related to the employee.

¹⁰ See extensively Ion Traian Ștefănescu, op. cit., p. 354.

¹¹ *Idem*, p. 355.

The foundation is the binding force of the contract will of the parties, the law is only bordering guarantee contract performance, penalizing failure to.

Execution of the individual employment contract, from the beginning and until terminated, put into play a complex set of legal rules, have certain traits that customizes to civil contracts that are similar.

In fact, the cause of the individual labor contract is through its execution.

As shown, although the actual execution of the individual employment contract occurs during its existence, however there are cases where this legal act can produce legal effects after the time of his termination.

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