

ESSENTIAL CLAUSES OF INDIVIDUAL EMPLOYMENT CONTRACT - QUESTIONS AND ANSWERS

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Abstract

This study aims to analyze the legal texts of the Labour Code which refers to the elements / clauses in individual employment contract and clarifying those that have been essential. Rules of the Labour Code which refer to the contents of the individual employment contract are not consistent. The texts of the Labour Code which refer to the essential and specific clauses in individual employment contract are art. 17 para. (1) - (3), art. 20 and art. 41-48. Also Order no. 64/2003 sets out the mandatory elements that must be included in the individual employment contract, showing that through negotiation between the parties, the contract may include specific clauses under the law. The analysis is done in the light of the provisions of art. 1179 and art. 1185 of the Civil Code, as in common law. At the end of the study, we conclude that certain provisions were essential character to the conclusion of any individual employment contract, others result of the negotiation, have essential character only to the contracting parties, while certain clauses are essential for certain types of individual employment contracts. Finally, it is assessed and the consequences of lack of essential clauses and establish its content contrary to legal norms.

Keywords: *individual employment contract, clauses essential, clauses specific, items.*

JEL Classification: K12, K31

Recently, at a conference dedicated to labor law² were discussed clauses of the individual employment contract, trying to define what is meant by essential clauses and specific clauses in this contract. Contradictory allegations have prompted a debate on the types of clauses in individual employment contract, without arriving at a definition of these terms. Therefore, understanding these debates to extend below.

1. Introductory considerations

A. Civil Code operates to distinguish between the essential elements of the contract, the essential conditions for the validity of a contract and the essential terms of a contract.

Art. 1179 of the Civil Code provides essential conditions for the validity of a contract, namely: the capacity to contract, the parties consent, a specific object and legitimate, lawful and moral cause. These conditions are basically the same with the validity of any legal act. The contract ends following the meeting of two wills consistent legal order of birth, modification or extinguishment of a legal relationship. According to art. 1182 par. (1) of the Civil Code, the contract is concluded through negotiation by the parties or by accepting without reservation of an offer to contract. The elements on which the parties must reach consensus to conclude the contract in art. 1182 par. (2) The legislature has operated the distinction between by elements essential and secondary elements without stable content („it is sufficient for the parties to agree on the essential elements of the contract, even if it allows some secondary elements to be agreed later times Instructs their determination to another person?”). The civil legal doctrine³ recognizes that essential characteristic refers to the benefits derived from the contract for each side, and secondary elements arising therefrom. But it is possible that one party or both parties to consider an essential element of the contract being considered which would have been normally secondary. In this case, art. 1185 of the Civil Code states that despite the rule laid down in art. 1182 par. (1) and (2), the contract can not be considered concluded only when an agreement is reached and appreciated element on one side or both as essential.

Civil Code does not define what is meant by essential clauses in the contract. Analysis of legal texts is inferred that are essential clauses be set so the ex law or by the will of the parties. Where are

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³ L. Pop, I.-F. Popa, S.I. Vidu, *Tratat elementar de drept civil. Obligațiile*, Universul Juridic, Bucharest, 2012, pp. 98-99.

designated as essential by the will of the parties, the Code states that must be accepted in writing by the party who proposed them. As a result, the essential terms not identified with the essentials, essential clauses sphere is higher than that of the essential elements in the contract. Also, the validity terms are independent, being neither provision nor essential.

B. Compared to the existing regulation in civil law, labor law is not reflected concept of essential elements, only the essential clauses and specific clauses.

Legal texts incidents are:

- Art. 17 para. (1) of the Labour Code: "Prior to the conclusion or modification of individual employment contract, the employer must inform the person selected for employment or, where applicable, the employee of the terms upon which they intend to include in the contract or amend. "

- Art. 17 para. (3) of the Labour Code: "The person selected for employment or employee, as the case will be informed at least:

a) the identity of the parties;

b) work or, in the absence of fixed job, the possibility that employee to work in different locations;

c) premises or, where appropriate, the domicile of the employer;

d) position / occupation according to the Classification of Occupations in Romania or other regulations and job descriptions, specifying duties of the post;

e) professional activity evaluation criteria applicable to the employee by the employer;

f) risks specific to the job;

g) the date on which the contract is to take effect;

h) for a fixed-term employment contract or a temporary contract, its duration;

i) the duration of the leave to which the employee is entitled;

j) conditions to give notice to the Contracting Parties and their duration;

k) basic salary, other constituents of the earnings and frequency of salary payments to the employee is entitled;

l) during normal working in hours / day and days / week;

m) indicating the collective labor agreement governing the working conditions of employees;

n) during the probationary period. "

- Art. 17 para. (4) "elements of information provided in par. (3) must be reflected in the content individual contract work "

- Art. 20 para. (1) of the Labour Code: "Apart from the essential clauses provided for in art. 17 between parties can be negotiated and included in the individual employment contract and other specific clauses. "

- Art. 41 para. (3) of the Labour Code: "Changing individual employment contract refers to any of the following: a) duration of the contract; b) the place of work; c) type of work; d) working conditions; e) salary; f) working time and rest time. "

- Art. 2 of Order no. 64/2003 approving the model framework of the individual employment contract: par. (1) "individual employment contract between employer and employee shall include the mandatory elements set out in the framework model"; par. (2) "By negotiation between the Parties individual employment contract may include specific clauses under the law."

C. a. In order to form consent for the conclusion or modification of individual employment contract, the Labour Code provides that the employer shall inform the person selected for employment or, where applicable, the employee of the terms upon which they intend to enroll in the contract or amend them.

Among the items listed in art. 17 para. (3) some information purposes only and does not consent to form may be subject to individual negotiation [those listed in letter a) letter c) letter m)] while others may form the object of individual negotiation.

All items on the information that was made and that have been individually negotiated shall be included under Art. 17 para. (4) of the Code, the content of individual employment contract, the clause without a contract can not be reached⁴.

⁴ See M. Volonciu, in Al. Athanasiu, M. Volonciu, L. Dima, O. Cazan, *Codul muncii. Comentariu pe articole. Vol. I*, C.H. Beck, Bucharest, 2007, p. 40.

If, by definition, it is about certain types of individual employment contracts, besides the elements specified in Art. 17 para. (3) it must be acknowledged and subsequently included in the contract, and other individual items as follows:

- Individual employment contract must include part-time, according to art. 105 par. (1) and: hours of work and distribution of working hours; the conditions may change work program; a ban on overtime, except in cases of force majeure or for other urgent works to prevent accidents or to eliminate their consequences;

- Individual employment contract contains home, according to art. 109: the express mention that the employee works at home; program under which the employer has the right to control the activity of the employee and the actual method of control; employer's obligation to provide transportation to and from the domicile of the employee, as appropriate, raw materials and the materials used in the activity, as well as the finished products they carry.

b. Art. 41 of the Labour Code establishes the rule that change individual employment contract may be made only by agreement of the parties [para. (1)]. As an exception, unilateral modification of contract by the employer is permitted under the limiting of the code: to establish individual performance objectives for employee [under Art. 40 para. (1) f)] in case of force majeure, as a disciplinary measure or as a measure to protect the employee (art. 48), for reducing working hours and salary from 5 days to 4 days per week to remedy the situation caused reduction [art. 52 para. (3)], in case of delegation (art. 43 and art. 44) and in case of posting (Art. 45-47).

2. Considerations on the essential clauses in individual employment contract

Towards the settlement of the labor code are born more questions that answers make the following arguments.

2.1. What are the essential clauses in individual employment contract?

From the beginning mention that according to the Explanatory Dictionary of the Romanian Language, the word "essential" means "which is the most important part of a problem or a thing; which keeps the essence regarding the essence; primordial, fundamental principal ". Thus, an item appears to be essential when defining, fundamental for a particular contract.

The wording of all the legal texts that, after undergoing pre-contractual phase (consisting of presentation of evidence at the employer, project presentation or addendum of the individual employment contract and individual negotiation), all the terms contained in the contract have been informed in pursuant to art. 17 para. (1) and (3) can not be considered other than the essential terms.

These clauses are included in the essential framework model of individual employment contract, approved by Order no. 64/2003. If art. 17 refers only to specific risks station, lit. G and lit. K. mentioned in order detailing the conditions of employment the employee operating⁵ and specific rights related to safety and health at work⁶.

In this regard it is relevant and art. 20 para. (1) of the Code which expressly designates the clauses of art. 17 as essential clauses.

If the employee is to work abroad, the employer is obliged to provide some additional information provided in art. 18 para. (1) of the Code. Of this information, par. (2) thereof, the on duration of work to be performed abroad, the currency in which to pay the remuneration and payment arrangements, benefits in cash and / or in kind, other than salary, must be reflected in the content of individual employment contract, is therefore essential clauses in the contract.

⁵ According lett. G model framework, the individual employment contract must provide the employee if the work is conducted in accordance with Law no. 31/1991 and whether it is in normal / special / special working under Law no. 263/2010 on the unitary system of public pensions, as amended and supplemented.

⁶ Lett. K model framework must be specified in the individual employment contract has specific duties related to safety and health at work, ie if and under what conditions the employee benefit: personal protective equipment, personal equipment is working, hygiene materials, food for protection and other rights and obligations specific safety and health at work.

The other clauses of the contract are non defining, fundamental conclusion of the individual employment contract are not essential.

2.2. What is the ratio of essential items provided for art. 17 para. (3) those listed in art. 41 para. (3) of the Code?

A comparative analysis of these texts shows that: the reference to working conditions in art. 41 para. (3) d) is present only partly in the letter f) risks on job-art. 17 para. (3) and fully framework model of individual employment contract and probation referred to under n) of art. 17 para. (3) it is not included in the enumeration of art. 41 para. (3).

The reference to working conditions in art. 41 para. (3) it is not completely original, but the scope of these conditions is broader than that referred to in art. 17 para. (3) f) and includes health and safety conditions at work. However, as noted above, the framework model of individual labor contract clause imposes its contents both on working conditions and on the specific rights relating to health and safety related work.

In terms of probation, according to art. 31 para. (1), the legislature established the possibility for individual employment contract parties to insert such a clause. If this clause was inserted in the contract negotiated and - having established duration of art. 31 para. (1) - she uses both Contracting Parties. The probationary period is not usually binding. As an exception, the employment of disabled people, testing the professional skills is made exclusively by way of the probationary period of at least 45 working days⁷.

As it stated in legal doctrine⁸, art. 41 para. (3) is not intended to limit in any way change the terms of which may not be decided unilaterally all the clauses have the force of law to the parties and may be modified, in principle, by their agreement will.

As a rule, generic elements defined in art. 41 para. (3) are found specifically in art. 17 para. (3) of the Code. Suplimentare elements are not subject to individual negotiation, being naturally thus finds himself on probation and that is a possible clause in the contract.

2.3. What are the essential terms that may be subject to unilateral changes by the employer and are clauses which may be modified by agreement of the parties?

Respecting the principle of symmetry conclusion of legal documents, if both parties agree, negotiate the content of the individual employment contract, the Labour Code establishes the rule that the parties, all only by mutual agreement, may modify it according to art. 41 para. (1) of the Labour Code. Thus, modification of the individual employment contract is usually done by agreement and can watch any of the clauses of the contract.

By exception to the rule change individual employment contract by mutual consent, according to par. (2) thereof is possible unilateral amendment of the work place by the employer in circumstances and conditions laid down by the Code. These situations place a unilateral amendment of labor believes that based on general and prior consent given by the employee at the end of individual employment contract which has agreed that, exceptionally, during the execution would occur temporary change situations; These situations are those listed above [pt. I lit. C) b)]⁹.

Art. 41 para. (3) must be interpreted by reference to the preceding paragraphs and the provisions of art. 17 para. (3). As noted, this paragraph expresses in summary form, concentrated all the elements of art. 17 para. (3) and there is a discrepancy between the two provisions. Consequently, all essential

⁷ Art. 83 para. (1) d) of Law no. 448/2006 on the protection and promotion of rights of persons with disabilities.

⁸ I.T. Ștefănescu, *Tratat teoretic și practic de drept al muncii*, 3rd ed. revised and enlarged, Universul Juridic, Bucharest, 2014, p. 381-382; R. Dimitriu, *Contractul individual de muncă - prezent și perspectivă*, Lumina Lex, Bucharest, 2005, p. 212-213; Al. Athanasiu, L. Dima, *Dreptul muncii*, All Beck, Bucharest, 2005, p. 80.

⁹ The solution allows the Legislature to establish and modify the individual performance of the employee unilaterally by the employer has been criticized in legal doctrine. proponing the law ferenda completion of art. 17 of the Labour Code by adding the objective performance information content requirement, thus being subject to individual negotiation. See Al. Athanasiu, *Codul muncii. Comentariu pe articole. Actualizare la vol. I-II*, C.H. Beck, Bucharest, 2012, p. 34-39.

terms of art. 17 para. (3) which are consistent with those reproduced in synthesis of art. 41 para. (3) can not be modified except by consent of the parties, pursuant to art. 41 para. (1). Virtually all essential terms listed art. 17 para. (3) can not be altered by unilateral act of the employer, except in cases and under conditions determined by law.

Obviously, those items on which is informing the selected person or, where applicable, the employee and not subject to negotiation individual is inconceivable to be modified by agreement of the parties (identity of the parties seat or, where appropriate domicile employer collective agreement applicable), while one of them - collective labor contract - rational, can not be changed by any unilateral act of the employer.

When modifying the contract by agreement of the parties, employer's obligation to provide information under Art. 17 of the Code, as the employer and employee are in the negotiation phase for the modification¹⁰. Conversely, if unilateral changes to the individual employment contract, in cases and under conditions established by law (delegation, detachment, crossing temporarily in another work), the employer has the obligation to inform the employee of the terms that will be temporarily changed since in those cases the parties is not taking place individual negotiation.

2.4. What are the essential clauses and specific clauses in individual employment contract?

According to art. 20 para. (1) and (2) of the Code, the parties can be negotiated and included in the individual employment contract and other rights and obligations by considering the specific clauses. Without confining to, they are such clauses: on training, non-compete clause, mobility clause, the confidentiality clause. Called out specific terms, the parties can negotiate, according to their interests and in compliance with art. 38 of the Code, any clauses unnamed¹¹.

These specific clauses named or unnamed, are optional, they may or may not be included in the content of the employment contract. They are fairly basic, defining termination of employment. None of the specific clauses can not have an essential character. But once inserted in the contract negotiated and effect as set by law.

2.5. Outside essential clauses specified in Art. 17 could be other essential clauses in individual employment contract?

As mentioned above, labor law there is no concept of essential elements, only the essential clauses and specific clauses in individual employment contract.

In opposition to this view, the Civil Code expressly provides in art. 1185 possibility *neîncheierii* individual employment contract if one side insists to reach agreement on an item or on some form unless an agreement is reached on them. In such a situation, the contract can not be considered closed, despite the rule laid down in art. 1182 par. (1) and (2) of the Civil Code, only when an agreement is reached on the item in question.

In relation to this option, questioning whether labor legislation there any specific regulation¹² that does not allow application of art. 1185 of the Civil Code? A specific clause in the individual

¹⁰ Al. Athanasiu, L. Dima, *Dreptul muncii, cit.supra*, p. 81.

¹¹ Any contractual clauses are those unnamed, unforeseen acts, established under the principle of freedom of will, by agreement of the parties and effect to the extent that they are negotiated with the law. Over time, case law and legal doctrine, recognize a number of clauses unnamed individual contracts of employment, namely the clause on intellectual property rights, the conscience clause, clause object clause performance clause stability clause risk free time restriction clause, clause delegate duties etc. See I.T. Ștefănescu (coordonator), *Dicționar de drept al muncii*, Universul Juridic, Bucharest, 2014; I.T. Ștefănescu, *Tratat teoretic și practic de drept al muncii, third edition, revised and enlarged, loc.cit.*, 2014, p. 355 et seq.; A. Țiclea, *Tratat de dreptul muncii. Legislație. Doctrină. jurisprudență, VIII edition, revised and enlarged*, Universul Juridic, Bucharest, 2014, p. 396 et seq.; B. Vartolomei, *Dreptul muncii. Curs universitar*, Universul Juridic, Bucharest, 2016, p. 103 et seq.; M. Gheorghe, *Dreptul individual al muncii. Curs universitar*, Editura Universul Juridic, Bucharest, 2015, p. 149 et seq.; R. Dimitriu, *Contractul individual de muncă. Prezent și perspective, loc.cit.*, p. 175 et seq.; O. Macovei, *Conținutul contractului individual de muncă, loc.cit.*, 2004, p. 297 et seq.; O. Ținca, *Observații referitoare la unele clauze specifice din contractul individual de muncă*, „Revista română de dreptul muncii” no. 4/2008, p. 17 et seq.

¹² Labour Code expressly stipulates in art. 278 par. (1) that its provisions round with civil law, to the extent that they are not incompatible with the specific employment relationship. See I.T. Ștefănescu, Ș. Beligrădeanu, *Privire analitică asupra corelației dintre noul Cod civil și Codul muncii*, „Dreptul” no. 12/2009, p. 11-45.

employment contract, named or unnamed, pursuant to art. 1185, could become an essential clause in the contract?

Given that labor law does not contain specific provisions derogating and that the specific service is not done in this case impossible to apply the rules of ordinary law consider that a specific clause in the employment contract could have an essential character if the negotiation that clause that the very existence of the contract.

As a result, it can advance the idea that on the individual employment contract (like the civil contract), that an essential clause can result from either law or the will of the parties they intend to clarify this. Moreover, a clause which is not contrary to law, morals and which is decisive for the contract parties about volitional is recognized as lawful.

3. Conclusion

In conclusion, labor law distinguishes between essential and specific clauses, named or unnamed, in the individual employment contract. In our view are essential clause following: the duration, place of work, type of work, job duties, criteria for assessing the professional activity of the employee applicable to the employer, working conditions, working hours, annual leave, wages, conditions for granting the notice period. These clauses must be included in the content of individual employment contract, which is the key requirement for complete control of the information that has become employee. A clause unforeseen by law as having the essential character can acquire such character when the parties or one of them intend to clarify the negotiation so as they depend on completion of the work of the individual.

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