Gaps in Iabor Legislation Related to COVID-19

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Keywords: non-working days, industrial accident, remote work.

Abstract: The article analyzes the normative legal acts regulating labor relations adopted during the COVID-19 pandemic. As a result of the analysis of these acts, the author comes to the conclusion that during the pandemic there was a violation of the hierarchy of normative legal acts built in Article 5 of the Labor Code of the Russian Federation, and their inconsistency arose when issues that should be regulated in the Labor Code of the Russian Federation were regulated in by-laws. In particular, the bylaws introduced the category "non-working days", which is not provided for by the Labor Code of the Russian Federation. Analyzing labor legislation during a pandemic, the author identified such gaps in legislation as non-proliferation of rules on remote work to foreign citizens living outside the Russian Federation, as well as non-proliferation of rules on remote work to relationships with the participation of aggregators, not attributing medical masks during a pandemic to personal protective equipment of workers in the workplace, as well as not recognizing the fact of infection with coronavirus infection COVID-19 as an accident at work. As a result, the author proposes to fill these gaps by introducing appropriate amendments to the labor legislation.

1 INTRODUCTION

In the context of the coronavirus pandemic (COVID-19), most states have taken measures to improve labor legislation in order to adapt it to the new conditions. During the pandemic, gaps in the labor legislation were revealed, which made it necessary to improve it in the field of remote work, labor protection of employees and protection of their labor rights.

In this regard, new concepts such as "remote work", "non-working days", which were not previously known, have appeared in the labor legislation. Unfortunately, in a hurry, many changes that had to be included in the Labor Code of the Russian Federation and other federal laws were regulated at the level of bylaws and even at the level of "instructive" letters containing interpretative norms.

It is obvious that the gaps in labor legislation need to be filled, but only within the framework of the hierarchy of normative legal acts built in Article 5 of the Labor Code of the Russian Federation, especially since there are already positive examples, for example, amendments to Chapter 49.1 of the Labor Code of the Russian Federation on remote work.

2 RESEARCH METHODOLOGY

During the study, the historical and legal method was used to assess the legislation on non-working days, the comparative legal method was used to determine the similarities and differences in the legal regulation of non-working days and weekends, as well as non-working holidays, the systematic method was used to analyze the relations of aggregators regulated by civil law and remote workers regulated by the norms of the Labor Code of the Russian Federation, as well as the logical method and methods of analysis and synthesis were used in the interpretation of the norms of law.

3 RESULTS AND DISCUSSIONS

Due to the pandemic and the need to contain the spread of the virus, there was a need for short-term release of workers from work. In the Labor Code of the Russian Federation, two types of rest time are the most suitable for this among the rest time: weekends and non-working holidays. Article 111 of the Labor Code of the Russian Federation provides for two days

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Lada, A.
Gaps in labor Legislation Related to COVID-19.
DOI: 10.5220/0010659900003224
In *Proceedings of the 1st International Scientific Forum on Jurisprudence (WFLAW 2021)*, pages 28-32
ISBN: 978-989-758-598-2

off for a five-day and one day for a six-day working week. Moreover, the employer can introduce a reduced working week to employees, including at the expense of additional days off. Article 112 of the Labor Code of the Russian Federation establishes non-working holidays, and at the federal level, this list is exhaustive. The Government of the Russian Federation in order to rationalize the use of weekends and non-working holidays is given the opportunity to move the weekend to other days.

Therefore, in connection with the need to release employees from work, the most rational would be to provide days off in accordance with Article 111 of the Labor Code of the Russian Federation. However, the Russian President took a different path. He established so-called "non-working days" for employees, which are not provided for by labor legislation.

The Decree of the President of the Russian Federation of 25.03.2020 No. 206 from March 30 to April 3, 2020 declared non-working days with the preservation of wages for employees. By Decree of the President of the Russian Federation No. 294 of 28.04.2020, from 6 to 8 May 2020, inclusive, were also declared non-working days with the preservation of wages for employees. The Ministry of Labor of the Russian Federation in a letter dated 26.03.2020 No. 14-4/10/P-2696 clarified that a non-working day does not apply to either weekends or non-working holidays. The situation was repeated in 2021. By the Decree of the President of the Russian Federation of 23.04.2021 No. 242 from 4 to 7 May 2021. non-working days were declared with the preservation of wages for employees.

It should be noted that the legal regime of so-called "non-working" days has both similarities and differences from the regime of weekends. The similarity is that the annual leave is not extended for both weekends and non-working days, and the presence of both days off and non-working days is not a reason for reducing the wages of employees.

The differences are as follows: first, for payment, when working on a weekend, payment is made according to Article 154 of the Labor Code of the Russian Federation in double the amount or an additional day of rest is provided, when working on non-working days, the payment is made in the usual, and not increased, amount.

According to some lawyers, the so-called "non-working days", by their legal nature, cannot be attributed to working time (Arshinova , 2020), while other scientists believe that "non-working days" also cannot be attributed to rest time (Golovina and Kushina and Serova, 2020). Thus, it can be stated that the decrees of the President of the Russian Federation introduced a completely new category of "non-working days", which is not provided for by labor legislation.

We should agree with the scientists who state that during the pandemic there was a violation of the hierarchy of normative legal acts built in Article 5 of the Labor Code of the Russian Federation and their inconsistency (Golovina and Ramakulov and Tomashevsky and Hasenov, 2020), when the issues that should be regulated in the Labor Code of the Russian Federation began to be regulated in by-laws. Article 5 of the Labor Code of the Russian Federation stipulates that amendments to the Labor Code of the Russian Federation must be implemented by separate federal laws. Therefore, the establishment of a new category of "non-working days" by the Presidential decree contradicts Article 5 of the Labor Code of the Russian Federation.

However, it should be noted that there is a gap in the legislation if there is a need for short-term release of workers from work during the pandemic. The category of "non-working days" proposed in the decree of the President of the Russian Federation seems quite successful. But this category should be established in the federal law by making changes to the Labor Code of the Russian Federation. It is necessary to introduce Article 111.1 of the Labor Code of the Russian Federation "Non-working days", which states the following: "Non-working days are introduced during the pandemic in order to prevent its spread. Specific dates of non-working days are established by the Presidential decree. For the period of non-working days, employees retain their place of work and average salary. The presence of non-working days is not a reason for reducing the wages of employees."

Another innovation during the pandemic was a more detailed regulation of remote work in the Labor Code of the Russian Federation. According to scientists, remote work corresponds to the new relationships in the social and labor sphere and metaphysics (philosophy of law), and therefore is a normal practice (Lada and Markov, 2019).

Chapter 49.1 of the Labor Code of the Russian Federation does not grant the right to foreign workers residing outside the Russian Federation to work remotely on the territory of the Russian Federation, although taking into account the fact that the borders are closed during the pandemic, this could partially solve the problem of attracting highly qualified foreign workers.

It is necessary to agree with scientists who believe that the ban on remote work for foreigners living

outside the Russian Federation restricts the freedom of the parties to remote labor relations, does not meet the goals of Chapter 49.1 of the Labor Code of the Russian Federation and significantly reduces the value of the benefits of remote work (Vasil'eva and SHuraleva, C., 2016).

Therefore, the provisions of the law contained in Chapter 48.1 of the Labor Code of the Russian Federation should also apply to the work of Russian citizens, foreign citizens and stateless persons permanently residing outside the territory of the Russian Federation.

Another gap in the legislation is the too narrow interpretation of remote work and the fallout from the legal regulation of labor law norms of similar relations, in particular relations with the use of aggregators. The relations of the aggregator with the contractor are regulated exclusively by the norms of civil law. However, the scientists ' proposal to regulate these relations with labor law norms deserves attention, since they are similar to labor relations (Lyutov and Voitkovska, 2021): monitoring compliance with the limit of hours worked by a taxi driver through a tachograph, a bonus system for drivers that resembles the bonus system for employees (Lada and Voronin, 2020), as well as with such types of work regulated by labor law , such as "work on call" (Zakalyuzhnaya, 2015). As one of the arguments, they cite the decision of the Court of Appeal of Paris on the recognition of the contract between a taxi driver and the Uber platform as an employment contract (Lyutov, 2020).

Also, working in the "cloud" has a lot in common with labor relations, which is the concept of virtual work regardless of the location and jurisdiction of the enterprise, without fixing the workplace and with no reference to the time of work (CHikanova and Seregina, 2018).

Many scientists express confidence that in the next few years, work based on Internet platforms will be regulated by labor legislation (Filipova, 2020).

In order to protect the rights of these persons, it is necessary to introduce a new chapter 48.2 in the Labor Code of the Russian Federation to call it "Legal regulation of labor of employees with aggregators".

One of the security measures that an employer must provide during a pandemic is the mandatory wearing of medical masks.

In the order of the Ministry of Science and Higher Education of the Russian Federation of August 28, 2020, No. 1133, all educational institutions of higher education are required to ensure the mandatory wearing of medical masks. However, the order does not mention at whose expense medical masks should be purchased, which is a gap in the legislation. It seems that during a pandemic, a medical mask should be equated with personal protective equipment and applied by analogy to the norms of Article 212 of the Labor Code of the Russian Federation on the obligation of the employer to ensure the purchase and issue of personal protective equipment at their own expense. An argument in favor of this may be the obligation of the employer to provide medical masks to the staff of medical institutions. During a pandemic, if the employer does not have the obligation to conduct mandatory testing of employees for COVID-19, the presence of an employee in the workplace can be no less dangerous than being in a medical facility.

In this regard, it is necessary to amend the labor legislation, equate the protective medical mask with personal protective equipment during the pandemic, and oblige the employer to purchase protective medical masks at their own expense during the pandemic, and, if necessary, protective gloves.

It should be noted that the refusal to issue a medical mask at the expense of the employer during the pandemic should be equated with the failure to provide the employee with personal protective equipment. In particular, Article 220 of the Labor Code of the Russian Federation provides for the refusal of an employee to perform work in case of failure to provide the employee with individual and collective protection equipment, which should also be applied if the employee is not provided with a medical mask at the expense of the employer.

The issue of the employer's responsibility for the infection of an employee with COVID-19 in the workplace is relevant. The legislation of the Russian Federation establishes that if a medical worker who directly works with patients with the COVID-19 coronovirus has contracted this disease, then there is a presumption that he was infected at the workplace. Thus, the fact of infection of a medical worker directly working with patients with the COVID-19 coronovirus is actually equivalent to an accident at work.

For the rest of the employees, there is no such presumption, and therefore they need to prove that they are infected with the COVID-19 coronavirus infection in the workplace. In practice, this fact is quite difficult to prove. If the employee proves that the employer violated the sanitary and epidemiological norms prescribed by law, then the fact of infection with the COVID-19 coronavirus infection in the workplace will be much easier to prove.

In this regard, it is necessary to fix the presumption in the resolution of the Plenum of the Supreme Court of the Russian Federation, according to which, if the fact of violation by the employer of sanitary and epidemiological norms aimed at preventing the spread of COVID-19 coronavirus infection is proved, then it is considered that the employee has contracted COVID-19 coronavirus infection in the workplace.

Judicial practice has not yet been formed on this issue, but the first claims have already been filed by medical workers in St. Petersburg (Ermakov, 2020). The difficulty lies in proving the fact of infection in the workplace.

It seems that if an employee can prove that he or she contracted the COVID-19 coronavirus infection during working hours at the workplace or on the territory of the employer, then this fact should be equated with an industrial accident and extend to the employee the effect of the Federal Law of the Russian Federation "On Mandatory Social Insurance of Employees against Industrial Accidents and Occupational Diseases", according to which the social Insurance fund of the Russian Federation will have to pay the employee the same payments as in any other industrial accident: a one-time payment, average earnings, medical expenses. And the employer will have to compensate the employee for moral damage.

At the same time, it should be taken into account that if the employer has taken all the measures provided for by law to prevent the infection of employees, but the employee still became infected, then he is not entitled to payments. In the world practice, there is a tendency to remove responsibility from the employer for the infection of an employee with the COVID-19 coronavirus infection in the workplace, in particular, in the United States, it is proposed to completely exempt the employer from responsibility to the employee associated with the consequences of the pandemic. Trade unions do not agree with this approach, since limiting the liability of companies will lead to the fact that their managers will no longer care about the safety of their employees(Efimova, 2020) .

4 CONCLUSIONS

During the pandemic, gaps in labor legislation were identified, which revealed the need to improve labor legislation in the field of remote work, labor protection of employees and protection of their labor rights.

1. The Labor Code of the Russian Federation does not provide for such a category as "non-working days". Nevertheless, during the pandemic, the category of "non-working days" is regularly applied at the level of the decree of the President of the Russian Federation. At the same time, it should be noted that there is a gap in the legislation in the need for short-term exemption of workers from work during the pandemic. To give legitimacy to this category, it is necessary to make changes to the Labor Code of the Russian Federation. It is necessary to introduce Article 111.1 of the Labor Code of the Russian Federation "Non-working days", which states the following: "Non-working days are introduced during the pandemic in order to prevent its spread. Specific dates of non-working days are established by the decree of the President of the Russian Federation. For the period of non-working days, employees retain their place of work and average salary. The presence of non-working days is not a reason for reducing the wages of employees."We hope you find the information in this template useful in the preparation of your submission.

2. A gap in the legislation is the non-proliferation of the norms on remote work for foreign citizens living outside the Russian Federation, which restricts the freedom of the parties to remote labor relations. Therefore, the application of the legal norms contained in Chapter 48.1 of the Labor Code of the Russian Federation should also be extended to the work of Russian citizens, foreign citizens and stateless persons permanently residing outside the territory of the Russian Federation.

3. A gap in the legislation is the lack of legal norms regulating at whose expense medical masks for workers should be purchased during a pandemic. It seems that during a pandemic, a medical mask should be equated with personal protective equipment and applied by analogy to the norms of Article 212 of the Labor Code of the Russian Federation on the obligation of the employer to ensure the purchase and issue of personal protective equipment at their own expense. In case of non-issuance of a medical mask to an employee, apply the consequences provided for in Article 220 of the Labor Code of the Russian Federation, in particular, the employee's refusal to perform the work.

4. A gap in the legislation is the lack of norms on the employer's labor law liability for the infection of an employee with a coronavirus infection in the workplace, which allows the employer not to care about the safety of its employees. It seems that the fact of infection with a coronavirus infection should be equated with an accident at work and extend to the

employee the effect of the Federal Law of the Russian Federation "On Mandatory social insurance of employees against accidents at work and occupational diseases". In the resolution of the Plenum of the Supreme Court of the Russian Federation, to fix the presumption according to which, if it is proved that the employer violates sanitary and epidemiological standards aimed at preventing the spread of COVID-19 coronavirus infection, then consider that the employee has contracted COVID-19 coronavirus infection in the workplace.

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