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MODERN TRENDS OF EMPLOYER'S PECUNIARY LIABILITY IN UKRAINE

The article is devoted to current trends of legislative regulation of pecuniary liability of the employer. The analysis has shown a gradual increase of the role of pecuniary liability of the employer. The article focuses on quantifying and justifying the difference between property liability and pecuniary liability of the employer. Modern trends of development the employer's pecuniary liability characterized by increasing his responsibility and by closer attention of the legislator to legislative regulation of labor relations between the parties of the labor contract, but such trends don't solve fundamental problems. The paper contains proposals and recommendations for improving current legislation on employer's pecuniary liability and also contains recommendations for revision of the draft Labour Code of Ukraine.

Key words: employer, liability, employer's pecuniary liability, employer's property liability, liability in labor law.

The modern trends of labor law development are largely determined by the provisions of the draft Labour Code of Ukraine. However, the development of market economy in the state requires a review of existing approaches to the employees' rights, in particular, on bringing the employer to pecuniary liability. At the same time, considers the lack of experience of the applying to the employers of various ownership and organizational forms the pecuniary liability, the difficulties arise in process of applying the provisions on the employer pecuniary liability in practice. To some extent, this problem related to the false substitution of the concepts of «pecuniary liability» and «property liability». The settlement of the aforementioned problems caused the task of this scientific article. In particular, the article reveals the difference between pecuniary and property liability of the employer.

The article is summarizing the main trends of the development of employer's pecuniary liability and objectives of proposals and recommendations for its improvement.

Scientific and theoretical basis of the research are the works on pecuniary liability in labor law. The issue of pecuniary liability of labor contract parties has been studied by such scholars as: V. S. Venediktov, L. I. Lazor, O. M. Lukyanchikov, O. I. Protsevskyy, O. S. Pashkov, P. D. Pylypenko, V. I. Prokopenko, P. R. Stavyskiy, S. M. Prylypko, Yu. V. Trofymovska, N. M. Khutorian, H. I. Chanysheva, O. M. Yaroshenko and others.

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Liability, as the legal phenomenon, plays an important role in the regulation of any legal relations, using of this legal instrument responds to a violation of the existing rules of conduct by specific participants of the relations. At its core liability is the obligation of the offender to suffer the adverse effect for breaking the law or contract. The development of labor law science designed the sectorial types of liability of participants of labor relations; pecuniary liability is one of such types. However, given the fact that the negative effects of violations of labor laws or contract manifested in the form of personal or material restrictions, in practice the pecuniary liability is often replaced by property liability.

In modern labor law science the pecuniary liability considers as the obligation of one party of employment contract (employee or employer) to compensate the damage caused to the other party as a

result of the guilty, unlawful failure or improper fulfillment of their job duties¹. We should note that the employer's pecuniary liability doesn't exist always in different periods of labor law development as an independent field.

Thus, A. M. Lushnikov and M. V. Lushnikova note that at the late XIX - early XX centuries pecuniary liability as an independent institute of social legislation was absent, but three areas in the legal regulation of this problem have been separated. 1. The employee's liability for damage to employer's property based on the principles of civil law... 2. The employer's liability for damage caused to the employee's health regulated by civil law... 3. The employer's liability for damage caused to the employee's property that consisted exclusively responsible for late payment of wages².

In the contest of studying the issue of development of employer's pecuniary liability it's be worth looking at N. M. Khutoryan works. The author substantiated that the regulation of the pecuniary liability of labor contract parties has passed several stages of development, including: the first stage - the establishment and improvement of legislation on pecuniary liability (started from the adoption of the Labor Code of the USSR - 1922 and ended in 1970). This stage characterized by the specifying of regulation of the employee's pecuniary liability. The second stage - the second codification of labor legislation and its development (1970 - 1986). At this stage it really necessary to point out that some articles of the Labour Code enshrined the pecuniary liability of the company, institution or organization in case of injuring the employee's health damage, or in the case of unlawful dismissal or transfer to another job³. The fourth stage - building a legal democratic state, formation and development of market relations (1990 until now), that characterized by increasing of pecuniary liability of owner or authorized body to the employee in case of unlawful dismissal or transfer to another job; also this stage characterized by establishment types and compensation procedure for pecuniary damage caused by the injury to the employee's health; another feature of mentioned stage is the introduction of compensation by the owner or authorized body of moral damages to the employee and complementation the range of subjects that can act as an employer, and therefore they can act as the party of pecuniary liability⁴.

So, abovementioned provisions show that a staged allocation of labor law from the civil law characterized by the development of independent institutions of labor law, and pecuniary liability isn't exception. Time indicates the increased attention of the legislator to the role of pecuniary liability of the employer. However, the current stage of labor law development characterized by preparing for the adoption of the draft Labour Code of Ukraine. Art. 2 of the Draft enshrined one of the tasks of the Code: to regulate employers and employees liability. Book 8 of the proposed draft deals with the liability of the labor relations parties⁵.

In the context of analyzing the provisions of the draft Labour Code of Ukraine it should be mentioned more appropriate version of the article on the Rules of internal labor order. Today the provisions of Art. 142 of Labor Code of Ukraine are limited by the statement that labor order in enterprises, institutions, organizations determined by the rules of internal labor order approved by the labor collective on the proposal of the owner or the authorized body and by the elected body of primary trade union organization (trade union representative) on the basis of standard rules⁶. Art. 267 ch. 2 p. 7 of draft Labour Code of Ukraine provides that employer's and employee's liability regulates by the rules of internal labor order⁷. This approach characterizes by decrease of state regulation of labor relations and at the same time by increase the importance of the treaty means of regulation of mentioned relations. To some extent we can say that such provisions eliminate the procedure problem on bringing the employer to pecuniary liability. The abovementioned provisions give the opportunity to the participants of labor relations to determine by

¹ Прилипко, С.М. (2009). *Трудове право України: підручник*. Харків: ФІНН.

² Лушников, А.М., Лушникова, М.В. (2009). *Курс трудового права: учебник в 2-х т. Т.2. Коллективное трудовое право. Индивидуальное трудовое право. Процессуальное трудовое право*. Москва: Статут, 1151.

³ Хуторян, Н.М. (2003). *Теоретичні проблеми матеріальної відповідальності сторін трудових правовідносин*: автореф. дис.... канд. юрид. наук. Харків.

⁴ Хуторян, Н.М. (2003). *Теоретичні проблеми матеріальної відповідальності сторін трудових правовідносин*: автореф. дис.... канд. юрид. наук. Харків.

⁵ *Проект Трудового кодексу України 2014* (Верховна Рада України). *Офіційний веб-сайт Верховної Ради України*. <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53221>

⁶ *Кодекс законів про працю України 1999* (Верховна Рада УРСР). *ВВР*, 50, 1971.

⁷ *Проект Трудового кодексу України 2014* (Верховна Рада України). *Офіційний веб-сайт Верховної Ради України*. <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53221>>

themselves (on contractual basis) the procedure of bringing employee and employer to pecuniary liability. At the same time, it is necessary to emphasize that economic inequality of employee and employer isn't in employee's favor, in particular, in the issues of contractual regulating of the employer's pecuniary liability. This fact proves the need for the involvement of trade unions or other public organization to «balance» the employee's and employer's status. We believe that the participation of trade union is the necessary requirement because employees are not always legally knowledgeable in the labor relations local regulation questions, and it gives the potential possibility to employer to avoid the concretization of the procedure of bringing employee to liability under the provisions of the Rules of internal labor order.

Regarding the provisions of Book 8 «Liability of the parties of labor relationship», chapter 2 is devoted to the liability of the employer. Thus, there are five articles dealing with employer's liability - Art. 374-378. However, the review of articles of the draft Labour Code of Ukraine shows that some articles contain references to the liability under the law. In general, it should be noted that the pecuniary liability of the employer regulated by articles 275-277. These articles fix that the employer's pecuniary liability set in the damages caused to the employee's property, and in the case of default the obligation concerning with providing the goods and services to employee, and in other cases prescribed by the Labour Code, the law or employment contract.

Review articles of the draft Labour Code articles reviewing states that lawmakers excluded from the legislative regulation the pecuniary liability of the employer in the case of employee's health damage that is incorrect. The mentioned question has been debated from the introduction of compulsory state social insurance against accidents at work and occupational diseases that caused disability. The draft resolved this problem isn't in employee's favor.

Despite the separation of the employer's liability in certain article, using the phrase «liability under the law» and its analogs become the problem, because lead to mix the property and pecuniary liability of the employer. Such inaccuracy in the legislation may reduce the effectiveness of the provisions of pecuniary liability of the employer as a party o labor contract.

The presence of certain common characteristics of pecuniary and property liability primarily related to the fact that the negative property consequences become the result of bringing to liability. We should also consider the nature of the labor law and its institutions. The kinship of civil and labor law doesn't precludes the independence of pecuniary and property liability of the employer. For this purpose we define and describe the differences between pecuniary and property liability of the employer.

The first difference - subjects. Employer's property liability assumes the onset of negative consequences to him for violation the labor laws within enforcement relationship, where state mainly is the subject. Pecuniary liability takes place exclusively within the labor relationship between the parties - employer and employee. It is important that the employer's pecuniary liability comes not only due to breaking the law, but local laws and labor contracts.

The second difference is the causes of liability. Property liability is the result of breaking the obligations and the employer's obligations arise not only to employees and labor collective, but also to the state and its authorities. The cause of pecuniary liability is labor property offense that characterizes by a number of specific features. These specific features influence on the following differences between these two types of liability.

The third difference is the presence of guilt. The fourth difference is the direct actual damage. The scientists pay special attention to these features. S. M. Prylypko emphasizes that pecuniary liability is possible in the case of presence the guilt and direct actual damage. The author writes: «in civil law a person can be bringing to pecuniary liability even in with the absence of guilt.» The scientist focuses on the fact that in the pecuniary liability the lost benefit is non-refundable¹. Y. Trofymovska pints on the difference between the pecuniary and property liability on the basis of fault². Agreeing with the authors we should note that their studies focused on the following differences for the liabilities of the employee. We set ourselves the task to study such differences for employer's liability. So if the guilt, as the feature of employer's pecuniary liability, is a prerequisite for its occurrence, would direct actual damage will be the necessary feature? Yes, the legislation provides that in the case of pecuniary liability the employees' rights

¹ Прилипко, С.М. (2009). До питання матеріальної відповідальності сторін трудового договору. *Проблеми законності*, 100, 155-164.

² Трофимовська, Ю.В. (2015). Теоретичні проблеми відмінності матеріальної відповідальності за трудовим правом від майнової відповідальності за цивільним правом України. *Форум права*, 1, 323–328.

and legitimate interests guaranteed by holding the liability only for the direct actual damage¹. As for employers, the current Labour Code does not contain the similar provision for the employer, but traditionally in labor law the pecuniary liability occurs only with the presence of direct actual damages. Here is the example: the pecuniary liability for the employee's health damage caused by the improper fulfillment of his duty concerning with the creation a safe and harmless labor conditions.

In contrast, the draft Labour Code Art. 376 «Employer's pecuniary liability for failure the duties concerning with goods and services providing» provides that failure by the employer obligations on employee's goods and services providing stipulated by the collective or labor contract gives to the employee the right to recover from the employer the cost of these goods and services according to the retail prices prevailing in this region, regardless whether the employee has paid for the goods and services or not². The proposed article provides a possibility to use the employer's liability without specifying actual direct damages that is incorrect. Of course, the state should take all possible means that would encourage employers to fulfill labor laws, acts of social partnership and provisions labor contracts, however, the applicability of the pecuniary liability without the direct actual damage rather a property liability. We believe that the provisions of this article suggest the substitution of pecuniary liability by property liability.

Therefore we propose to change this article by providing such penalties in the case if the employee had paid the goods and services. Another variant of changes is possible by changing the title of the article, where the word «pecuniary» should be changed to «property.» As a result, we should note that direct actual damage should remain the essential feature of employer's pecuniary liability, and accordingly remain the basis of differences between pecuniary and property liability of the employer.

The fifth difference is the measure of responsibility. In labor law the measure of liability limited by the extent and the limits. There are limited and full liabilities in labor law, and depending on organization of labor it divided on individual and collective liability³. This division applies to the liability of the employee. The limits of employee's pecuniary liability provided for Art. 132-135 of Labor Code of Ukraine. Full liability can be applied only for employer for the damages. Thus, if a measure of liability is the negative consequences for guilty party of labor contract, the measure of restoration of violated labor rights can't be recognize as the measure of employer's liability. Therefore the provisions of Art. 264 «The consequences of violation of terms of payroll schedule, guarantee and compensation payment» look contentious, it provides: provides: «in the case of payroll schedule, guarantee and compensation payments provided by the law, collective agreement, the employer must pay to the employee a penalty (compensation) equal to National bank dual rate per year for each day of delay and pay the full amount of wage arrears considering inflation rate for all the delay period and the percent per annum from the overdue amount»⁴. These provisions enshrined the property liability that is used under the Civil Code of Ukraine, and thus it is unclear whether the legislator is trying to cancel the employer's pecuniary liability for failure one of his major labor duties or draft authors don't understand neither functions nor differences between pecuniary and property liability.

We don't deny the possibility of applying to employer the property liability for violation of payroll schedule, in fact, the Constitution of Ukraine⁵ does not prohibit using of different types of liability for the violation of law. So, once again actualize the question to specify the grounds of pecuniary liability of the employer.

The sixth difference is the indemnification procedure and its sources. Property liability has at least two indemnification procedures - contractual and legal. The source of compensation is serves the property of the person who bears the property responsibility. In labor law the indemnification procedure for employee's pecuniary damage enshrines in the relevant articles of the Labor Code of Ukraine. As for the damage compensation caused to the employee by the employer that are several ways, including: contractual (voluntary repayment by issuance an order or regulation by the employer) and compulsory (the decision of the commission on labor disputes or court decision). Thus, the logic of the pecuniary liability involves that the indemnification procedure carried out on the contractual basis determined by the parties within the labor contract, and usually it's employer's order or regulation. As for the source of compensation, the employer-legal

¹ Кодекс законів про працю України 1999 (Верховна Рада УРСР). ВВР, 50, 1971.

² Проект Трудового кодексу України 2014 (Верховна Рада України). Офіційний веб-сайт Верховної Ради України. <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53221>

³ Прилипко, С.М. (2009). *Трудове право України*: підручник. Харків: ФІНН.

⁴ Проект Трудового кодексу України 2014 (Верховна Рада України). Офіційний веб-сайт Верховної Ради України. <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53221>

⁵ Конституція України 1996 (Верховна Рада України). ВВР, 30, 1996.

entity and employer-individual person should repay from the funds allocated to their accounts. Regarding the employer-individual person who enters into labor contract with the employee for the personal services labor (drivers, nurses, etc.), such repayment could be made from the property of the employer.

Seventh difference is the term liability. As a general rule the limitation period in civil law is three years. So the pecuniary liability may be imposed on the basis of limitation. In the labor legislation the terms of application the pecuniary liability has other time dimensions. So the Art.136 of Labor Code of Ukraine enshrines that the regulation of the owner or his authorized authority or superior authority must be issued no later than two weeks after the detection of damage caused by the employee and should be performed until seven days from the day of the notice about it to the employee. If the employee disagrees with a deduction or size, the labor dispute in his statement should be settled by the law. Art. 233 of Labor Code of Ukraine enshrines that for the owner's appeal to the court in the issues of recovery from the employee's the material damage caused to enterprises, institutions, organizations set a period of one year from the date of detection the damage caused by employee.

If the employer's pecuniary liability using through the decision of the labor disputes commission, the provisions of Art. 225 of the Labor Code of Ukraine should be applied, according to them the employee may apply to the commission on labor disputes within three months from the date when he knew or should have known about the violation of his rights, and in disputes on payment of his wages - without any limitation period. Art. 233 of the Labor Code of Ukraine enshrines that the employee may request with the statement on the resolution of a labor dispute directly to the district court within three months from the date when he knew or should have known about the violation of their rights, and in the cases of dismissal - within one month from the date of delivery of a copy of the order on dismissal or from the date of issuance of labor book. In the case of violation the legislation on payment for labor the employee may apply to the court to recover the wages without any limitation period¹.

The abovementioned shows that the terms of bringing to the pecuniary liability of the employer different from the term of bringing to the property liability of the employer.

Art. 396 of the draft Labour Code provides one year period for reference to the court with the individual labor disputes (despite dismissal, reassignment, unlawful refusal to work, penalties wage, guarantees and compensation payments), the term counting from the day when the employee knew or should have known about the violation of his rights². It is also necessary to note that the draft code provides dismissal from paying the state fee and legal expenses for claims arising from the employment relationship.

Overall, despite of similarities of pecuniary and property liability of the employer, the pecuniary liability has its specificity that is caused by the nature of labor relations. Mixing and substitution of the employer's pecuniary and property liability significantly worsen the legal status of the employee. The development of labor law science and improving of labor legislation demonstrate the need to strengthen the employer's pecuniary liability in the current conditions.

The abovementioned differences of employer's pecuniary and property liability prove the need for finalization the draft Labour Code in the context of separation this two types of employer's liability and the need to determine the grounds and conditions of the his liability by the law.

The abovementioned differences of employer's pecuniary and property liability prove the need for finalization the draft Labour Code in the context of separation this two types of employer's liability and the need to determine the grounds and conditions of the his liability by the law. As for the draft Labour Code the separation of the articles on the employer's pecuniary liability is the positive fact. However, the proposed provisions should not be adopted. At least the reason is the confusion with the types of employer's liability that, in practice, would lead to the inability to use the employer's pecuniary liability.

In modern terms the legal definition of the grounds and conditions of employer's pecuniary liability is the main task of the legislator. Modern trends of the development the employer's pecuniary liability characterized by increasing his responsibility and by closer attention of the legislator to legislative regulation of labor relations between the parties of the labor contract, but such trends don't solve the fundamental problems.

Employer's pecuniary liability today has many controversial issues, and therefore it needs further studying to improve legislation and ensure effective mechanisms of protection the employee's rights and interests, in particular, in the cases of violation by employer his duties in labor relations.

¹ *Кодекс законів про працю України 1999* (Верховна Рада УРСР). ВВР, 50, 1971

² *Проект Трудового кодексу України 2014* (Верховна Рада України). Офіційний веб-сайт Верховної Ради України. <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53221>

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