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Master Paper

Early termination of employment contract/wrongful discharge

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A B S T R A C T

The current topic represents the importance of protection of labor rights as human rights, evolutions and development of employment relations. It underlines the importance of legal termination of labor contract, particular cases and conditions of early termination of labor contracts /wrongful discharge. The topic also reflects competitive information of labor legislation in different countries.

INTRODUCTION

Labor law definition and history, main principles

Labor law (also known as employment law) is the body of laws, administrative rulings, and precedents which address the legal rights of, and restrictions on, working people and their organizations. As such, it mediates many aspects of the relationship between trade unions, employers and employees. This branch of law has its history and phases of development.

Work has been regulated by governments for many centuries. From the ancient world until the 19th century, slave systems were strictly regulated by both laws and customs.

Under capitalism the labor law becomes an important branch of law in the light of human – workers' rights protection.[1]

Labor power (labour force) is a crucial concept used by Karl Marx in his critique of capitalist political economy. He regarded labour power as the most important of the productive forces. Under capitalism, according to Marx, the productive powers of labour appear as the creative power of capital. Work becomes just work, workers become an abstract labour force, and the control over work becomes mainly a management prerogative.

Labor law arose due to the demands of workers for better conditions, the right to organize, and the simultaneous demands of employers to restrict the powers of workers' many organizations and to keep labor costs low.

Labor law as every branch of law has its main principles, which are guaranteed by Constitutions of states, by custom law and other by- legislation. Based on the generally accepted principles and norms of international law and pursuant to the main principles of legal regulation of labor relations and other relations directly linked to them shall be recognized as:

[1] www.wikipedia.com

- freedom of labor, including the right to work which everyone shall freely choose or freely agree to, the right to dispose of one's capacity for work, choose trade or profession and the kind of activities;
- prohibition of forced labor and discrimination in the sphere of labor;
- protection against unemployment and assistance in job placement;
- safeguarding the right of every employee to equitable work conditions, including the work conditions meeting safety and health requirements, the right to rest and leisure, including limitations of working hours, provision of daily rest, days-off and non-working holidays, paid annual vacations;
- equality of employees' rights and opportunities;
- safeguarding the right of every employee to timely and complete payment of equitable wages ensuring the decent human sustenance for himself/herself and his/her family and not being lower than the minimal wage set by the federal laws;
- safeguarding employees' opportunities, without any discrimination, for carrier advancement with account for work performance, skills and the job seniority as well as for professional training, re-training and skill improvement;
- safeguarding the employees' and employers' right of association for protection of their rights and interests, including the right of employees to organize labor unions and join them;
- safeguarding the right of employees to participate in the organization's management in the forms stipulated by law;
- combining state and contractual regulation of labor relations and other relations directly linked to them;
- social partnership which includes the right of employees, employers, their associations to participate in contractual regulation of labor relations and other relations directly linked to them;
- liability for damage to the employee caused by his/her performance of work duties;

- establishing official state guarantees on safeguarding rights of employees and employers, exercising official state surveillance and control of compliance with them;
- safeguarding everyone's right to official state protection of his/her labor rights and freedoms, including by judicial process;
- safeguarding the right to settlement of individual and collective labor disputes as well as the right to strike in the manner set by this Code and other federal laws;
- duties of the parties to a labor contract to honor the terms and conditions of the contract agreed upon, including the right of the employer to require the employees to perform their work duties and take proper care of the employer's property and the right of employees to require the employer to honor its duties and liabilities concerning the employees, the labor laws and other acts containing the labor law norms;
- safeguarding the right of labor union representative to exercise labor union control of compliance with the labor laws and other acts containing the labor law norms;
- safeguarding the right of employees to protection of their dignity in the framework of their labor activities;
- Safeguarding the right to mandatory social insurance for employees.

In labor relations the above mentioned principles are to protect mostly employee’s rights and guarantees, which are breached in majority cases of wrongful termination of labor relations.

Labor relations are those relations, which are based on the mutual agreement of employee and employer, under which the employee shall personally perform labor functions (work with certain profession, qualification or position) with certain remuneration keeping to the rules of internal labor discipline and the employer shall provide with working conditions envisaged by labor legislation, other normative legal acts containing norms of labor law, collective and labor contract. There are several definitions of labor contract which have enough similarities with each other. The Contract of Employment is a legally binding contract and a formal document.

An employment contract is an agreement entered into between an employer and an employee at the commencement of the period of employment and stating the exact nature of their business relationship, specifically what compensation the employee will receive in exchange for specific work performed.

An employment contract shall be an agreement between an employee and an employer, according to which the employee undertakes to perform work of a certain profession, qualification or to provide certain services in accordance with the code of conduct established at the workplace, and the employer undertakes to provide the employee with the work specified in the contract, to pay him the agreed wage for the work done and to ensure working conditions as set in the legislation of current country other normative legal acts the collective contract and by agreement between the parties. [2]

Employment contract is concluded:

1) with an indefinite term, in case its term of validity is not specified in the employment contract
2) with a definite term in case its term of validity is specified in the employment contract

An employment contract with a definite term is concluded in the case when labor relations can not be defined for an indefinite period taking into account the conditions or the nature of the work to be done unless otherwise is envisaged by this code or law.

The employment contract signed for a definite period may be concluded for a certain period of time or by defining calendar date of the contract or for the period of the performance of certain work, but not exceeding five years. Upon the expiration of the employment contract with a definite term the term of validity of the employment contract may be extended upon the consent of the parties. The aggregate term of validity of employment contracts signed with a definite term for not more than five years with the same employer may not exceed five years in case the interruption of contracts signed with a definite time does not exceed one month except for cases envisaged by section 2 of this Article. The written agreement of the parties to extend a

[2] Labor code of RA

contract signed for a definite term shall be made at least ten days prior to the expiration of the contract.

UK law holds that employment contracts have implied terms (assumed, unspoken, essential terms), as well as explicit terms (typically those in writing). Legal precedent provides for example that there is an implied contractual term of trust and confidence, meaning that each party to the contract is expected to behave in a manner that allows the other to maintain trust and confidence in the other.

In order to conclude labor contract there is need to have legal and labor capacity:

The capacity (labor legal capacity) to have labor rights and bear responsibilities is equally recognized for all the citizens of the Republic of Armenia. The foreign citizens, persons with no citizenship in the Republic of Armenia shall have the same labor legal capacity, as the citizens of the Republic of Armenia if not otherwise stipulated by the law.

The labor legal capacity and the capacity to acquire and implement labor rights with his/her activities, to create labor obligations and implement them (labor activity) in full volume are originated from the moment of coming the age of sixteen, except in cases stipulated by this code and other laws.

Legal and labor capacity of employer legal entities is originated from the moment of their establishment.

The employers acquire labor legal rights and bear labor responsibilities as well as perform them through their entities. These entities are formed and operate on the basis of laws, other normative legal acts, charter oaf employer and legal acts approved (adopted) by him/her.

Legal and labor capacity of the employer citizen is regulated by the Civil Code of the Republic of Armenia. Employer citizens may perform labor rights and bear responsibilities themselves.

Employee is the capable citizen that has reached the age defined by this Code who performs certain work for the benefit of employer by certain specialty, qualification or position. But in the framework of international law the term “citizen” is not appropriate which is in other legal documents is substituted with term “person”.

An employer is a person or institution that hires employees or workers. Employers offer wages or a salary to the workers in exchange for the worker's labor power, depending upon whether the employee is paid by the hour or a set rate per pay period. A salaried employee is typically not paid more for more hours worked than the minimum, whereas wages are paid for all hours worked, including overtime.

Employers include everything from individuals hiring a babysitter to governments and businesses which may hire many thousands of employees. In most western societies governments are the largest single employers, but most of the work force is employed in small and medium businesses in the private sector.

Specifically, an employee is any person hired by an employer to do a specific "job". In most modern economies the term employee refers to a specific defined relationship between an individual and a corporation, which differs from those of customer, or client. Most individuals attain the status of employee after a thorough process of interviews with several departments within a company. If the individual is determined to be a satisfactory fit for the position, he is given an official offer of employment within that company for a defined starting salary and position. This individual then has all the rights and privileges of an employee, which may include medical benefits and vacation days. The relationship between a corporation and its employees is usually handled through the human resources department, which handles the incorporation of new hires, and the disbursement of any benefits which the employee may be entitled, or any grievances that employee may have. An offer of employment, however, does not guarantee employment for any length of time and each party may terminate the relationship at

any time. This is referred to as *at will*[3] employment. While the terms accountant, lawyer and photographer might refer to professions, they are not employee titles, which may include Controller, Vice President of Legal Affairs, and Head of Media Development.

There are differing classifications of workers within a company. Some are full-time and permanent and receive a guaranteed salary, while others are hired for short term contracts or work as temps or consultants. These latter differ from permanent employees in that the company where they work is not their employer, but they may work through a temp-agency or consulting firm. In this respect, it is important to distinguish independent contractors from employees, since the two are treated differently both in law and in most taxation systems.

Early termination/ wrongful discharge, definition, types

The term 'early termination' and 'termination' are different legal concepts under the labor law. The term 'early termination' of employment contract refers to one or both parties terminating the legal effect of employment contract for specific reasons, after the contract has been signed and before full performance. Early termination generally occurs under two circumstances (a) early termination by law (b) early termination by agreement.

The term 'termination' of employment contract refers to a situation where legal rights and obligations of the parties under the contract have expired, the contractual employment relationship of the parties is no longer effective and performance of the contract has ceased. The Labor Law contemplates two categories of termination of employment contracts, namely: (a) termination upon expiry, which becomes effective immediately; (b) termination upon the occurrence of agreed events.

An individual can face termination of employment ("firing"), or job loss, for one of many reasons including mistreatment of persons and general laziness, among others.

[3] www.nolo.com

The most drastic termination of employment is hostile involuntary termination, in its most severe form known as "firing" or "sacking" or "being bounced out." Usually, such type of termination occurs for offenses such as stealing, gross insubordination, sexual harassment (or any type of harassment) of another employee, or a violation of the law. A somewhat less severe form would be standard dismissal, discharge, or termination. It still could be known as a firing, but it is also referred to as being "let go." Reasons include below average job performance, lateness, calling out, the workplace being able to find better employees than the incumbent, continued minor violations of company policies, or not being suited for the particular environment that job duties must be done in. This type of discharge is also known to happen to probationary employees that were recently hired, but who cannot adjust to the environment of the workplace he or she was hired in. Being "let go" could also mean that the decision was made mutually.

The least severe termination is to be laid off or made redundant, which is usually not strictly related to personal performance but economic cycles or the company's need to restructure itself, or a change in function of the employer (for example, a certain type of product is no longer offered by the company and therefore jobs related to that product are no longer needed). One other type of layoff is the aggressive layoff. Under such a situation the employee is laid off for a just cause but is never replaced and the job is eliminated.

In a postmodern risk economy, such as the United States, a large proportion of workers will be laid off at some time in their life, and often not for reasons related to performance or ethics.

In many countries, in particular in social democracies as found in western Europe, firing an employee is expensive and risky in that firings require extensive documentation (in the event of a wrongful-termination lawsuit), and because fired employees may sue their former employers, disclose trade secrets to competitors, expose illegal practices, etc. Finally, in the United States, unemployment benefits are financed by companies, and a firm's unemployment costs increase with each worker laid off or fired. Depending on the circumstances and company

policy, a fired employee may or may not be entitled to a severance package or unemployment benefits.

Termination has its worldwide accepted universal types:

The classic definition of terminating someone's employment is being fired, or in technical terms involuntary termination. In the workplace, an employee may be fired for many reasons:

- Work performance that fails to meet a given standard, especially over a period of time
- Chronic absence
- Inappropriate conduct or misconduct Engaging in illegal activities on the job (such as embezzlement or illegal subordinate harassment including denial of pay and benefits.
- Criminal or traffic record

In several countries legislation allows to dismiss workers without explanations and reasons. e.g. In the United States, most states have adopted the at-will employment contract that allows the employer to dismiss employees without having to provide any of the reasons listed above, although through the variety of court cases coming out of "at will" dismissals, can make such at will contracts ambiguous. Usually an at will termination is handled as a "layoff".

At-will employment is a doctrine of American law that defines an employment relationship in which either party can terminate the relationship with no liability if there was no express contract for a definite term governing the employment relationship. Under this legal doctrine:

> any hiring is presumed to be "at will"; that is, the employer is free to discharge individuals "for good cause, or bad cause, or no cause at all," and the employee is equally free to quit, strike, or otherwise cease work.[4]

Several exceptions to the doctrine exist, especially if unlawful discrimination is involved regarding the termination of an employee.

[4] www.wikipedia.org

Although at-will employment allows an employee to quit for no reason, the rule that either party can terminate the relationship is most often invoked when an employer wants to fire an employee at any time. Since this practice virtually eliminates job security, it can create an atmosphere of fear that may contribute to workplace bullying. However, there are limitations upon the employer's ability to terminate without reason. As a means of downsizing, say closing an unprofitable factory, a company may fire employees en masse.

ARMENIAN LEGAL FRAMEWORK AND IMPLICATIONS

Types of early termination of the labor contract prescribed by law.[5]

Grounds for the Termination of the Employment Contract are under Armenian law.

An employment contract shall be terminated:

1) upon the consent of the parties;

When annulling the employment contract with the consent of the parties one party offers the other party in written form to annul the contract. If the latter accepts the offer, it must, within seven days, notify of it the party, which has put forward the offer to terminate the employment contract. Having agreed to terminate the contract, the parties shall conclude a written agreement on the termination of the contract, in which they mention the dates and other conditions (compensations etc.) for the termination of the contract.

2) in case the contract expires ;

3) upon the initiative of the employee ;

An employee shall be entitled to terminate an employment contract signed for an indefinite term, as well as an employment contract signed for a definite term prior to its expiry by giving his employer written notice of it at least 14 days in advance. A longer term for notification may be envisaged by the collective contract. Upon the expiry of the period of notice,

[5] Armenian Labor Code

the employee shall be entitled to terminate his employment, and the employer must formulate the termination of the employment contract and make final settlement with the employee

4) upon the initiative of the employer ;

An employer may terminate an employment contract signed for an indefinite term and one signed for a definite term prior to the expiry of the contract:

1) In case, when the organization is liquidated (the activity of the sole entrepreneur is terminated);

2) In case, when the employer is bankrupt;

3) In case, when the number of employees is reduced, which is preconditioned by changes in the volume of production, economic and technological conditions and conditions of organization of work, as well as by production needs;

4) In case, when the employee is not suitable for the position held or job done;

5) Because of unsatisfactory result of the trial period;

6) For the employee’s non-performance or incomplete performance of his duties

7) In case, when the confidence towards the employee is lost;

8) In case of the long-term inability to work (in case the employee does not come to work for more than 120 consecutive days or for more than 140 days because of a temporary inability to work if it is not defined by the law and other normative acts that the job and title are preserved for a longer term in case of certain diseases)

9) Because the employee reaches the retirement age

10) in other cases envisaged by this code

5) In other cases established by this Code.

Legislation also provides certain cases when the termination of employment contract is prohibited.

The termination of an employment contract upon the initiative of the employer is prohibited:

1) during the period of temporary inability of the employee to work;

2) during the leave of the employee:

3) after a decision on a strike is adopted and during the strike in case the employee partakes in this strike in the manner defined by this code

4) during the implementation of duties imposed on the employer by state and local self-governance bodies,

In cases, when the organization is liquidated (the activity of the sole entrepreneur is terminated) and when the number of employees is reduced, which is preconditioned by changes in the volume of production, economic and technological conditions and conditions of organization of work, as well as by production needs the employer shall give a written notice to the employee not later than two months beforehand.

In cases when the employee is not suitable for the position held or job done or the employee reaches the retirement age the employer shall give a written notice to the employee not later than two weeks beforehand.

In labor codes of Russian Federation, Bulgaria and Georgia conditions and legal basis for early termination of labor contract are quite similar.[6]

Wrongful discharge

Wrongful discharge, also called wrongful termination or wrongful dismissal is an idiom and legal phrase, describing a situation in which an employee's contract of employment has been terminated by the employer in circumstances where the termination breaches one or more terms of the contract of employment, or a statute provision in employment law. It follows that the

[6] Labor codes of RF, Bulgaria, Georgia

scope for wrongful dismissal varies according to the terms of the employment contract, and varies by jurisdiction.

Wrongful termination generally means an unfair employment discharge. However, not every unfair employment discharge constitutes wrongful termination. [7]Wrongful termination is the most common term used. But an unfair employment discharge is also referred to as:

- Wrongful discharge
- Wrongful firing
- Wrongful dismissal
- Illegal discharge
- Illegal termination
- Illegal dismissal

The absence of a formal contract of employment does not preclude wrongful dismissal in jurisdictions in which a de facto contract is taken to exist by virtue of the employment relationship. Terms of such a contract may include obligations and rights outlined in an employee handbook.

Exaples of wrongful dismissal might include:

- Dismissals without going through a contractually mandated dismissal process, which might involve an escalating series of warning letters, where grounds for dismissal are not such as to meet the test for summary dismissal.
- dismissal for a wrongful cause, for instance in a circumstance in which a dismissible action is falsely attributed to an employee.
- Racial, sexual or age discrimination

[7] www.compactlaw.co.uk

- retaliation for filing a workers' compensation claim or for reporting illegal employer activity.

As some of the alternate terms indicate, an employer must *illegally* discharge an employee for the act to constitute wrongful termination, at least in the legal sense.

If the discharge is not illegal, then it's not likely to be wrongful termination in the legal sense, regardless of how unfair it seems.

For example, if a manager unfairly discharges an employee clearly in violation of a specific discrimination law, then the discharge was illegal and thus, likely to be wrongful termination.

But, if a manager unfairly discharges an employee because of an unresolved personality conflict that adversely affects the employment relationship, then it's not likely to be an illegal discharge and thus, not likely to be wrongful termination.

To better understand whether or not an unfair employment discharge constitutes wrongful termination, it's important to know that employment is "at will" in virtually all states. It means that employment is presumed to be voluntary and indefinite for both employers and employees.

INTERNATIONAL BEST PRACTICE

The role of international labor law and conventions

International labor norms which are established in several international agreements are the main instruments fir labor rights protection. (A number of provisions concerning labor matters are contained in the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, which are legally binding human rights agreements).

Another important act is ILO Declaration on Fundamental Principles and Rights at Work. The 86th International Labor Conference (1998) adopted by an overwhelming vote a solemn ILO Declaration on Fundamental Principles and Rights at Work, committing the Organization's

member States to respect, to promote and to realize in good faith the right of workers and employers to freedom of association and the effective right to collective bargaining, and to work toward the elimination of all forms of forced or compulsory labor, the effective abolition of child labor and the elimination of discrimination in respect of employment and occupation. The Declaration underlines that all member countries have an obligation to respect the fundamental principles involved, whether or not they have ratified the relevant conventions.

International and regional labor organizations

One of the important organizations in this sphere is The **International Labour Organization (ILO)** is a specialized agency of the United Nations that deals with labour issues. Its headquarters are in Geneva, Switzerland. Founded in 1919, it was formed through the negotiations of the Treaty of Versailles, and was initially an agency of the League of Nations. It became a member of the UN system after the demise of the League and the formation of the UN at the end of World War II. Its Constitution, as amended to date, includes the Declaration of Philadelphia (1944) on the aims and purposes of the Organization.

In Europe the number of labor organizations and trade unions in 20th century increased. In France 17 labor organizations are acted, in Sweden 10 regional labor organizations.[8]

Trade unions

Unions may organize a particular section of skilled workers (craft unionism), a cross-section of workers from various trades (general unionism), or attempt to organize all workers within a particular industry (industrial unionism). These unions are often divided into "locals", and united in national federations. These federations themselves will affiliate with Internationals, such as the International Trade Union Confederation.

[8] www.4icj.com

In many countries, a union may acquire the status of a "juristic person" (an artificial legal entity), with a mandate to negotiate with employers for the workers it represents. In such cases, unions have certain legal rights, most importantly the right to engage in collective bargaining with the employer (or employers) over wages, working hours, and other terms and conditions of employment. The inability of the parties to reach an agreement may lead to industrial action, culminating in either strike action or management lockout, or binding arbitration. In extreme cases, violent or illegal activities may develop around these events.

In other circumstances, unions may not have the legal right to represent workers, or the right may be in question. This lack of status can range from non-recognition of a union to political or criminal prosecution of union activists and members, with many cases of violence and deaths having been recorded both historically and in the current day.

Unions may also engage in broader political or social struggle. Social Unionism encompasses many unions that use their organizational strength to advocate for social policies and legislation favorable to their members or to workers in general. As well, unions in some countries are closely aligned with political parties.

Reform

In theoretical point of view Armenian legal framework of labor law meets majority of requirements to create a strong basis for protection of workers' rights, but in comparison with European practice where the theoretical achievements are brought to a practice level, the employee's status in Armenia is not protected sufficiently. There are several reasons for such situation and one of them that workers' do not know the means of protection of their rights, in other words the lack of information. The other reason is the weeks believe in trade unions function also in officials, in particular in court system.

Hence there is a need to provide citizens with appropriate information, also to enlarge the rights of trade unions.

Conclusion

By concluding above mentioned it is obvious that Armenia as a country which is only past 15 years lives in capitalism form, needs to integrate the European and American labor practice by enlarging the possibilities of labor organizations, trade unions, by giving more supervising functions to them. Also by developing the special understanding that both employees and employers are equal in labor relations.

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