

REFLECTIONS REGARDING THE ENFORCEMENT OF THE PREVENTION LAW IN THE AREA OF EMPLOYMENTS RELATIONSHIPS

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Abstract

The Law no 270/2017 - Prevention Act is an inedited step in the Romanian legislation. For the first time in Romanian legislation, the ascertaining agent of a contravention has the obligation to establish several remedial measurements in order to clarify the legal framework of their specific activity. Because of the numerous contraventions regulated by the labor legislation, the Prevention Act concerns all the employers. Within the present paper, the author indicates the specific Labor law contraventions which permit the application of the Prevention Act and the contraventions which are incompatible with this Law.

In the matter of contraventional liability, the relation between the public body responsible for control and enforcement, on the one hand, and the subject of law whose activity is to be checked in order to make sure that it complies with the law, on the other hand, involves a median element between the full compliance situation (abiding by the applicable legal provisions) and the non-compliance situation (not abiding by the rules is punishable by a civil fine).

As in other areas covered by contraventional sanctioning, as far as employment relationships are concerned, the legislator elected a small number of contraventions to which the special rules provided for by the Prevention Law could be applied.

Keywords: prevention, prevention measures, contraventional liability, labour law, labour legislation.

I.

1. Law no. 270/2017 on prevention¹ represents a unique regulatory approach to legislation in Romania. For the first time in the history of national regulations, the legislator lays down a set of measures and instruments aimed at ensuring the prevention of committing contraventions.

Basically, in the matter of contraventional liability, the relation between the public body responsible for control and enforcement, on the one hand, and the subject of law whose activity is to be checked in order to make sure that it complies with the law, on the other hand, involves a median element between the full compliance situation (abiding by the applicable legal provisions) and the non-compliance situation (not abiding by the rules is punishable by a civil fine). This median element is represented by the very measures and instruments that are used in the event of a situation of non-compliance with legal rules, in order to remedy the non-compliance situation and, thus, to avoid the enforcement of a legal sanction for a contravention.

2. The remedy is, according to art. 2 let. a) of the Law, any measure taken by the investigating official included in the remedial plan which aims to make the person having committed a contravention fulfil his obligations under the law.

The remedial plan represents the annex to the report on the contravention committed and the enforceable sanction, completed as provided for in art. 4 of the Law, by means of which the investigating official sets out measures and remedial terms. The remedial term is the period of time, no longer than 90

calendar days since the date of delivery or, where appropriate, since communicating the report on the contravention committed and applying the legal sanction for the contravention thereof consisting of warning, concluded under art. 4 of the law, which specifies that the person having committed the contravention has the opportunity to remedy the irregularities which have been found and fulfil legal obligations; the length of the remedial term is determined taking into account the circumstances of committing the offense and the length of time necessary to fulfil legal requirements. The length of the remedial term established by the control body cannot be changed.

3. According to art. 3 para. (1) of Law no. 270/2017, all public authorities and institutions with powers to control, determine and sanction contraventions shall, in accordance with the areas under their responsibility, within three months of the entry into force of the law, draft and disseminate reference materials and guides and allocate special sections dedicated to public information on their website, regarding:

- a) legislation in force relating to determining and legally sanctioning contraventions;
- b) the rights and obligations of these public authorities / institutions in carrying out the activities related to determining contraventions and applying legal sanctions, as well as the rights and obligations of persons subject to these activities;
- c) providing separate detailed information about each contravention for which the public authority /

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institution has capacity to determine and apply the legal sanctions and / or other applicable measures.

According to their areas of competence, public authorities and institutions with control powers shall direct interested persons so that the legal provisions are fairly and unitarily enforced. In carrying out these guiding activities, public authorities and institutions with control powers shall:

- a) a) draft guidance and control procedures to be used by all the persons having the capacity to carry out control activities;
- b) b) display on their sites highly frequent court cases and guidance solutions issued in these cases, as well as guidance and control procedures;
- c) c) actively exercise their role of guiding the persons being controlled in each control activity, offering, according to the procedures, the necessary instructions and guidance so that future abuse of the legal provisions could be avoided. The fulfilment of this obligation will be expressly stated in the control report, showing the instructions and guidance that have been offered.

Central public administration authority having nationwide powers to coordinate the business environment shall, within six months of the entry into force of this Law, develop and operate a portal providing, in a centralized way, online services and resources in order to disseminate information regarding the matters referred to in art. 3 para. (1) of the Law.

4. The Prevention Law does not have a general area of applicability, in the sense that it does not concern, hypothetically, all the contraventions regulated by national legislation. The solution of the legislator was to establish by means of a separate low-level legislative act, the list of contraventions for which the Prevention Law applies. Thus, by means of the Government Decision (GD) no. 33/2018 on the establishment of the contraventions covered by the Prevention Law no. 270/2017, as well as the model for the remedial plan², this list of contraventions was approved.

According to art. 4 para. (1) of the Law, in case of determining that one of the contraventions laid down by GD no. 33/2018 was committed, the investigating official concludes a report of the contravention by means of which he enforces a warning sanction, enclosing a corrective plan. In this situation, no complementary contraventional sanctions are enforced.

Exceptionally, the investigating official does not prepare a remedial plan, in which case only the warning sanction is enforced, in the following circumstances:

- a) if, during the control, the person having committed a contravention fulfils his legal obligation;
- b) if the contravention committed is not continuous.

The warning sanction is also enforced if the sanctioning of contraventions, as provided in GD no. 33/2018 expressly stipulates the exclusion of the warning from being applied.

The responsibility for fulfilling the remedial measures is reserved to the person who, by law, is contravenitionally liable for the determined facts.

If a person commits multiple contraventions, from the ones provided in GD no. 33/2018, determined at the same time by the same investigating official, it is concluded only one report on ascertaining the contravention committed and the sanction being enforced, to which a corrective plan is enclosed, as appropriate.

5. The investigating official shall check in the control ledger, as well as in the records of the authority / public institution the person having committed the contravention is part of, if the latter has previously benefited from the measure provided in art. 4 of the Law.

For those persons who are not required to keep a control ledger (document regulated by Law no. 252/2003 on the control ledger³), the official investigator shall check the records of the public institution / authority the person having committed the contravention is part of, if the latter has benefited from the provisions comprised by art. 4 of the Law.

The investigating official shall make entries in the control ledger referring to the remedial plan. After completing the control, the number and date of the control document are entered in the control ledger.

6. The violation of the provisions in art. 4 para. (1) and (2) of the Law no. 270/2017 causes nullity of the report on the contravention committed. If the violation of the provisions in art. 4 para. (1) and (2) covers only a part of the contraventions determined and sanctioned by means of the report, this document is void only in respect to the contraventions thereof (partial nullity).

7. According to the art. 8 para. (1) of Law no. 270/2017, within 10 working days since the closing date of the remedial term, the public authority / institution with control powers shall resume the control activity and complete the second part of the remedial plan enclosed to the report on the contravention committed and the sanctions enforced and, where appropriate, the control ledger, with details on how to respect the remedy measures set.

If, when resuming control, it is ascertained that the person having committed the contravention failed to fulfil his legal obligations under the remedial measures set, within the timeframe allowed, the investigating official concludes another report of the contravention committed and sanctions enforced, by means of which the contraventions are determined and the legal sanction(s) enforced, other than warning, complying with the legislation which lays down and sanctions the contraventions provided for by GD no. 33/2018.

If, within three years since the date the report of the contravention committed and the sanctions

² Published in The Official Gazette of Romania, part I, issue 107, February 5th, 2018.

³ Published in The Official Gazette of Romania, part I, issue 429, June 18th, 2003, as amended and supplemented.

enforced as provided for in art. 4 of the Law, the person having committed the contravention commits the same contravention again, the legal provisions in force, regulating the way in which petty offences are determined and sanctioned, are directly applicable, and it is no longer possible to enforce the Prevention Law.

If, within three years since the date the report on the contravention committed and the sanctions enforced as provided for in art. 5 of the Law, the person having committed the contravention commits one or more of the contraventions provided for in GD no. 33/2018, the legal provisions in force, regulating the way in which contraventions are determined and sanctioned, are directly applicable.

8. In accordance with art. 10 para. (1) of the Prevention Law, since the entry into force of this regulation (January 17, 2018), notwithstanding the provisions in Government Ordinance (GO) no. 2/2001 on the legal regime of contraventions⁴, approved with amendments and supplements by Law no. 180/2002⁵, as amended and supplemented, so as to determine and sanction the contraventions included in the GD no. 33/2018, the provisions of the Prevention Law are enforced.

Regarding the sanctions enforced under the provisions comprised by the Prevention Law, the sanctions thereof complement the provisions of the GO no. 2/2001, approved with amendments and supplements by Law no. 180/2002, as amended and supplemented.

When enforcing the Prevention Law, the contraventions, as well as the model for the remedial plan to be enclosed to the report on the contravention committed and the sanctions enforced were also laid down by GD no. 33/2018.

II.

1. With reference to the branch of law named labour law, the contraventional liability is a form of legal liability in its own right, but it is not part of the labour legislation (law)⁶.

The Labour Code - Law no. 53/2003⁷ refers only to sanctioning certain contraventions (covering facts, circumstances which are generic, focusing on expressing legal employment relationships). Law no. 62/2011 on social dialogue⁸ is similar in this respect. Otherwise, in about 40 pieces of legislation in various fields, over 180 contraventions are regulated, which require as a prerequisite the existence of a legal employment relationship (which usually stems from the conclusion of an individual contract of employment)⁹.

2. The legislative acts regulating contraventions related to employment relationships, other than those of the Labour Code and Law no. 62/2011 can be grouped into two categories: a) legislative acts which partially or totally belong to employment legislation; b) legislative acts which do not belong to employment legislation¹⁰.

a) Legislative acts which partially or totally belong to employment legislation:

– Law no. 142/1998 regarding the granting of meal vouchers;

– Law no. 108/1999 on the establishment and organization of Labour Inspection;

– GO no. 25/2014 on the employment and secondment of foreigners in Romania and on amending and supplementing some legislative acts on the regime of foreigners in Romania;

– Law no. 202/2002 on equality of chances between women and men;

– Law no. 217/2005 regarding the establishment, organization and functioning of the European Works Council;

– Law no. 279/2005 on apprenticeship in the workplace;

– Law no. 67/2006 on the protection of employees' rights in case of transfer of the undertaking, the units or parts thereof;

– Law no. 193/2006 regarding the granting of gift and childcare vouchers;

– Law no. 200/2006 on the establishment and use of the Guarantee Fund for payment of wage debts;

– Law no. 319/2006 on job safety and health;

– Law no. 448/2006 on the protection and promotion of the rights of disabled persons;

– Law no. 467/2006 on establishing the general framework for informing and consulting employees;

– G.O. no. 137/2000 on preventing and sanctioning all forms of discrimination;

– G.D. no. 905/2017 on the general registry of employees¹¹;

– GD no. 846/2017 for establishing the gross minimum basic wage guaranteed for payment¹².

b) Legislative acts which do not belong to employment legislation:

– Law no. 82/1991 on accounting;

– Law no. 76/2002 on the unemployment security system and on the stimulation of employment;

– G.O. no. 37/2007 on the establishment of the application of the rules on driving times, breaks and rest periods for drivers and the use of equipment to record

⁴ Published in The Official Gazette of Romania, part I, issue 410, July 25, 2001.

⁵ Published in The Official Gazette of Romania, part I, issue 268, Aprilie 22, 2002.

⁶ See I.T. Ștefănescu, *Tratat teoretic și practic de drept al muncii* (Theoretical and Practical Treatise of Labour Law), ediția a IV-a, revăzută și adăugită, Editura Universul Juridic, București, 2017, p. 915.

⁷ Republished in the The Official Gazette of Romania, part I, issue 345, May 18, 2011, as amended and supplemented.

⁸ Republished in the The Official Gazette of Romania, part I, issue 625, August, 31, 2012, as amended and supplemented.

⁹ See, for a presentation in extenso of these contraventions, A. Țiclea, *Tratat de dreptul muncii. Legislație. Doctrină. Jurisprudență* (Labour Law Treatise. Legislation. Doctrine. Caselaw), Ediția a VIII-a, revizuită și adăugită, Editura Universul Juridic, București, 2014, p. 922-990.

¹⁰ See I.T. Ștefănescu, *op. cit.*, p. 920-921.

¹¹ Published in The Official Gazette of Romania, part I, issue 1005, December 19th, 2017.

¹² Published in The Official Gazette of Romania, part I, issue 950, November 29th, 2017.

their work;

– Government Emergency Ordinance no. 158/2005 on leave and social security allowances.

In legal literature dedicated to labour law, it is shown that a successive timely ordering of the statutes which provide for and contravenitionally sanction employment related acts, as well as the excessive number of these contraventions raise the question of the need for a thorough substantive analysis, which should result in narrowing down (by grouping them, if this is the case) the contraventions in this area and to integrate, following the logic of their seriousness and that of the protected issues, those that must remain in the Labour Code and in the Law on Social Dialogue¹³.

This approach is all the more necessary now, given the option of the legislator to regulate the preventive measures to (directly) apply a pecuniary contravenitional sanction.

III.

As in other areas covered by contravenitional sanctioning, as far as employment relationships are concerned, the legislator elected a small number of contraventions to which the special rules provided for by the Prevention Law could be applied.

According to GD no. 33/2018, in the matter of legal employment relationships only the following eight contraventions are enumerated:

1. Art. 23, for violation of the provisions of art. 5, art. 7 para. (1), art. 8 para. (2), art. 9, para. (1) and (4), art. 11 and art. 12 of Law no. 279/2005 on apprenticeship in the workplace, republished in the Official Gazette of Romania, Part I, issue 498 of August 7, 2013, as amended.

The acts considered are:

– art. 5: The employer shall appoint an apprenticeship coordinator who shall guide the apprentice so that the latter could acquire the professional competencies necessary to obtain the qualification for which the apprenticeship in the workplace is organized;

– art. 7 para. (1): The person who cumulatively meets the following conditions may enter into a contract of apprenticeship:

- a) he takes the necessary steps towards finding a job by himself or by applying for a job at the employment agency in whose jurisdiction he is domiciled, or, where appropriate, he is a resident, or at another employment services provider accredited under the law;
- b) he reached the age of 16;
- c) he is not qualified for the occupation in which apprenticeship is organized in the workplace;
- d) he meets the access requirements to be trained through apprenticeship in the workplace, on qualification levels, according to GO no. 129/2000 on adult professional training, republished, as amended and supplemented;

– - art. 8 para. (2): The registered sole trader or,

where applicable, the designated representative of the family owned and operated business trains apprentices, acting at the same time as apprenticeship coordinator;

– - art. 9 para. (1) and (4):

• Para. (1) The duration of the apprenticeship contract is determined by the qualification level for which the apprentice is going to be prepared, and may not be less than:

- a) 12 months, if the apprenticeship in the workplace is organized to achieve the competencies corresponding to a level 2 qualification;
- b) 24 months if the apprenticeship in the workplace is organized to achieve the competencies corresponding to a level 3 qualification;
- c) 36 months, if the apprenticeship in the workplace is organized to achieve the competencies corresponding to a level 4 qualification;

• Para. (4) The timeframe necessary for the theoretical training of the apprentice is included in the normal hours of work;

– art. 11:

• Para. (1): The apprentice status gives him all the rights and obligations under Labour Law, this Law and, where appropriate, all the special laws governing the occupation.

• Para. (2): The apprentice benefits from legal provisions applicable to the other employees, to the extent that they are not contrary to the apprentice status;

– art. 12: In order to professionally train the apprentice, the employer shall provide the apprentice with access to theoretical and practical training, as well as all the necessary conditions so that the authorized training provider and the coordinator would fulfil their duties as far as the training of the apprentice is concerned.

2. Art. 217 para. (1) let. c) of the Law on Social Dialogue no. 62/2011, republished in the Official Gazette of Romania, Part I, issue 625 of August 31st, 2012, as amended and supplemented.

According to art. 217 para. (1) let. c) of Law no. 62/2011, it is a contravention and is thus sanctioned with a fine amounting to 3,000 lei, the failure of the parties signing the collective labour agreement at unit group or industry level to submit the agreement thereof for publication. Responsibility is equally shared by the parties.

3. Art. 13 para. (1) of Law no. 67/2006 on the protection of employees' rights in case of transfer of the undertaking, the unit or parts thereof, published in the Official Gazette of Romania, Part I, issue 276 of 28 March 2006.

The rule states that failure by the transferor or transferee to fulfil the obligations of this law is a contravention and is sanctionable by a fine amounting from 1,500 to 3,000 lei.

4. Art. 113 let. a), b), e), h) of the Law no. 76/2002 on the unemployment security system and on the stimulation of employment, published in the

¹³ See I.T. Ștefănescu, op. cit., p. 921.

Official Gazette of Romania, Part I, issue 103, February 6th, 2002, as amended and supplemented.

According to art. 113, it is a contravention if:

– let. a) there is no compliance with art. 10 of the Law concerning the obligation of employers and providers of employment services, respectively, to communicate the number of job vacancies or, where appropriate, the number of the unemployed who were counselled and employed;

– let. b) they do not use the Classification of Occupations in Romania under the provisions of art. 15 of the law;

– let. e) there is no compliance with art. 41 para. (2) of the Law - employers who employed, according to the law, individuals among the recipients of unemployment benefits shall notify, within 3 days, the employment agencies where they were registered;

– let. h) there is failure to communicate the data and information requested in writing by the National Agency for Employment or the local employment agencies in order to fulfil the duties provided by the law other than those regarding the communication of data, information, as well as if there is failure to produce all the documents and any other information and documents requested by the official bodies which control local employment agencies, while conducting control activities and so as to meet statutory duties.

5. Art. 9 of Law no. 467/2006 on establishing a general framework for informing and consulting employees, published in the Official Gazette of Romania, Part I, issue 1006, December 18th, 2006.

According to art. 9, it is a contravention to fail to fulfil obligations under the art. 5 of the Law, which provides:

– para. (1): Employers shall inform and consult employees' representatives, according to the laws in force concerning:

a) the recent and probable development and economic situation of the company;

b) the situation, structure and probable development of employment within the company, as well as regarding any anticipatory measures envisaged, especially when there is a threat to employment;

c) the decisions which can lead to substantial changes in labour organization, contractual relations or employment relationships, including those covered by Romanian legislation on specific procedures for information and consultation on collective redundancies and the protection of employees' rights, in case of company transfer;

– para. (2) Information shall be given at a time, in a manner and with a content appropriate to enable employees' representatives to examine the issue properly and prepare, where appropriate, consultation;

– para. (3) Consultation shall take place:

a) at an appropriate time, in an appropriate manner and with an appropriate content to enable employees' representatives to examine the issue properly and develop a point of view;

b) at a relevant representation level for the

management and the employees' representatives, depending on the subject being discussed;

c) based on the information supplied by the employer and on the view that employees' representatives are entitled to express;

d) so as to allow the employees' representatives to meet the employer and obtain a reasoned response to any point of view that they might express;

e) so as to negotiate an agreement on the decisions falling within an employer's obligations referred to in para. (1) let. c).

6. Art. 35 para. (1) of Law no. 335/2013 regarding the traineeship for higher education graduates, published in the Official Gazette of Romania, Part I, issue 776, December 12th, 2013, as amended.

According to art. 35 para. (1), it is a contravention and is sanctionable by a fine amounting from 1,000 lei to 2,000 lei, the violation of the provisions relating to:

– the use of trainees to carry out other activities and / or perform other tasks than those provided in the job description and the traineeship contract;

– the experience of the mentor supervising the trainees' activity and the fact that a mentor can coordinate and monitor at the same time, no more than 3 trainees;

– the activity of the trainee evaluation committee, under the provisions of the art. 8 para. (1) and (3) of the Law;

– the fact that the report of the committee evaluating the traineeship period is made known to the trainee on the date of its completion by the evaluation committee;

– the fact that within five days from the completion of the traineeship, the employer is required to issue the certificate of completion of the traineeship;

– maximum duration of the traineeship contract;

– the fact that the trainee's basic monthly salary, established by the individual employment contract, is the one negotiated by the parties, for an average schedule of 8 hours per day or 40 hours per week, under the law, which is to be completed by provisions included in the applicable collective labour contract;

– the trainee's obligation not to resign within a period determined by addendum to the individual employment contract.

7. Art. 39 para. (2) for the violation of the provisions of art. 13 let. c) art. 39 para. (6) let. a) for the violation of the provisions in art. 9 para. (1), art. 39 para. (6) let. b) for the violation of the provisions of art. 14 and 15, art. 39 para. (8) let. a) for the violation of the provisions of art. 12 para. (1) let. d), art. 13 let. g) and art. 18 para. (6), as well as art. 40 of the Law on Job Safety and Health no. 319/2006 published in the Official Gazette of Romania, Part I, issue 646, July 26th, 2006, as amended.

8. Art. 23 para. (1) of Law no. 200/2006 on the establishment and use of the Guarantee Fund for payment of wage debts, published in the Official

Gazette of Romania, Part I, issue 453, May 25th, 2006, as amended.

IV.

The conclusion that can be expressed after considering the option of the legislator on indicating the contraventions in the area of employment relationships is that none of the general acts contraveniently sanctioned under the Labor Code and the Law on Social Dialogue was considered.

The enumeration in Appendix 1 to the G.D. no. 33/2018 is limitative. The special rules governing the norms that regulate preventive measures cannot be applied by analogy to other contraventions, even if it could be argued that they are less serious than the contraventions for which the Prevention Law is applied.

References

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