

Contracts for the Provision of Services and Labor: A Comparative Analysis Under the Ukrainian Legislation

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ABSTRACT

The article analyzes the legal consequences of concluding a labor contract and a contract for the provision of services. The need for such an analysis is due to the fact that employers often prefer to conclude civil law contracts with employees instead of labor contracts, since the latter are less beneficial for them. At the same time, for an employee, the conclusion of a contract for the provision of services instead of an employment contract entails the deprivation of all guarantees provided for by labor legislation. The historical prerequisites for the existence of similarities between labor and civil contracts are examined in the article. In order to distinguish between these types of contracts, a comparative analysis of the legal nature and consequences of the conclusion of an employment contract and a contract for the provision of services is carried out. The article analyzes the guarantees that are provided for by labor legislation and are aimed at ensuring the human right to work. It is concluded that when concluding civil contracts, these guarantees are lost, which significantly worsens the position of the employee. In this regard, the article analyzes the recommendations of the International Labor Organization aimed at distinguishing between civil and labor legal relations. The conclusion is made that it is necessary to consider these recommendations in the national legislation of all Member States.

Keywords: labor contract, contract for the provision of services, civil law, labor law, guarantees, employee, employer

1. Introduction

One of the basic socio-economic human rights is the right to work, which occupies a central place in the system of labor rights. It is the basis of the whole complex of socio-economic rights. Only through its implementation material goods are created, further growth of welfare is ensured, material and spiritual values are multiplied, successes in the field of economy are achieved. The legal essence of the right to work is disclosed in the provisions of Art. 43 of the Constitution of Ukraine, which became the legal field of the constitutional proclamation of the right to work and the consolidation of the mechanism for ensuring the exercise of this right. It originated with the adoption of the Constitution of Ukraine in the context of compromise decisions and actions in opposition

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to the past Soviet legal doctrine and the newest for Ukraine market system of legal relations. According to the current Ukrainian legislation, everyone has the right to work, which includes the opportunity to earn a living by work, which he or she freely chooses or freely agrees to. In addition, all citizens have the right to freely dispose of their abilities to work, choose the type of activity and profession.

Under modern conditions, the realization of the human right to work is possible not only through the conclusion of an employment contract, but also by concluding a contract of civil law, the subject of which is the result of personal labor. Civil law provides for a number of contracts through which a person has the opportunity to exercise their ability to work (contracts for the provision of services, commission agreement, vehicle lease agreement with the provision of management and maintenance services, copyright agreement, etc.). At the same time, concluding a civil contract with an employer is becoming more and more common. It should be noted that the provisions of labor law do not apply to the relationship between the parties to civil contracts, which, in turn, can seriously worsen the legal status of employees and adversely affect the relevant guarantees. That is why it is necessary to distinguish the employment contract from related civil contracts and the consequences, which appear in each case.

2. Literature Review

Labor and civil contracts are the subject of research by many scholars. Therefore, the problem of the contract in law is given sufficient attention by representatives of the theory of law, as well as certain branches of law. With regard to labor and civil law, it should be noted the work of researchers of theoretical and scientific-practical problems of labor and civil contract and their history: K. Annenkov (1899), Yu. Gambarov (1911), D. Meyer (2003), G. Shershenevich (2019), S. Carrion (2020), J. Ortiz (2020) and others.

Characterizing the level of scientific research of problems related to determining the legal nature of labor and civil contracts, it should be noted that this issue has been considered in numerous works of scientists in the field of labor and civil law, in particular: P. Pilipenko (1999), A. Hrynyak (2013), S. Pogribny (2019) and other scholars.

The methodological basis of the study is a dialectical method with a system-functional approach to the analysis of the studied phenomena. This allowed us to consider the labor contract and the contract for the provision of services as elements of the legal system that are in the process of constant development. This methodological approach also uses the formal-logical method, which studied the legislation on labor contract and the contract for the provision of services, and the historical method, which allowed to study the specifics of contractual relations for the provision of services in specific historical conditions, the dynamics of their development. The method of comparative analysis was used to compare the labor contract and the contract for the provision of services.

3. Historical Aspects of the Common Features of the Labor Contract and the Civil Contract for the Provision of Services

The principles of legal regulation of labor relations were developed by Roman lawyers. At that time in Roman law there was a separate contract of employment (*locatio-*

conductio opens or opens faciendi). At that time, hiring a slave as a movable thing fully satisfied the needs of the economy in labor and hiring services was not practiced. Roman lawyers only approached the legal distinction between property and personal rent, things and labor, but never brought this distinction to an end (Lushnikov, 2009), so the concept of "employment contract" at that time was absent in positive law. It was believed that the legal basis of all employment contracts are three main types of contract, which came from Roman law in a slightly modified form: personal employment, refit contract and contract of agency. As a result, in the science of civil law by the beginning of the twentieth century three positions on the legal nature of the employment contract, which was governed by the rules of civil law, were formed (Lushnikov, 2009).

The emergence of labor law with its central institution "employment contract" is associated with the justification of labor as a special object of legal regulation, which does not fit into the civil law structure of employment, as it differs from any object of civil rights (Tal, 2006).

The concept of "employment contract" was invented by V. Elyashevich (1907). The very nature of the employment contract, as claimed in the legal literature, was investigated by L. Tal, who distinguished between contracts for independent (entrepreneurial) work and contracts for non-independent (official) work. It is the contract of non-independent (official) work meant an employment contract as a regulator of labor relations, which "follows from the subordination of the labor force of one person to the purpose and authority of another person". An element of such an agreement was the "promise of work" (Tal, 2006).

L. Tal attributed the following to the characteristic features of an employment contract:

- an employee under an employment contract promises to provide his labor force for the benefit of another's economy;
- an employee is required to perform work personally;
- from the employment contract follows the obligation of the employee to coordinate their behavior with the procedure established by the owner, the employer must protect the identity of the employee from the dangers associated with his actual stay in another's economic sphere;
- an employee has the right to remuneration for his work (Tal, 2006).

Later, these characteristics were generalized and were called "personal, organizational and property" features of the employment relationship, which were considered inextricably linked. This construction proved its ability in both theoretical and practical terms. It should be noted that for many years other civil law constructions were not taken into account, in particular: service contracts, copyright agreements, the implementation of which is related to the use of labor of individuals. In the theory of law there is a certain theoretical icon of the style that the employment contract originated and, accordingly, stood out from the system of civil law contracts, and more specifically, from the contract. Therefore, the problem of distinguishing between employment contract and civil law employment contracts has always been one of the central in the science of labor law. It has important theoretical and practical significance, because the independence of the employment contract actually symbolizes the independence of the field of labor law. This problem remains relevant in modern socio-economic conditions.

Scholars suggest that in the long run the employment contract should be transformed into

a kind of civil contract, when all labor relations will be governed by civil law, which will form the appropriate structural element of civil law, its institution (Chanyшева, 2012).

Some scholars are even more categorical. They believe that the employment contract as an organizational and legal model of hired labor in a market economy has exhausted itself, and it was replaced by a civil contract of employment (Braginsky & Vitryansky, 1997).

The problem of distinguishing the employment contract from related civil law contracts, especially the contract for the provision of services, became relevant in the 20s of last century (Barkov, 1924). The differences which exist between these two kinds of contracts can be united into two groups: legal and economic. The legal ones included:

1) on the subject of the contract: the provision of labor, not the obligation to provide the finished product;

2) by the special nature of wages: the provision of labor for remuneration in accordance with the time and amount of work, but regardless of its commercial effect. The latter may not be related to the quantity and quality of labor and may depend on market conditions and other circumstances;

3) by the nature and scope of liability of the parties: the employee is released from liability for the consequences of non-performance or poor performance of the work.

Some scholars insisted that the sign of risk is one of the grounds for distinguishing between employment contract and contract for the provision of services (Agarkov & Genkin, 1944). The hired person was limited in liability even if he or she was directly at fault, while the employer was fully liable for his or her responsibilities.

The main economic features of the distinction between employment contract and civil law contracts were:

1) independence of hired labor and economic weakness of the hired person, his or her economic dependence on the employer. The employment contract regulated relations within the organization, while civil law - between two independent entities;

2) personal performance of work, absence of institutes of "labor representation". This was not considered a prerequisite for civil contracts;

3) performance of work by means and materials of the employer, which was also not mandatory for civil law contracts.

Obviously, none of these criteria alone could clarify the situation and they had to be analyzed together. In addition, the delimitation of these agreements was extremely difficult and required great legislative certainty. It followed that the identified employment contract had to be governed by labor law, and civil contract - by civil law. The following solution was proposed to the choice of legislation to be applied to the contract: if the legal nature of the contract in question, employment or contract for the provision of services, or if one contract combines features of both, it is necessary to find out which of them prevail, and to qualify the contract as a whole. Disputed cases should be resolved in favor of employees, i.e. the questionable contract should be qualified as an employment contracts (Lyakh, 1925). In essence, this meant the introduction of a presumption of applying labor law to all questionable contracts.

Nowadays in Ukraine, the differences between the employment contract and civil contracts are determined on the basis of current legislation depending on the subject of the contract and its nature, remuneration, term of the contract, the procedure for concluding the contract and other features (Bolotina, 2008).

4. Comparative Characteristics of the Nature and Consequences of Labor Contract and Contract for the Provision of Services

To correctly determine the legal nature of employment and civil contracts, it is necessary to pay attention to their essential points and characteristics. Of paramount importance is the purpose of concluding the contract and, accordingly, the choice of means that will regulate the conclusion of the contract: labor contracts are regulated by the provisions of labor law, civil contracts - by the provisions of civil law. The specific choice of the appropriate tool is clearly manifested at the stage of determining the purpose of the contract (Getmantseva, 2015).

Thus, the purpose of concluding an employment contract is to receive remuneration in the form of wages, the amount of which depends on the complexity and conditions of work performed, professional and business qualities of the employee, the results of his or her work. In the process of work, the employee reaches the proper professional level. Taking into account the fact that money is a special kind of movable property, the purpose of concluding a civil contract is to obtain a certain property result of work. The purpose of any contract defines its subject as one of the essential conditions of the contract. Judicial practice also follows this path.

The subject of the employment contract is work, while the subject of the civil contract is the performance by the party of a certain amount of work. In the decision of the Supreme Court of Ukraine in case No. 820/1432/17, the court emphasized that under the employment contract, the employee is obliged to perform not some individually defined work, but work in one (or more) profession, specialty, position of appropriate qualification, to perform a certain job function in the enterprise. However, it is necessary to emphasize the fact that the job function that will be performed by an employee in a particular profession, specialty, qualification or position must be provided in the staff list of the enterprise, institution, organization. The staff list is a document that establishes the structure, staff and salaries of employees for a given enterprise, institution, organization (Ministry of Labor and Social Policy of Ukraine, 2007). Despite the fact that the labor legislation does not provide for the mandatory presence of staffing in each business entity, in practice, experts from the Ministry of Labor consider the lack of staffing as a violation of labor legislation, for which employers may to provide financial sanctions in the form of a fine. If we proceed from this logic, then the employer himself may be subject to the sanction provided for in Art. 265 of the Labor Code of Ukraine.

The subject of a civil contract may be the performance of works or the provision of services. If it is a work, then the object must be materialized, and if it is a service, it must be consumed during the provision of the service. A. Hryniak notes that the subject of contracts is the individualized result of the contractor's work, which acquires one or another materialized form, as the work is performed from the materials of the parties and is submitted in a form suitable for evaluation. The subject of service contracts is the process of providing the service itself, and not the achievement of a materialized result. In addition, the main result in the provision of services is expressed in intangible form, but has economic value and useful effect for the customer, while the result of the contractor's work is always manifested in one form or another, i.e. is tangible (materialized) (Hrynyak, 2016). It is necessary to pay attention to whether the contract defines the amount of work

performed in the form of specific physical quantities to be measured, which should have been reflected in the act of their acceptance; information on what specific result of the work the contractors must give to the customer; list of tasks of work, its types, quantitative and qualitative characteristics. It should be noted that the subject of the contract further determines the process of organization of work (activity), which is determined within the relevant time limits and is also a defining feature in distinguishing the nature of employment and civil contracts.

According to Art. 846 of the Civil Code of Ukraine, terms of performance of work or its separate stages are established in the contract. If the contract does not set deadlines, the contractor is obliged to perform the work, and the customer has the right to demand its performance within a reasonable time, in accordance with the nature of the obligation, the nature and scope of work and business practices. The same rule is provided in Art. 905 of the Civil Code of Ukraine: the term of the contract for the provision of services is set by agreement of the parties, unless otherwise provided by law or other regulations.

The term of the employment contract is clearly regulated. Art. 23 of the Labor Code of Ukraine provides that the contract may be indefinite, concluded for an indefinite period, fixed-term, concluded for a definite period, established by agreement of the parties, and concluded for the duration of certain work. Term in labor law should be considered as a basis for the emergence, change and termination of employment and as a special form of existence in time of a particular employment relationship (Chanyшева, 2011), during which the employee performs his or her job function in a particular profession, specialty, qualification with subordination to the economic and disciplinary authority of the employer. The employer manages production through a system of interconnected methods of recruitment, using economic and disciplinary authority. This feature is key to determining the nature of the employment contract and, accordingly, the employment relationship and the demarcation of the civil contract and civil relations. The economic and disciplinary power of the employer is manifested primarily in the following:

- 1) definition of the employee's workplace, which means a certain area of production space, equipped with mechanisms, tools, units adapted for work, the place of direct performance of the labor function. It is characterized by clearly defined parameters: shop, site, department, the corresponding unit (Melnytska, 2012). It should be noted that it is the employer who must inform the future employee about the working conditions in the workplace, including dangerous and harmful production factors and the possible consequences of their impact on the health of the employee. The employer keeps records of working time of each employee, for which, as a rule, uses a timesheet, which is the main source of information on this issue. After all, the report card is one of the main grounds for calculating wages, compiling statistical and tax reports (Hetmantseva & Kozub, 2014);
- 2) organization of the labor process and control over the activities of the employee, namely the personal performance of work provided by the provisions of the employment contract, job descriptions, rules of internal labor regulations; checking the quantity and quality of work performed; rationing and planning of work, determining the content and type of work within the labor function;
- 3) organization of wages. When paying wages, the employer is obliged to inform each employee in writing about the components of wages that are due to the employee for the relevant period, as well as the amount, grounds for deductions and the total amount

payable. In this case, wages must be paid to the employee on working days within the time limits set by the collective agreement, but at least twice a month. The time interval between payments should not exceed 16 calendar days (Art. 115 of the Labor Code of Ukraine). With regard to civil contracts, the fee under the service contracts is determined by agreement of the parties. The contract may specify either the price of the service or the method of determining it;

4) establishment of organizational and economic conditions necessary to ensure labor discipline and productivity: definition and distribution of rights and responsibilities of employees, establishing appropriate order in the enterprise in accordance with the rules of internal labor regulations, application of measures for violation of labor discipline and involvement in material liability for damage to the employer.

In the employment contract, a person, who performs the work, has the status of an employee, which gives rise to certain legal guarantees for the establishment of working conditions, working hours, rest time, wages, labor protection, etc. According to Art. 865 of the Civil Code of Ukraine, the contractor must be a business entity. If a person provides services, he or she may have the status of an entrepreneur (Article 906 of the Civil Code of Ukraine) or the status of a self-employed person who conducts independent professional activity. Thus, under a civil contract, the contractor (performer) is not an employee and, as a rule, does not have any legal guarantees provided by law. Therefore, determining the nature of employment and civil contracts is of great legal importance, as the legal status of the person depends on such qualification, which will determine not only the rights and obligations of the parties, but also the appropriate means of protection in case of breach of contract.

Speaking about the nature of contracts in labor and civil law, it is necessary to note the termination of their validity. Termination of the employment contract is clearly regulated by law in compliance with the procedure for dismissal (Articles 22, 36, 40, 41, 43, 43-1, 47, 116 of the Labor Code of Ukraine). Civil law contracts are terminated, as a general rule, by proper execution. The main way to terminate the contract is the agreement of the parties, because it is most consistent with the nature of the contract due to the fact that all relationships between the parties are based on mutual consent. In the case of termination of the contract by agreement of the parties, there is an expression of will of all parties who wish to terminate the relationship that existed between them. When the contract is terminated at the initiative of one of the parties, the end of the contractual relationship is directed only to the will of this party in case of denial or passivity of the other.

Termination of a civil contract is an act aimed at terminating a partially or completely unfulfilled contract, and thus the obligations arising from it are terminated for the future (Protskiy, 2017). The law gives the customer the right to terminate the contract at any time, refusing to perform it, in accordance with Art. 849 of the Civil Code of Ukraine. In this case, he is obliged to pay the contractor a fee for the work performed and reimburse him for damages caused by the termination of the contract, as the termination of the contract by the customer is not associated with any breach by the contractor, but solely with his will.

5. Guarantees and Compensations in the Field of Labor Relations, which are Lost at the Conclusion of Civil Contracts

Guarantees and compensations in the field of labor legal relations are regulated by a number of laws and by-laws of Ukraine. The Labor Code of Ukraine provides for a whole chapter VIII, which is called "Guarantees and Compensations". In addition, practically each of the eighteen chapters of the Labor Code of Ukraine, stipulates certain guarantees for each of the parties to the employment contract - both the employer and the employee.

Art. 265 of the Labor Code of Ukraine establishes financial liability for violation of labor legislation, including for violation of the minimum state guarantees for wages, provided for in Art. 12 of the Law of Ukraine "On Wages", 10 times the minimum wage for each employee in respect of whom such a violation was committed (Verkhovna Rada of Ukraine, 1995). It is possible to highlight the following guarantees to employees who conclude an employment contract:

1. Guarantees and compensations for workers who combine work with training, as well as for persons sent for advanced training, retraining, training in other professions with a break from production.

In accordance with Art. 201-220 of the Labor Code of Ukraine, the employer is obliged to create the necessary conditions for combining work with training for workers undergoing industrial training or combining work with training.

For workers studying on the job in general education, vocational and technical educational institutions, a shorter working week or a reduced duration of daily work is established with the preservation of wages in accordance with the established procedure. According to Art. 209 of the Labor Code of Ukraine for employees who successfully study in secondary general education evening (shift) and correspondence educational institutions, for the period of the academic year, a shortened working week is established by one working day or the corresponding number of working hours (if the working day is shortened during the week).

These persons are released from work during the academic year for no more than 36 working days with a six-day working week or the corresponding number of working hours. With a five-day work week, the number of days off from work changes depending on the length of the work shift while maintaining the number of free hours from work.

Individuals who combine work with training are provided with additional educational leaves in the manner prescribed by the Labor Code and the Law of Ukraine "On Vacations" dated November 15, 1996 (Verkhovna Rada of Ukraine, 1996).

2. Guarantees for working women.

Art. 174 of the Labor Code of Ukraine prohibits the use of women's labor in work with harmful or hazardous working conditions, as well as in underground work, except for some types of underground work (non-physical work or work on sanitary and domestic services).

It is also prohibited to involve women in lifting and moving loads, the mass of which exceeds the established limits for this. According to the order of the Ministry of Health "On approval of the maximum norms for lifting and moving heavy objects by women" of December 10, 1993, the maximum permissible weight of a load for women when lifting and moving loads when alternating with other work is 10 kg, and with a constant nature

of such work - 7 kg (Ministry of Health of Ukraine, 1993).

According to Art. 175 of the Labor Code of Ukraine, the attraction of women to work at night is not allowed, with the exception of those branches of economic activity where it is caused by a special need and is allowed as a temporary measure.

It is not allowed to involve pregnant women, as well as women with children under 3 years of age, in work at night, in overtime work and work on weekends and on business trips. Women with children aged 3 to 14 years or children with disabilities cannot be involved in overtime work or sent on a business trip without their consent (Art. 176-177 of the Labor Code of Ukraine).

Women in accordance with Art. 179 of the Labor Code of Ukraine can get maternity leave with a duration of 70 calendar days before childbirth and 56 calendar days after childbirth, and in case of complications of childbirth or the birth of two or more children - 70 calendar days.

In addition to these holidays, in accordance with Art. 18 of the Law of Ukraine "On Vacations", a woman is also granted partially paid parental leave until the child reaches the age of three. If the child needs home care, the woman is granted unpaid leave on the basis of a medical certificate until the child reaches the age of six. The time of partially paid leave and additional unpaid leave to care for a child until the child reaches the age of six is counted both in the total length of service and in the length of service in the specialty (Verkhovna Rada of Ukraine, 1996). However, the length of service, which gives the right to annual paid leave, does not include the time spent on parental leave (Article 181 of the Labor Code of Ukraine). The same procedure established by Art. 179 and 181 of the Labor Code of Ukraine also applies to women who adopt a child or take a child under guardianship.

3. Guarantees for minors.

Minors, that is, persons under the age of 18, in labor relations are equated to adults, and in the field of labor protection, working hours, vacations and some other working conditions they enjoy the benefits established by the legislation of Ukraine.

According to Art. 188 of the Labor Code of Ukraine, it is not allowed to hire persons under the age of 16. Each enterprise must keep a special register of minors, indicating the date of their birth (Article 189 of the Labor Code of Ukraine).

At the same time, it is prohibited to use labor of persons under 18 years of age in heavy work, work with harmful or dangerous working conditions, as well as in underground work.

It is also prohibited to involve persons under 18 years of age in lifting and moving loads, the mass of which exceeds the established limit norms for them, approved by the order of the Ministry of Health "On approval of the maximum standards for lifting and moving heavy objects by minors" dated March 3, 1996 (Ministry of Health of Ukraine, 1996).

Minors cannot be employed in jobs with such factors as:

- great physical stress;
- forced abnormal position of the body during work;
- vibration from pneumatic tools, machine tools, mechanisms;
- unfavorable meteorological conditions (high and low ambient temperatures);
- work underground;
- exposure (possibility of exposure) to certain industrial poisons (lead, phosphorus,

arsenic), dust, X-rays, ionizing radiation and electromagnetic fields;
 - significant neuropsychic stress;
 - increased risk of injury (Lein, 2020).

According to Art. 191 of the Labor Code of Ukraine, all persons under the age of 18 are employed only after a preliminary medical examination and subsequently (until they reach 21 years of age) undergo it annually.

4. *Guarantees for downtime not due to the employee's fault.*

In case of non-fulfillment of production standards through no fault of the employee, payment is made for the actually performed work, but the monthly salary in this case cannot be lower than 2/3 of the tariff rate of the category (salary) established for him.

In the manufacture of products that turned out to be a defect through no fault of the employee, remuneration is made in accordance with reduced rates. Nevertheless, the monthly salary of such an employee cannot be lower than 2/3 of the tariff rate of the category (salary) established for him.

Downtime not due to the employee's fault, if such an employee warned the owner or a person authorized by him (foreman, other officials) about the beginning of the downtime, is paid at the rate of not less than 2/3 of the tariff rate of the category (salary) established for the employee (Claessens & Ueda, 2020).

Downtime due to the fault of the employee is not paid (Articles 111-113 of the Labor Code of Ukraine).

In this regard, the International Labor Organization (hereinafter – ILO) pays considerable attention to the definition of labor relations.

The ILO recognizes that the concept of labor relations is equally present in all legal systems and traditions, although the obligations, rights and benefits associated with labor relations vary from country to country. The criteria for determining the actual existence of an employment relationship may also vary, even though many countries use common concepts such as dependency and subjectivity (Padin, 2020). However, regardless of the criteria used, governments, employers and workers share the desire to ensure that such criteria are sufficiently clear to make it easier to define the scope of different legislation and to cover people it is intended to cover, i.e. persons who are in an employment relationship.

According to the ILO, an employment relationship is a concept that creates a legal relationship between a person called an “employee” and another person called an “employer” to whom he or she provides his or her work or provides services under certain conditions. Self-employment, based on commercial contracts and civil contracts, is by definition not part of the employment relationship.

The ILO recommends that Member States provide for a clear definition of the conditions that will be used to establish the existence of an employment relationship.

The ILO obliges Member States to provide for the possibility of defining in their laws and regulations, or by other means, specific features of the existence of an employment relationship. Such features could include the following elements:

a) the fact that the work:

- is performed in accordance with the instructions and under the control of the other party;
- provides for the integration of the employee into the organizational structure of the enterprise;

- is performed exclusively or mainly in the interests of another person;
 - performed personally by the employee;
 - is performed according to a certain schedule or at the workplace, which is specified or agreed by the party who ordered it;
 - has a certain duration and implies a certain continuity;
 - requires the presence of an employee;
 - provides for the provision of tools, materials and mechanisms by the party who ordered the work;
- b) periodic payment of remuneration to the employee:
- the fact that this remuneration is the only or main source of income of the employee;
 - remuneration in kind by providing the employee with, for example, food, housing or vehicles;
 - recognition of such rights as weekly days off and annual leave;
 - payment by the party who ordered the work, travel carried out by the employee in order to perform the work;
 - or that the employee does not bear financial risk (paragraph 13 of ILO Employment relationship Recommendation № 198) (International Labor Organization, 2006).

The International Labor Organization proceeds from the legal presumption of the existence of an individual employment relationship in the case when the presence of one or more relevant features is determined. At the same time, the ILO draws attention to the need for clear formulation of legislation and its scope.

6. Conclusions

1. Labor and civil contracts serve as a legal form of communication between the parties. Properly defined nature of the employment contract allows to provide the employee with the guarantees provided by labor legislation, and to promote the creative and professional development of the employee as a person. Properly defined nature of the civil contract allows to effectively fulfill its purpose as a legal means of regulating public relations. Determining the nature of employment and civil contracts is of great legal importance, as it determines the legal status of the person, which will determine not only the rights and obligations of the parties, but also the appropriate means of protection in case of breach of contract.

2. Concluding a civil contract with a potential employee is often a more attractive option in comparison with an employment contract. The conclusion of a civil contract instead of an employment contract allows to avoid labor disputes, in particular, regarding records of work in the work book, the provision of holidays, disciplinary and material liability, payment for a period of temporary disability, payment of additional payments, allowances, prizes, etc.

3. The conclusion of civil law contracts is often more profitable also from the point of view of tax optimization. Since payments under civil contracts are not related to labor relations, they are not included in the payroll and, accordingly, are not subject to social insurance contributions.

4. Employers abuse their rights and often enter into civil contracts instead of employment contracts, thus neglecting social human rights. In order to prevent this, in our opinion, it

is necessary to supplement the Code of Administrative Offenses of Ukraine with an article stipulating liability for illegal conclusion of civil contracts instead of employment contracts in the form of a fine.

5. When distinguishing between civil and employment contracts, it is necessary to take into account the position of the International Labor Organization on the features of labor relations in the national legislation of Ukraine. It is necessary to clearly define in national laws and regulations specific signs of the existence of an employment relationship. Such features include the following elements:

- 1) the fact of performance of work according to instructions and under the control of other party;
- 2) integration of the employee during the performance of work in the organizational structure of the enterprise;
- 3) performance of work exclusively or mainly in the interests of another person;
- 4) performance of work personally by the employee;
- 5) subordination of the employee to a certain schedule or performance of work at a specifically defined workplace;
- 6) the work is characterized by a certain duration and involves a certain continuity;
- 7) the work requires the presence of the employee;
- 8) tools, materials and mechanisms for the performance of work are provided by the party who ordered the work;
- 9) the employee is periodically paid remuneration, which is the only or main source of income of the employee;
- 10) remuneration is made in kind by providing the employee with, for example, food, housing or vehicles;
- 11) the employee is provided with weekly days off and annual leave;
- 12) the employee does not bear financial risk.

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