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Audits of the state labour inspectorate: areas of concern

A. Diligul

ORCIDID 0000-0001-6520-247X

Dnipropetrovsk State University of Internal Affairs

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PhD, Associate Professor,
department of Civil Law
disciplines,
Dnipropetrovsk State
University of Internal Affairs

diligulka@ukr.net

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The article deals with topical issues of inspections of economic entities by the State Labour Inspectorate bodies. The relevance of this topic is explained by the fact that the amount of penalties for violations of labour law is quite significant, and in connection with the increase in the minimum wage in recent years they have become even larger.

The Labour Inspectorate would surely rank second in the ranking of the most popular entities of the controlling bodies, second only to the tax authorities. Moreover, given the increased attention on the part of the latter to labour relations, there are all prerequisites to ensure that employers' interest in labour inspections does not subside.

Keywords: *inspection; authorities State Labour Inspectorate; control measures; employment inspection; inspection visit.*

Introduction

Assigning control functions to local authorities in compliance with labour legislation has already led to the abuse of powers by the latter due to the illegal granting them the state labour inspector status and powers.

Analysis of recent researches and published papers. The issue of audits by the bodies of the State Labour Inspectorate and the powers of local authorities at conducting inspection visits was thoroughly studied by such authors as: Oleksandr Slobozhan, M.G. Aleksandrov, V.S. Andreyev, V.S. Venedyktov, O.M. Bandurka, N.K. Voyevodenko, V.M. Harashchuk, V.Y. Hotsa, L.Y. Ginzburg, L.M. Davydenko, V.V. Zhernakov, S.O. Ivanov, S.S. Karinskyi, Y.O. Klionov, Y.M. Korshunov, M.V. Kosiuta, O.V. Krasnookyi, O.V. Lavrynenko, L.I. Lazor, R.Z. Livshyts, M. Mychko, V.H. Malov, L.A. Muksinova, L.Y. Ostrovskiy, A.Y. Pasherstnyk, P.D. Pylypenko, O.S. Pashkov, V.I. Prokopenko, O.I. Protsevskiy, M. Rudenko, V.P. Silayev, V.M. Skobelkin, O.I. Stavtseva, P.R. Stavyskiy, L.O. Syrovatska, N.M. Khutorian, O.I. Shebanova, B.O. Shelomov et al.

The purpose of the article is to study the legitimacy of empowerment of local authorities to monitor labour law

compliance and the lawfulness of actions of the State Labour Inspectorate during audits and inspection visits.

Presentation of the basic materials

One of the means to increase the labour law compliance is to ensure proper supervision and control by the authorized bodies. Among the latest advances of modern labour law science in terms of supervision and control, the academic papers by Y.M. Popovych "Supervision and Control over Compliance with Labour Legislation of Ukraine" (2003) and H.O. Zamchenko "Principles of Supervision and Control over Compliance with Labour Legislation of Ukraine" (2008) should be noted, as well as the articles by the Russian scientists O.E. Denysova "Prosecutor's Supervision over the Respect for Citizens' Rights to Safe Working Conditions" (2001) and S.F. Vaslychev "Legal Regulation of Supervision and Control over Labour Protection and Compliance with Employment and Labour Legislation" (2001). Taking into account the significant contribution of scientists to the development of methods to deal with the problem of supervision and control over labour law compliance, it should be noted that in these papers, the subjects under supervision and control have been considered in fragments and in terms of thesis research only.

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This article intends to reveal the powers of government bodies and local authorities to monitor labour laws compliance by business entities.

Thus, it should be noted that decentralization reform is currently underway in Ukraine, local self-government is being provided with more resources and administrative powers, which means more opportunities to influence various aspects of community life. At this rate, at the end of 2016, the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine" (1774-VIII) was adopted, which referred the control over labour law compliance and imposition of fines for its infringement to the executive bodies of regional city councils and joint territorial communities.

According to the Law of 05.04.07 No. 877-V, the bodies of the Derzhpratsi have the right to conduct scheduled and unscheduled audits of labour law compliance by business entities according to the rules established by the Law No. 877, but taking into account the features specified in special labour laws and international treaties. [3]

It should be noted that the labour legislation provides for such audits by the bodies of Derzhpratsi, however, recently there have been changes in the laws on local self-government, which are currently contrary to the provisions of the labour code and introduce the right to conduct audits of business entities compliance with employment and labour laws by the executive bodies of local authorities, which leads to the abuse of local authorities' powers and artificial granting of equal powers to government bodies and local authorities. [2,5]

The Federation of Employers submitted comments on the draft amendments to the Procedure for State Control of Compliance with Labour Legislation, and sent the relevant procedure of Derzhpratsi to the Federation for approval. [7, p.28]

According to the proposed amendments to the Procedure, an attempt is being made by the Derzhpratsi to retain control functions over local authorities. That is, the officials of local authorities will continue to carry out inspection visits, draw up reports, impose fines. [7, p.28]

Assigning of control functions on local governments has already led to abuse of their power due to the illegal granting of status and powers of the state labour inspector under ILO Conventions No. 81, 129, according to which the state labour inspector has a wide range of discretionary powers. [1]

Today, local authorities have promptly established departments of municipal control of compliance with labour laws. [1]

According to the complaints of entrepreneurs, local authorities' controllers have poor competence to conduct audit, incorrectly determine the disposition for the application of penalties, the legal nature of the contract under which services are provided, all commercial contracts are legally qualified as labour ones, for which fines amounting to 30 (today 10) minimum wages are applied for each employee not registered under employment contract. For minor breach of labour legislation, a fine amounting to a minimum wage is applied for each such infringement multiplied by the number of employees, and multi-million fines have been imposed, when in the case of minor offenses

an official may be discharged from administrative liability with a verbal warning. [5,6] [8, p.18]

The Federation of Employers believes that local government officials have been given powers similar to those of investigators and detectives under the ILO conventions granted to state labour inspectors. Many companies work in multi-shift mode, at night the employer is not only unable to provide access to documents and the necessary explanations, but also is not obliged to do so. Unhindered access to the production facilities is also a threat to the labour inspector, as the latter must be familiar with the basic safety requirements at the facility and, if necessary, have personal protective equipment corresponding to the production conditions. [7, p.29] [8, p.18]

Granting the status of a state labour inspector to the local authorities' officials contradicts the ILO Convention No 81. Indeed, the inspection visits should be arranged under the supervision and control of the central government, but the local authorities does not have such a status. It should be noted that in accordance with the current legislation, labour inspectors are recruited solely on the basis of their qualifications to perform the duties that will be assigned to them, they receive appropriate training to perform their duties, while ensuring the involvement of properly qualified technical experts and specialists in the work of the inspectorate, and further training is provided during their work. To date, the officials of local authorities do not meet any of these requirements. In addition, labour inspectors can only be government officials who are not the officials of local authorities. [7, p.29]

Among other things, there is a duplication of functions of territorial bodies of the Derzhpratsi and local authorities, which contravenes the ideas of the strategy of reforming the supervision (control) system, which is based on the elimination of control functions duplication.

The illegality of assigning control functions to local authorities is also confirmed by the decision of the Sixth Administrative Court of Appeal in case No. 826/8917/17 dated 14.05.2019 [11]

Thus, the decision of the Sixth Administrative Court of Appeal of May 14, 2019 in case No. 826/8917/17, which revoked the Resolution of the Cabinet of Ministers of Ukraine dated 29.04.2017 No. 295 "On Some Issues Regarding the Application of the Article 259 of the Labour Code of Ukraine and Article 34 of the Law "On local bodies of self-government in Ukraine" states: "The resolution approving the Procedure for the state control over labour law compliance introduces unjustified granting the powers of state supervision (control) to the bodies, which have not received such powers by law. The Law of Ukraine "On Basic Principles of State Supervision (Control) in the Area of Economic Activity" does not provide for any powers of executive bodies of regional city councils and joint territorial communities to exercise state supervision (control)."[11]

In view of the above, the audit of business entities in terms of compliance with labour legislation is regulated exclusively by the Law of Ukraine "On Basic Principles of State Supervision (Control) in the Area of Economic Activities".

However, the Law of Ukraine "On Basic Principles of State Supervision (Control) in the Area of Economic Activities" does not provide for any powers to the executive

bodies of regional city councils and joint territorial communities to exercise state supervision (control). [3]

Thus, regulations of parts 4 and 5 of Art. 2 of the Law of Ukraine "On Basic Principles of State Supervision (Control) in the Area of Economic Activities" state that control measures shall be taken by the bodies of state supervision and control over compliance with the labour and employment legislation in the manner specified by this Law. [3]

According to Art. 3 of the Law of Ukraine "On Basic Principles of State Supervision (Control) in the Area of Economic Activities", the state supervision (control) is carried out on the principles of inadmissibility of duplication of powers of state supervision (control) bodies and inadmissibility of state supervision (control) measures by different state supervision (control) bodies on the same issue. [3]

According to part one of the Article 259 of the Labour Code, the state supervision and control over compliance with labour legislation by the legal entities, regardless of form of incorporation, type of activities, economic management by the individual entrepreneurs, who use hired labour, is carried out by the central executive body that implements the state policy on supervision and control over compliance with labour laws. [4,5]

The system of central executive bodies consists of ministries, state committees, central executive bodies with special status (State Committee of Ukraine for Industrial Safety, Labour Protection and Mining Supervision, territorial departments for labour protection supervision, state labour inspectorates, state inspectors). [4,5]

Article 19 of the Commercial Code stipulates that government bodies are authorized to exercise state control and state supervision over economic activities. [12]

According to the provisions of Part 3 and Part 4 of Art. 265 of the Labour Code of Ukraine, the penalties specified in Part 2 of this Article shall be imposed by the central executive body that implements the state policy on supervision and control over compliance with labour laws, in accordance with the procedure established by the Cabinet of Ministers of Ukraine. [5]

However, in violation of the above provisions of current legislation, the inspections and control over labour law compliance, the decisions on imposing fines are not made by the central executive bodies, but by the executive bodies of local authorities.

Conclusions

Thus, the review of statistical information on the activities of individual subjects of supervision and control over the labour legislation of Ukraine indicates a significant amount of work to be carried out by these bodies, namely: ensuring compliance with labour legislation; ensuring safe working conditions; provision of appropriate pension maintenance; protection from unjustified dismissal; protection from other illegal actions of the employer; restoration of violated rights and compensation for damage. [8, p.19]

However, currently local authorities, endowed with the functions of supervision and control over compliance with labour laws, while duplicating the functions of government

bodies, in exercising their so-called powers never comply with current legislation and act under the old Acts of inspections, which by virtue of the Resolution of the Sixth Court of Appeal have become null and void, without following the audits procedure, which significantly violates the rights and legitimate interests of business entities in respect of which such audits are conducted.

As previously mentioned, the laws establish the principle of prohibiting the duplication of functions and discretionary powers of government bodies, so, in our opinion, the provisions on local authorities' control over labour law compliance, as well as some provisions of the Law of Ukraine "On Local Self-Government", which grants the functions of government bodies to control the business entities' compliance with labour legislation to the local authorities, are subject to repeal and are contrary to the basic principles and basis of current legislation of Ukraine.

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