

# **Issues legal and economic regarding amendments of the individual employment contract because the individual performance targets are not achieved by the employee**

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## **Abstract**

*Adapting a gainful economic or technological developments may require modification of the individual employment contract under which the activity is performed, taking into account the intrinsic dynamism of employment.*

**Keywords:** *individual employment contract; individual performance goals; individual employment contract performance; modification of the individual employment contract.*

**JEL Clasification:** K31

## **I. Introductory issues**

### **A) General legal issues concerning individual employment contract modification**

Adapting a gainful economic or technological developments may require modification of the individual employment contract under which the activity is performed, taking into account the intrinsic dynamism of employment. If the parties jointly establish individual labor contract content, all in agreement, may agree to amend it at any time, according to art. 41 para. 1 of the Labour Code.

Individual employment contract is governed, in terms of its effects, and the provisions of principle of art. 1270 of the Civil Code – „*That valid contract has the force of law between the contracting parties*”.

The principle of "*pacta sunt servanda*", based on respect for moral demands of his word and the need for legal certainty imposed by society, finds its place in the more labor<sup>2</sup>. Its application implies that, wherever possible, the parties agree to maintain, throughout the execution of the contract, the terms initially set.

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<sup>2</sup> See, in this regard, R. Dimitriu, *Contractul individual de muncă. Prezent și perspective*, Tribuna Economică, Bucharest, 2005, p. 211.

The foundation is the binding force of the contract will of the parties, bordering the law only to ensure the performance of the contract, penalizing failure to execute him.

Execution of the individual labor contract, the conclusion and until terminated, put into play a complex set of legal rules has some features that customizes to civil contracts that are similar.

In fact, due to the individual employment contract is through its execution.

### **B) Individual employment contract modification procedure in the case of failure by individual employee performance objectives**

During the execution of the individual employment contract, amendment of any of its clauses is done usually by agreement, ending an addendum (*ad validitatem* written – requirement imposed by changes to art. 16 of the Labour Code). This provision, contained in art. 41 para. 1 of the Labour Code, is nothing but a consecration of the principle of mandatory legal act effects.

Changing individual employment contract by agreement requires negotiation similar to that achieved its conclusion.

The tacit acceptance of the amendment by the employee is excluded individual employment contract, the law establishing the requirement of an addendum.

Previously change individual employment contract, the employer must inform the employee of the terms upon which they intend to change (according to art. 17 para. 1 of the Labour Code).

Acts on changing individual employment contract shall be included in the register of the employees – that every employer is obliged to prepare, according to art. 2 para. 2 of the Government Decision no. 500/2011 on the General Register of employees<sup>3</sup>.

Currently, art. 34 para. 3 of the Labour Code provides that the general register of employees includes, among others, references to the period of secondment.

Art. 3 para. 2 letter c of Government Decision no. 500/2011 establishes that – in the register mentioned – have covered the period of posting and the employer's name is posted.

The legal texts mentioned that in general register of employees includes information concerning the individual labor contract modification made, but only through the legal institution of posting.

In addition to the provisions of the Labour Code which concern only the obligation of entry of the period of secondment, Government Decision no. 500/2011 establish accurate and employer name that is posted.

According to art. 41 para. 3 of the Labour Code, individual employment contract modification means any of the following:

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<sup>3</sup> Published in the "Official Gazette", Part I, no. 372 of 27 May 2011.

- duration of the contract;
- work place;
- type of work;
- working conditions;
- salary;
- working time and rest time.

In reality, as indicated in legal doctrine<sup>4</sup>, all terms (even those unnamed) have the force of law to the parties, they cannot be modified, usually only by their consent.

Exceptional, is possible unilateral amendment of the individual employment contract only in cases and under the Labour Code<sup>5</sup>.

From all labor legislation shows that the employee may not modify, under any circumstances unilaterally individual employment contract – in any of its essential elements. This impossibility is explained by the Labour Code which provides in art. 39 para. 2 letter b and c obligation to respect employee work discipline.

The employer has the prerogative disciplinary entitled to apply under the law, disciplinary sanctions whenever its employees find that they have committed a disciplinary offense.

Legal recognition of unilateral and punitive powers in favor of the employer constitutes an exception to the normal relations between the parties to a contractual relationship, characterized by joint-equal logic<sup>6</sup>.

The specificity of the individual employment contract is explained by the existence of mandatory subordination of the employee to the employer.

Moreover, previous legal practice in 2003 Labour Code appreciate the principle that individual labor contract modification unit initiative, opportunity subject to restrictive legal regulations, not contrary to the contractual nature of the legal relationship of employment (see, in this, the Court of Appeal Târgu-Mureș, sec. civ. no. 610/R of 26 August 1999).

The employer may provide legal unilaterally change the place and/or the type of work in the following cases:

- delegation (but only in the first period up to 60 days in 12 months, since the measure is necessary to extend the employee's consent, under art. 44 para. 1 of the Labour Code);
- posting (but only for the first period of 1 year extension of the measure may be submitted only with the consent of the employee, according to art. 46 para. 1 and 2 of the Labour Code);

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<sup>4</sup> See, in this regard, I.T. Ștefănescu, *Tratat teoretic și practic de drept al muncii*, third edition, revised and enlarged, Universul Juridic, Bucharest, 2014, p. 382.

<sup>5</sup> See, in this regard, Ș. Beligrădeanu, *Limitele dreptului unității de a dispune modificarea definitivă a contractului de muncă prin actul ei unilateral*, “Revista Română de Drept”, no. 9-12/1989, pp. 49-56.

<sup>6</sup> See, in this regard, I.T. Ștefănescu, *op. cit.*, p. 768.

- in case of force majeure, even if it was not expressly provided for by the Labour Code, all would have such an effect in the general rules;
- by way of disciplinary action;
- as protection of the employee (according to art. 48 of the Labour Code).

Changing individual employment contract unilaterally can occur in cases the employee is passed to another work<sup>7</sup>.

Even if you change the individual employment contract is the result of a unilateral act of the employer, such an amendment is based on general and prior consent given by the employee at the end of that contract.

By modifying the individual labor contract shall not bring any curtailment of workers' rights are protected by mandatory provisions of law and, as such, exclude any transaction, waiver or limitation (art. 38 of the Labour Code).

Modification of the individual labor contract can be achieved through contractual clauses – which are *ab initio* content contract.

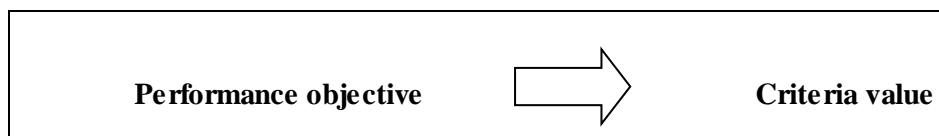
The possibility of inserting the individual employment contract other terms than those governed by the laws is certain, arising from the principle of freedom of will, a flexible vision on the regulation of labor relations<sup>8</sup>.

A clause has the effect of modifying the individual labor contract is the index that consists of periodic wage increase commitment (quarterly, semi-annually or at such other time) at least inflation index<sup>9</sup>.

Consequently, the salary is automatically increased in close correlation with the cost of living.

## **II. Amendments of the individual employment contract legally because the individual performance targets are not achieved by the employee**

Art. 40 para. 1 letter f the Labour Code gives the employer the right to establish "*individual performance objectives and criteria for assessing their achievement*".



In connection with the establishment of individual performance objectives, the legal doctrine formulated the following opinions:

- *according to the first*<sup>10</sup>, individual performance objectives and criteria for their evaluation, constituting a natural result of job duties, are

<sup>7</sup> *Idem*, p. 395-399.

<sup>8</sup> *Idem*, p. 355.

<sup>9</sup> *Idem*, p. 365.

<sup>10</sup> See, in this regard, Ș. Beligrădeanu, *Principalele aspecte teoretice și practice rezultate din cuprinsul Legii nr. 40/2011 pentru modificarea și completarea Codului muncii (II)*, „Revista Română de Dreptul Muncii”, no. 3/2011, pp. 26-27.

included in the job description annexed to the contract. Changing them would not be possible except by consent of the parties, pursuant to art. 41 para. 1 of the Labour Code.

- *according to the latter opinion*<sup>11</sup>, the establishment of individual performance objectives should not be confused with the establishment by the employer, the employee's agreement to end the individual employment contract, job description (the tasks for each employee). Individual performance objectives for the employee be determined after the conclusion of the contract, by the employer unilaterally and without the consent of the employee concerned.

We consider the latter to be founded opinion, given that the duties of the job are the result of agreement between the parties at the conclusion of the individual labor contract, while individual performance targets are set unilaterally by the employer during the execution of the contract. These objectives are included in the enumeration of the art. 17 para. 3 of the Labour Code, on the contrary, are provided only as a right of the employer (art. 40 par. 1 letter f of the Labor Code).

Initially, as a result of information selected by the employer of the person (art. 17 para. 3 of the Labour Code), individual performance evaluation criteria are accepted by future employee – making element content of individual employment contract (art. 17 par. 4 of the Labour Code).

Subsequently, the employer is entitled to modify these criteria (the bylaw – according to art. 242 of the Labour Code letter i) and communicate the employee. Symmetry legal acts – as a contract, an agreement will, and so must be changed – requires the consent of the employee<sup>12</sup>.

Individual performance objectives<sup>13</sup> are not quantitative and not to be confused with individual work time. They aim par excellence quality component of work, obtaining superior results<sup>14</sup>.

In legal doctrine<sup>15</sup> was formulated and the opposite view, according to which these "objective" means a specific quantity and quality of service tasks. Discussing about "individual performance goals" cannot ignore the rules work, its standardization, which also is a prerogative of the employer<sup>16</sup>.

As stated in legal doctrine<sup>17</sup>, individual performance targets are established and communicated unilaterally by the employer, the employee, but must: altogether

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<sup>11</sup> See, in this regard, I.T. Ștefănescu, *Repere concrete rezultate din recenta modificare și completare a Codului muncii*, „Revista Română de Jurisprudență”, no. 2/2011, p. 15-17.

<sup>12</sup> See, in this regard, I.T. Ștefănescu, *op. cit.*, p. 320-321.

<sup>13</sup> See, in this regard, B.Vartolomei, *Obiective de performanță individuală*, I.T. Ștefănescu (coord.), M. Gheorghe, I. Sorică, A.G. Uluitu, B. Vartolomei, A. Vidat, V. Voinescu, *Dicționar de drept al muncii*, Universul Juridic, Bucharest, 2014, p. 261-262.

<sup>14</sup> *Idem*, p. 321.

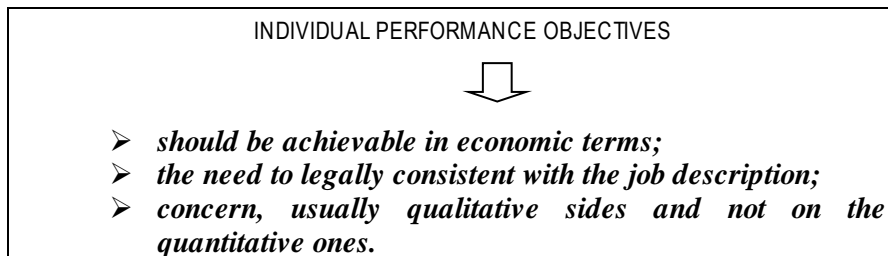
<sup>15</sup> See, in this regard, A. Țiclea, *Stabilirea obiectivelor de performanță individuală – prerogativă a angajatorului*, „Revista Română de Dreptul Muncii”, no. 7/2011, p. 13-14.

<sup>16</sup> *Ibidem*.

<sup>17</sup> See, in this regard, I.T. Ștefănescu, *Repere concrete rezultate din recenta modificare și completare a Codului muncii*, [www.juridice.ro](http://www.juridice.ro).

consistent with the job description and be achievable; addressing qualitative sides, and not quantitative, set by individual employment rules.

Individual performance objectives cannot be established for all employees, while targeting, in particular, those in leadership positions and those of the executives whose work depends, actually, the quality of products, services, works<sup>18</sup>.



### III. Conclusions

In case of non-individual performance objectives by the employee employee dismissal can occur without prior assessment, according to art. 63 para. 2 of the Labour Code or without prior disciplinary investigation, according to art. 63 para. 1 of the same law<sup>19</sup>.

But – in economic terms – for failure individual performance objectives, are possible other measures, less drastic, such as exclusion from bonuses, exclusion from promotion, change of place of work or type of work, with the consent of concerned, disciplinary sanctions (other than disciplinary dismissal) etc.<sup>20</sup>.

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<sup>18</sup> *Ibidem.*

<sup>19</sup> *Ibidem.*

<sup>20</sup> *Ibidem.*

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