

## ANALYSIS OF THE REGULATORY AND LEGAL PROVISION OF THE MARKET OF EMPLOYEE RENTAL SERVICES BASED ON THE EXAMPLE OF OUTSTAFFING IN UKRAINE

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**Abstract.** A problematic situation has been identified, in which the provision of the Law of Ukraine "On Employment of the Population" on the obligation to obtain a permit for hiring employees to another employer is fixed at the level of law, and the order establishing the procedure for issuing such a permit has not entered into force. The purpose of the article is to study the peculiarities of the regulatory and legal support of the market of services for leasing workers using the example of outstaffing in Ukraine. During the scientific research, methods of synthesis and analysis were used (when studying the essence of hiring (leasing) employees, as well as outstaffing); systematicity (when determining the interrelationship of laws of Ukraine regarding the hiring of workers for their further work in Ukraine for other employers); logical and structural (to determine directions for improvement of the regulatory and legal framework); synthesis (to determine an effective toolkit for ensuring the market of services for leasing workers on the example of outstaffing in Ukraine, taking into account the experience of the EU). Therefore, obtaining permission to hire workers for their further work in Ukraine for other employers is possible only after making appropriate changes to the Law of Ukraine "On the list of documents of a permissive nature in the field of economic activity" dated May 19, 2011 No. 3392-VI. It has been proven that activities under outstaffing contracts with foreign partners can be considered legal, but not regulated in Ukraine. Yes, neither in the Law of Ukraine "On Employment of the Population" No. 5067-IX of 07/05/2012, nor in the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Regarding the Formation of State Policy in the Field of Labor, Labor Relations, Employment of the Population and Labor migration" No. 341-IX dated 05.12.2019, the "outstaffing" approach is not used to organize the work of a worker abroad, and registration of this form of business in the Ministry of Social Policy is required only on the territory of Ukraine. Despite the fact that Ukraine is a member of the International Labor Organization, the ILO Convention No. 181 of June 19, 1997 has not yet been ratified by the Ukrainian Parliament. "About private employment agencies", in which the principle of outstaffing for international business is formulated.

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**Introduction.** The essence of the personnel rental service is that one company accepts a job on the basis of an employment contract (employs) an employee, and then transfers it to another company for hire (lease) on the basis of a contract for the provision of employee rental services. At the same time, legally, such an employee is in labor relations with the original company with which he has an employment contract, and in fact he is carrying out instructions/tasks received from the lessee (customer of services under the contract for the provision of employee rental services).

The staff rental service received legislative legitimacy only with the adoption of the Law of Ukraine "On Population Employment" [1]. However,

some issues, despite the adoption of the Law, remained open and not fully resolved. In particular, para. 1.2 h. 1 tbsp. 39 of the Law of Ukraine "On Employment of the Population" provides that the activities of business entities (employers who hire workers for their further work in Ukraine for another employer under the terms of employment contracts) are carried out on the basis of a permit issued by the central executive body, which implements state policy in the field of population employment and labor migration. The procedure for issuing a permit to hire workers for their further work in Ukraine for another employer is established by the Cabinet of Ministers of Ukraine. In order to fulfill Part 1 of Art. 39 of the Law of Ukraine "On Employment of the Population", the Cabinet of Ministers of Ukraine adopted Resolution No. 359 of the Cabinet of Ministers of Ukraine dated 20.05.2013, which approved the Procedure for Issuing a Permit for Hiring Workers for Their Further Work in Ukraine for Another Employer [2].

In accordance with Clause 2 of the above-mentioned Resolution of the Cabinet of Ministers of Ukraine No. 359 dated 20.05.2013, the resolution shall enter into force from the date of entry into force of the Law on Amendments to Certain Laws of Ukraine on Issuing Permits for Hiring Workers for Their Further Work in Ukraine for Another Employer.

On 05/23/2013, the Cabinet of Ministers of Ukraine, as a subject of the right of legislative initiative, in accordance with clause 2 of Resolution No. 359 of the Cabinet of Ministers of Ukraine dated 05/20/2013, submitted to the Committee of the Verkhovna Rada of Ukraine on social policy, employment and pension provision the Project Law No. 0951 "On Amendments to Certain Laws of Ukraine Regarding the Issuance of Permits for Hiring Workers for Their Further Work in Ukraine for Another Employer" [3]. In accordance with the terms of Draft Law No. 0951, it was proposed to supplement the list of documents of a permissive nature in the sphere of economic activity, approved by the Law of Ukraine "On the List of Permissive Documents in the Sphere of Economic Activity" [4]; to establish the provision that the Permit to hire workers for their further work in Ukraine for another employer is issued for an unlimited number of times; establish the provision that the decision to issue a permit or refuse to issue it shall be made within 10 working days from the date of receipt by the central executive body, which implements state policy in the field of population employment and labor migration, of the documents necessary for the issuance of the permit.

However, Draft Law No. 0951 was never adopted. That is, there is a situation in which the provision of the Law "On Employment of the Population" on the obligation to obtain a permit for the transfer of employees to another employer is fixed at the level of the law, and the procedure establishing the procedure for issuing such a permit has not entered into force. Thus, the question arises about how to be in such a situation for employers who intend and plan to provide services for hiring (leasing) employees, as well as what do employers do in the current situation?

**Literature review.** Studies of various aspects of the labor rental services market are widely presented in the scientific literature. Thus, the concept of interdependence of foreign labor and economic development of developed labor markets was developed by P. Taran, A. Roy, A. R. Ramos, R. Ranieri, J. Lammes, and others. Regularities of the influence of external labor markets on economic development within the framework of an individualistic approach were evaluated by K. Miyagiwa, S.-J. Kim, O. Galor, D. Tsiddon, M. Beine, S. Castles, M. Miller, H. De Haas, A. Solimano, and others. In the territorial aspect, Y. Haberfeld, R. Menaria, B. Sahoo, M. Bildirici, R. Vyas were engaged in studying the role of the labor market.

However, in modern conditions, questions arise related to the insufficient development of the provisions of the regulatory and legal support of the market of services for the rental of workers on the example of outstaffing in Ukraine.

**Aims.** The purpose of the article is to study the peculiarities of the regulatory and legal support of the market of services for leasing workers using the example of outstaffing in Ukraine.

**Methods.** During the scientific research, methods of synthesis and analysis were used (when studying the essence of hiring (leasing) employees, as well as outstaffing); systematicity (when determining the interrelationship of laws of Ukraine regarding the hiring of workers for their further work in Ukraine for other employers); logical and structural (to determine directions for improvement of the regulatory and legal framework); synthesis (to determine an effective toolkit for ensuring the market of services for leasing workers on the example of outstaffing in Ukraine, taking into account the experience of the EU).

**Results.** In accordance with Part 3 of Art. 36 of the Law of Ukraine "On Employment of the Population", the list of business entities that provide employment mediation services and business entities that hire employees for their further work in Ukraine for other employers is formed and maintained by the central executive authority, which implements state policy in the sphere of population employment and labor migration, in accordance with the procedure established by the Cabinet of Ministers of Ukraine. On June 5, 2013, the Cabinet of Ministers of Ukraine adopted Resolution No. 400, which approved the Procedure for forming and maintaining a list of business entities that provide employment mediation services and business entities that hire employees for their further work in Ukraine at other employers [5]. Clause 5 of the above-mentioned order stipulates that in order to be included in the list, intermediaries submit to the State Employment Service a registered letter with a notification of delivery of an application in the form established by the Ministry of Social Policy. Pursuant to Clause 5 of the Procedure, the Ministry of Social Policy of Ukraine adopted Order No. 471 on August 1, 2013, which approved the application form for inclusion in the List of business entities that provide employment mediation services and business entities that perform hiring employees for their further work in Ukraine for other employers [6]. Taking into

account the above, in order to avoid the application of fines, companies do not receive permission to hire (rent) employees to another employer (since the procedure for issuing permits has not entered into force), but only submit applications to the State Employment Service of Ukraine for inclusion in the list of entities businesses that provide employment mediation services, and business entities that hire employees for their further work in Ukraine for other employers, the form of which is approved by the above-mentioned Order of the Ministry of Social Policy of Ukraine No. 471.

In accordance with part 1 of Article 39 of the Law of Ukraine "On Employment of the Population", the activities of business entities - employers who hire employees for their further work in Ukraine for other employers under the terms of employment contracts, are carried out on the basis of a permit issued by the central executive body, which implements state policy in the sphere of population employment and labor migration. The procedure for issuing a permit for hiring employees for their further work in Ukraine with another employer. The specified resolution enters into force from the date of entry into force of the Law of Ukraine on Amendments to Certain Laws of Ukraine on Issuing Permits for Hiring Workers for Their Further Work in Ukraine for Another Employer (Clause 2 of the Resolution).

At the same time, in accordance with Article 1 of the Law of Ukraine "On the List of Permitting Documents in the Field of Economic Activity" dated 19.05.2011 No. 3392-UI, as amended, it is prohibited to require business entities to obtain permissive documents that are not included in the approved List this Law. With this in mind, the Verkhovna Rada of Ukraine on September 5, 2013 adopted as a basis the draft Law of Ukraine "On Amendments to Certain Laws of Ukraine on Issuing Permits for Hiring Workers for Their Further Work in Ukraine for Another Employer".

Thus, obtaining permission to hire workers for their further work in Ukraine for other employers is possible only after making appropriate changes to the Law of Ukraine "On the list of documents of a permissive nature in the field of economic activity" dated May 19, 2011 No. 3392-VI.

In the legislation of Ukraine, the concept of "outstaffing" as a separate type of business is implemented by the Law of Ukraine "On Employment of the Population" No. 5067-IX dated July 5, 2012 [1].

Considering that neither the Law of Ukraine "On Employment of the Population" No. 5067-IX of 07.05.2012, nor the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on the Formation of State Policy in the Field of Labor, Labor Relations, Employment of the Population and labor migration" No. 341-IX dated 05.12.2019 [7] the "outstaffing" approach is not used to organize the work of a worker abroad, and registration with the Ministry of Social Policy of this form of business is required only on the territory of Ukraine, then activity under outstaffing contracts with foreign partners can be considered legal, but not regulated.

Despite the fact that Ukraine is a member of the International Labor

Organization, the ILO Convention No. 181 of June 19, 1997 has not yet been ratified by the Ukrainian Parliament. "About private employment agencies", in which the principle of outstaffing for international business is formulated [8].

It should also be noted that in Ukraine there is no legal basis for organizing a long-term foreign business trip of an employee of a private enterprise. Provisions of Instruction No. 59 on business trips within Ukraine and abroad [9], as well as Resolution of the Cabinet of Ministers of Ukraine dated 02.02.2011 No. 98 "On the sums of expenses for business trips of civil servants, as well as other persons sent on business trips by enterprises, institutions and organizations that are fully or partially maintained (financed) at the expense of budget funds" [10] refer to state institutions, but do not extend to private enterprises, and are of a recommendatory nature. Leaving it to private enterprises to organize and reflect long-term business trips of their employees in accounting, the state reserved the right to conduct tax audits at its discretion, especially regarding the calculation of exchange rate differences from the use of currency.

The legislation of Ukraine does not allow a daily allowance for the time that has passed (post facto) to be paid to a seconded employee who is abroad in the currency of the country of the secondment as compensation for the funds used by him. The rules for the use of foreign currency on the territory of Ukraine, approved by the resolution of the Board of the National Bank of Ukraine dated 30.05.2007 No. 200 (chapter 2) until 2019, established that reimbursement of the expenses of own funds to a resident employee who was on a business trip abroad foreign currency is carried out in accordance with the legislation of Ukraine in the currency of Ukraine [11]. Government officials should pay attention to the fact that in Rules No. 200, the event - business trip was considered as a past event, and in the case of "outstaffing" - as an existing event.

With quarterly balance reporting, an enterprise with an annual turnover of more than 40 million hryvnias must end the employee's business trip on the last working day of the reporting quarter and start it again on the first day of the next quarter. Otherwise, monetary resources paid to the worker as per diem cannot be included in the expenses of the reporting period, which significantly overstates the quarterly income tax.

One of the conditions for the activity of any Ukrainian company is the employment of persons with disabilities. In accordance with Article 19 of the Law of Ukraine "On the Basics of Social Protection of Persons with Disabilities in Ukraine" dated 21.03.1991 No. 875-XII for enterprises, institutions and organizations that use hired labor, the standard of workplaces for the employment of disabled persons is established in the amount of four percent of the average number of full-time employees of the accounting staff for the year [12]. Without taking into account the fact that the age of this Law is thirty years and that over time changes occur in the life of society, we draw attention to two concepts that are not exactly the same: the number of jobs and the number of full-time employees.

The "outstaffing" business, which appeared in Ukraine in the 21st century, has no correlation with the legislation of the 20th century. Outstaffing companies do not create jobs for their employees and are not responsible for the final result of their work. The outstaffer's responsibility lies in the qualification level of his workers, in their ability to perform the work assigned to them by the technical staff of the company ordering the service. The staff of the outstaffing company consists of two categories: office workers and seconded workers. Jobs are created for office staff, but not for those who are seconded. Therefore, it is logical to deduct four percent from the number of full-time office staff of the company, and not from the total number of full-time workers of the outstaffing company, as the employees of government bodies claim.

The high degree of bureaucratization of personnel work with Ukrainian legislation during outstaffing significantly increases the document flow, which is associated with the number and variety of situations in which an employee is during the calendar year - this includes business trips, vacations, temporary layoffs, and full-time work in the territory of Ukraine.

To a large extent, this is related to the provisions of the Law of Ukraine "On Vacations", which establish two vacation options for an ordinary Ukrainian: annual (24 calendar days), which is mandatory for the employer, and at the expense of the employee (15 calendar days) [thirteen].

But in the latter case, in reality, leave is provided not only at the expense of the employee, but also partially at the expense of the employer. This period of non-work of the worker, when he has not earned anything for the owner, must be paid by the employer after one day of paid vacation.

The essence of the "outstaffing" business is the long-term secondment of a full-time employee to another enterprise. If the business trip is abroad, then having a type D work visa gives the right to work in the country of the business trip without a break for 365 days. Accordingly, the employer, sending his employee abroad, plans that the business trip will last 341 days (365 minus 24), and the work at the customer's production site will last 331 days (341 minus 10 days for travel in both directions). But this is only ideal, and in practice it is completely different. First of all, these are the New Year and Christmas holidays, which do not coincide with the celebration in our country. If in European countries they start from December 24 of the current year, then in Ukraine they end after January 7 of the next year. The "from - to" period is 14 days, minus three holidays (December 25, January 1, January 7), so we have 11 problematic calendar days. If the employee is registered, but not provided with work in Ukraine, then these are direct expenses of the employer. If you send him on vacation at the expense of the employee, then this is most of the time provided to him by law for family circumstances for the next calendar year. The way out for the enterprise may be temporary dismissal. But this is already a break in the insurance (pension) length of service, which is not good for the employee, but it "suits" the legislation of Ukraine and provides work to the personnel accounting employee.

Obtaining a work visa is an indisputable condition for a foreign business trip. The technological time for its registration is more than thirty days, which exceeds the term of annual leave. The same dilemma arises for the employer: spend your money or fire. The law gives the right to stipulate additional vacations in the Contract, but at the expense of the Owner.

We will analyze the problems of regulatory and legal support of outstaffing activities in the EU countries.

The understanding of the "outstaffing" business in the countries of the European Union developed at the end of the 20th century and was formed in the EU Directive No. 96/71 dated 16.12.1996 "On secondment of employees in connection with the provision of services" [14] with additions introduced by Directive 2018/957 / EU dated June 28, 2018 [15]. However, the provisions of these Directives applied only to member countries. For workers from third countries, the norm was established - "At the discretion of each state." The result of this was the fact that there is a gap between state decisions and documents with the real knowledge of executors in cities, for whom it is unclear the difference between a seconded worker from Ukraine who comes to perform work and one who is employed at an enterprise in their country.

The lack of a unified approach to seconded workers from third countries - non-EU members causes significant problems for outstaffing firms regarding the legislation of the country to which the secondment of the employee is planned. It is difficult to count on the support of the Embassy of Ukraine, as this issue is new for Ukrainian officials and diplomats. The trade and economic mission, as an institution of the Ministry of Economic Development, Trade and Agriculture of Ukraine, no longer exists.

Full legalization of a seconded worker in a foreign country is possible if two permits are available - for work and for stay - from two different state structures located in different countries. The granting of a work permit in the country of the customer enterprise does not necessarily lead to the granting of a residence permit (visa) in the embassy of this country in the state of the outstaffer enterprise. Visa refusal does not require clarification from the consul. Thus, situations are not uncommon when the difficult and costly way of obtaining a work permit has been passed, a foreign company - the customer - is waiting for the worker, and the visa - residence permit - has been refused. And this fact is subjective, depending on the mood of the consul.

EU directives declare that a mandatory condition for the activity of an outstaffer company in a foreign country, regardless of membership in the European Union and the country in which the company is registered, is the presence of a representative - a resident of this country. The functional responsibilities of the representative firm are very broad, so the qualification level and social status are very important. Sixty percent of the success of the Outstaffing business in a foreign country depends on a reliable and competent representative, which is very difficult to find.

There are also certain peculiarities in taxation.

According to paragraphs 14.1.183 of the Tax Code of Ukraine dated 02.12.2010 No. 2755-VI staffing service is an economic or civil law agreement, according to which the person providing the service (resident or non-resident) places at the disposal of another person (resident or non-resident) one or more natural persons to perform the functions defined by this agreement [16]. Outstaffing (English out - "outside" + English Staff - "state") involves providing the company-provider at the disposal of the company-customer with personnel to perform certain tasks. The Tax Code of Ukraine does not establish any restrictions or reservations regarding the inclusion in the composition of costs of services for the provision of employees under contracts for the provision of personnel.

Thus, an enterprise that applies the general taxation system (customer) can include in the composition of gross costs personnel services under an outstaffing contract, if such personnel perform work related to the economic activity of the customer, in accordance with paragraphs 139.1 of the Tax Code of Ukraine (PKU).

Economic activity - the activity of a person related to the production (manufacturing) and/or sale of goods, performance of works, provision of services, aimed at obtaining income and carried out by such a person independently and/or through his separate divisions, as well as through any another person acting for the benefit of the first person, in particular under commission agreements, mandates and agency agreements (clause 14.1.36 of article 14 of the Code of Civil Procedure).

According to the provisions of Art. 138 of the PKU, services provided by third-party organizations can be attributed to the cost of products, works and services (clause 138.8 of the PKU), general production (paragraph 138.8.5 of the PKU), administrative (paragraph 138.10.2 of the PKU), sales costs (para. 138.10.3 of the PKU) or other expenses (clauses 138.12.1, 138.12.2 of the PKU) related to production and sale, provided that the requirements of paragraphs Article 138.2 138 of the Civil Code, i.e. these expenses must be documented.

From the point of view of civil law, an outstaffing contract is a contract for the provision of services; due to this, the contract must specify, in particular, the services themselves, which must be provided by the executor (enterprise-provider) by means of its employee. In order to justify the necessity of hiring personnel under the outstaffing contract and the connection of costs under such a contract with economic activity, the contract must specify the number, qualifications of the personnel, the period of work and duties of the personnel.

The execution of the contract on the provision of personnel is confirmed by acts, which record the fact of providing employees to the customer and the working hours worked by them during the reporting period. No documents are drawn up between the customer and the employee, since the actual employer is the provider company. Therefore, the costs of the customer enterprise related to the acquisition of personnel services are taken into account as part of the costs when calculating the object of taxation on a general basis, taking into account

the specifics of the conditions of the concluded contract.

**Discussions.** The revision of the Law of Ukraine dated 07/05/2012 No. 5067-VI "On employment of the population", which entered into force on 01/01/2013, establishes additional requirements for the implementation of such activities [1]. According to the contract on the provision of personnel, the provider company undertakes to provide the customer with employees of a certain profession and qualification for the use of their labor in its production process for a fee. At the same time, an employment contract is concluded between the provider company and the employee, in which the provider company acts as an employer. At the same time, the employee, according to the employment contract, must, at the direction of the provider company (his employer), perform a labor function for another business entity - the customer.

Also according to paragraphs 3 clause 4 of Art. 39 of the Law of Ukraine "On Employment of the Population", for a customer who has unfilled staff units in the main professions, it is prohibited to provide employees for such professions, therefore, in contracts for staffing, it is advisable to indicate that employees perform auxiliary work, and not in the main professions of the technological process of the main production

Accordingly, Clause 2 of Art. 39 of the Law of Ukraine "On Employment of the Population" prohibits the activity of economic entities - employers who hire workers for their further work in Ukraine for another employer without permission. The provider company needs to take all the necessary actions to obtain a permit for the activities of business entities - employers who hire workers for their further work in Ukraine for another employer, and obtain such a permit from the State Employment Service.

The requirements for providers-employers and their obligations are provided for in Part 1 of Art. 39 of the Law of Ukraine "On Employment of the Population". Therefore, in accordance with the norms of this Law, the provider is obliged to:

- 1) conclude labor employment contracts with employees;
- 2) to pay wages to employees in an amount not lower than the amount of the minimum wage established by law and the wages that employees receive from the employer (customer) for performing the same work. This means that the salary paid by the provider to its employees transferred under the staffing contract must be at least two amounts at the same time:
  - the minimum wage established by law
  - wages paid by the customer company to its full-time employees for the performance of the same work (if such employees are available);
- 3) provide the employee with work and rest time under the conditions determined for the employer's (customer's) employees, provided for by the terms of the collective agreement and the rules of internal labor regulations.
- 4) to calculate and pay ESSV in favor of the employee in accordance with the classes of occupational risk of production to which the employer employing the employee's labor (i.e., the customer) is classified.

5) not to prevent the conclusion of an employment contract between the employee and the employer for whom he performed work.

Part 3 of Art. 53 of the Law of Ukraine "On Employment of the Population" provides for financial sanctions in the event that a business entity provides employment mediation services abroad without obtaining an appropriate license or hires employees for their further work in Ukraine for another employer without obtaining the appropriate permit - a fine in the amount of twenty times the minimum wage established at the time of detection of the violation is charged.

The Cabinet of Ministers of Ukraine by its Resolution No. 359 dated 20.05.2013 approved the Procedure for Issuing a Permit to Hire Employees for Further Work in Ukraine for Another Employer, which determines the procedure for issuing a permit for hiring employees for further work in Ukraine for another employer on terms of the employment contract [5].

**Conclusions.** Based on the specified conditions of registration of providers-employers, permission to hire employees for their further work in Ukraine for another employer is issued to business entities registered in Ukraine.

It is noted that there is no legal basis in Ukraine for the organization of a long-term foreign business trip of an employee of a private enterprise. Leaving it to private enterprises to organize and reflect long-term business trips of their employees in accounting, the state reserved the right to conduct tax audits at its discretion, especially regarding the calculation of exchange rate differences from the use of currency.

The specifics of the work of outstaffing companies are not taken into account in the activities of the executive authorities, namely: they do not create jobs for their employees and are not responsible for the final result of their work, they are responsible for the qualification level of the workers, their ability to perform the work assigned to them by the technical staff of the enterprise - the customer of the service.

As for the EU countries, the lack of a unified approach to seconded workers from third countries - non-EU members causes significant problems for outstaffing firms regarding the legislation of the country to which the secondment of the employee is planned.

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