

## Illegal Employment – Changes in Employer’s Registration Duty<sup>1</sup>

Silvia Trel’ová

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**Abstract:** *Illegal work and illegal employment are viewed as a serious problem in labour relationships and could have a rather negative impact on both employers as well as employees. Effective from January 1<sup>st</sup>, 2018, Act No. 294/2017 Coll., an amendment to the Act No. 82/2005 Coll. on Illegal Work and Illegal Employment and on Amendments and Supplements to Certain Acts as subsequently amended, changes the rules for determining what illegal employment is. This legislative change concerning employer’s duty to register employees in the Social Insurance Agency states that cases when employers fulfil their duty at a later date and without inspection bodies knowing of their failure to fulfil this duty do not amount to illegal employment.*

**Key Words:** *Labour Law; Employee; Employer; Illegal Employment; Illegal Work; Employer’s Registration Duty with Respect to the Social Insurance Agency; the Slovak Republic.*

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### Introduction

Illegal employment is an issue faced by the application practice which has been constantly intensifying over the years and which has been frequently discussed. Employers run the risk of illegal employment primarily due to the fact that their profits from their business activities are higher as a result of their failure to fulfil their tax duties and duties related to social and health insurance.

According to the currently applicable legislation, Act No. 82/2005 Coll. on Illegal Work and Illegal Employment and on Amendments and Supplements to Certain Acts as subsequently amended (hereinafter referred to as the “Act on Illegal Work and Illegal Employment”), which

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came into effect on April 1<sup>st</sup>, 2005, and has already been amended a number of times, there are altogether four cases which constitute illegal employment:

1. employing employees without the formation of any labour relationship or a civil service relationship;
2. employing a third-country national (i.e. a national of a country which is not a Member State of the European Union, a party to the Agreement on the European Economic Area or a country which is not the Swiss Confederation, or a stateless person) where the conditions for his/her employment arising from the Section 21(1) of the Act No. 5/2004 Coll. on Employment Services and on Amendments and Supplements to Certain Acts as subsequently amended are not met;
3. employing a third-country national who is staying in the Slovak Republic contrary to the applicable law<sup>2</sup> and performs a dependent work;<sup>3</sup>
4. failing to fulfil employer's registration duty with respect to the Social Insurance Agency in accordance with the Section 231(1)(b) of the Act No. 461/2003 Coll. on Social Insurance as subsequently amended (hereinafter referred to as the "Social Insurance Act") despite the fact that the preconditions for employment arising from the Act No. 311/2001 Coll. Labour Code as subsequently amended (hereinafter referred to as the "Labour Code") are satisfied.

With regard to the employment of the third-country nationals, we have to praise the legislative change in the Act on Illegal Work and Illegal Employment based on which employers are released from their liability for illegal employment of the third-country nationals provided that such

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<sup>2</sup> Note: One of the amendments to the Act on Illegal Work and Illegal Employment transposed into the Slovak labour law the Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009, providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals. It concerns the third-country nationals who are staying in the European Union Member States illegally and perform a dependent work. In terms of the Slovak Republic, the term "illegal stay" refers to the stay of a third-country national who is staying in the territory of the Slovak Republic contrary to the Act No. 404/2011 Coll. on Residence of Aliens and on Amendments and Supplements to Certain Acts as subsequently amended and the Act No. 480/2002 Coll. on Asylum and on Amendments and Supplements to Certain Acts as subsequently amended.

<sup>3</sup> Translator's note: "Dependent work" is defined in the Section 1(2) of the Slovak Labour Code as the work performed personally by the employee for his/her employer in accordance with employer's instructions, in the name of the employee and at the time designated by the employer.

nationals are staying in the territory of the Slovak Republic contrary to the legislation governing the residence of aliens, they perform dependent work and this person does not know that his/her residence document or residence permit had been forged. This is an extremely up-to-date issue given the fact that the findings of some temporary employment agencies have confirmed that the work undertaken by these agencies is used to the employees' disadvantage in the Slovak Republic.

In year 2016, the labour inspection identified 1 228 employers who breached the ban on illegal employment by employing altogether 2 756 individuals illegally.<sup>4</sup> According to Juraj Hamulák who refers to figures obtained by the National Labour Inspectorate, the number of cases of illegal employment identified in year 2017 accounted for 417 (as of May 18<sup>th</sup>, 2017).<sup>5</sup> Despite the lack of more up-to-date figures for year 2017, we could presume that there was an upward trend in illegal employment until the end of this calendar year.<sup>6</sup> However, it should also be taken into account that these are official figures, but the real number might and we assume that really is even higher.

### Legislative development of employer's registration duty

The Act on Illegal Work and Illegal Employment in its original wording defined the term "illegal employment", *inter alia*, as the employment provided by an artificial person or a natural person who is an entrepreneur and who utilises the dependent work of a natural person on the basis of a labour relationship formed between them, but who does not fulfil the registration duty with respect to the Social Insurance Agency.

"Almost six years after the Act No. 82/2005 Coll. became effective, it was amended by the Act No. 223/2011 Coll. which came into effect on July 20<sup>th</sup>, 2011. This amendment significantly changed the legal definition of illegal employment. The above-mentioned change could be viewed as

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<sup>4</sup> See document *Informative Report on Identifying and Fighting Illegal Work and Illegal Employment in Year 2016* [online]. 2018 [cit. 2018-01-20]. Available at: [http://www.rokovania.sk/File.aspx/ViewDocumentHtml/Mater-Dokum-207525?prefixFile=m\\_](http://www.rokovania.sk/File.aspx/ViewDocumentHtml/Mater-Dokum-207525?prefixFile=m_).

<sup>5</sup> See document *Number of Cases of Illegal Employment Already Identified in Year 2017 (as of May 18<sup>th</sup>, 2017)* [online]. 2018 [cit. 2018-01-20]. Available at: <http://www.nip.sk/register/#>.

<sup>6</sup> See HAMULÁK, J. *Legal or Illegal: Právno-teoretické východiská a aplikačné problémy nelegálnej práce a nelegálneho zamestnávania v Slovenskej republike* [Legal and Theoretical Base of and Application Issues Concerning Illegal Work and Illegal Employment in the Slovak Republic]. Bratislava: Wolters Kluwer, 2017. 139 p. ISBN 978-80-8168-688-7.

being of a mitigating nature, with respect to the strictness of the originally valid and effective provisions contained in the Section 2(2)(b) of the Act No. 82/2005 Coll. Therefore, if an employer did not fulfil his/her duty under the Social Insurance Act by failing to register his/her employee in the register of insured employees and contributors to the old age pension savings maintained by the Social Insurance Agency in time, any possible punishment could, in light of the amended wording, still be avoided by duly registering the inspected employee in the register by the time the inspection was carried out (by the beginning of such inspection).<sup>7</sup> The explanatory memorandum to this amendment states that this change is of a “legislative and technical” nature and was made as a response to the experience gained during the application practice.

Under the following amendment to the Act on Illegal Work and Illegal Employment, Act No. 308/2013 Coll., which came into effect on November 1<sup>st</sup>, 2013, the words “from the beginning of conducting the inspection of illegal work and illegal employment” were left out and the original legal regulation was thus restored.

The above-mentioned implies that from November 1<sup>st</sup>, 2013, both the non-registration as well as any later registration of an employee in the register of insured employees and contributors to the old age pension savings maintained by the Social Insurance Agency which was discovered during the additional inspection gave rise to illegal employment. The application practice complained about the fact that the provisions according to which an employer committed illegal employment if such employer failed to fulfil his/her duty to register an employee in the register of insured employees and contributors to the old age pension savings maintained by the Social Insurance Agency before such employee started his/her employment were rather “strict” with respect to the employers. Many employers noted in this regard that the time period within which this duty had to be met should be extended until the beginning of the inspection aimed at discovering the illegal work and illegal employment, stating that in many cases where an employer does not want to violate the Social Insurance Act neither wants he/she to employ an employee illegally nor should such employer be punished. Any such legislation would lead to difficulties in its application and any conduct would dogmatically and au-

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<sup>7</sup> See Nelegálne zamestnávanie z pohľadu inšpekcie práce [Illegal Employment from the Perspective of Labour Inspection]. *Legal News 1/2016* [online]. Available at: [http://www.akmlegal.sk/sk/pravne-novinky/detail/nelegalne-zamestnavanie-z-pohladu-inspekcie-prace-\(-legal-news-1/2016\)/14](http://www.akmlegal.sk/sk/pravne-novinky/detail/nelegalne-zamestnavanie-z-pohladu-inspekcie-prace-(-legal-news-1/2016)/14).

tomatically be considered as illegal employment. However, it is necessary to distinguish some specific cases in relation to the illegal employment.<sup>8</sup>

The above-mentioned experience gained during the application practice was also reflected in subsequent legislative changes implemented at the end of year 2017 through the Act No. 294/2017 Coll. which amended and supplemented the Act No. 82/2005 Coll. on Illegal Work and Illegal Employment and on Amendments and Supplements to Certain Acts as subsequently amended. This Act which came into effect on January 1<sup>st</sup>, 2018, changed the legal definition of illegal employment contained in the Section 2(2)(b) of the Act on Illegal Work and Illegal Employment. This legislative change was aimed at eliminating certain cases of a late registration of the formation of either a labour relationship or a civil service relationship in the respective register maintained by the Social Insurance Agency.

This elimination was achieved by the above-mentioned amendment to the Act on Illegal Work and Illegal Employment. The amendment replaced the wording “failed to fulfil a duty arising from a special law” with the wording “failed to register him/her in the register of insured employees and contributors to the old age pension savings within seven days of the lapse of a time period prescribed by a special law for the registration in this register, but not later than by the beginning of the inspection of illegal work and illegal employment if the inspection begins within seven days of the lapse of a time period prescribed by a special law for the registration in the register.”

The new provisions state that employers have to fulfil their registration duty within seven days of the lapse of the time period prescribed for fulfilling the duty under the Section 231(1)(b) of the Social Insurance Act, e.g. from the commencement of employee’s employment, but not later than by the beginning of the inspection of illegal employment which commences prior to the lapse of this seven-day time period. This means that if an inspection body conducts the inspection of illegal work and illegal employment after the employee commences his/her employment and it finds out within the time period of seven days that the employer has

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<sup>8</sup> See TRELOVÁ, S. Opodstatnenosť represívnych opatrení v súvislosti s „čiernou prácou“ [Justification of Repressive Measures in Connection with Illegal Work]. In: *Paneurópske právnické fórum: II. ročník* [online]. Bratislava: Paneurópska vysoká škola, 2017, pp. 395-404. ISBN 978-80-89453-33-7. Available at: [https://www.paneurouni.com/wp-content/uploads/2017/03/paneuropecke\\_pravnicke\\_forum\\_2017.pdf](https://www.paneurouni.com/wp-content/uploads/2017/03/paneuropecke_pravnicke_forum_2017.pdf).

not fulfilled his/her registration duty yet, the inspection body has to declare that illegal employment is committed in this case. However, provided that the employer fulfils his/her registration duty within the given seven-day time period and manages to do it before the inspection is carried out, the inspection body cannot declare that illegal employment is committed and no sanction may be imposed on the employer either. If the employer fulfils this duty after the seven-day time period elapses or he/she fails to fulfil this duty, then the inspection body, regardless of the time when the inspection is conducted, declares that the prohibition of illegal employment is breached.

As far as the changes in employer's registration duty are concerned from the perspective of illegal employment, the application practice calls for a positive retroactivity which we find rather debatable.

**Table 1 Overview of Legislative Changes in the Legal Regulation of Employer's Duty to Register His/Her Employee in the Social Insurance Agency**

<b>Legal Regulation of the Duty to Register an Employee in the Social Insurance Agency</b>
<b>01 April 2005 – 19 July 2011</b>
Section 2(2)(b): "... an individual with whom a labour relationship was formed in accordance with a special law and <i>did not fulfil his/her registration duty with respect to the Social Insurance Agency arising from a special law.</i> "
<b>2 July 2011 – 31 October 2013</b> (Act No. 223/2011 Coll.)
Section 2(2)(b): "... an individual with whom a labour relationship was formed in accordance with a special law and <i>did not fulfil his/her duty arising from a special law by the time the inspection of illegal work and illegal employment commenced.</i> "
<b>01 November 2013 – 31 December 2017</b> (Act No. 308/2013 Coll.)
Section 2(2)(b): "... an individual with whom a labour relationship or a civil service relationship was formed in accordance with a special law and <i>did not fulfil his/her duty arising from a special law.</i> "
<b>As of 01 January 2018</b> (Act No. 294/2017 Coll.)
Section 2(2)(b): "... an individual with whom a labour relationship or a civil service relationship was formed in accordance with a special law and <i>did not register him/her in the register of insured employees or contributors to the old age pension savings within seven days of the lapse of the time period prescribed by a special law for the registration in this register, but not later than by the commencement of the inspection of illegal work and illegal employment if such inspection commenced within seven days of the lapse of the time period prescribed by a special law for the registration in this register.</i> "

Source: Data processed by the author herself.

## Non-application of registration duty

In terms of illegal work and illegal employment, the registration duty does not apply if the work for the employer who engages in business activities is performed by a relative in the direct line, a sibling or a spouse who is covered by a pension insurance or receives a statutory pension, or is a pupil or a student at the age not exceeding 26 years. In these cases, the absence of an employment contract or any of the agreements on work performed outside an employment relationship constitutes neither illegal work nor illegal employment.

The foregoing implies that the registration duty does not apply to an entrepreneur provided that any of these persons is, under the Social Insurance Act, a participant in the pension insurance, regardless of the fact whether such participation in this insurance is mandatory or optional. In terms of the personal scope of the pension insurance, the Social Insurance Act prescribes that the mandatory pension insurance applies to the employees and the self-employed persons. As for employees, every employee is covered by the mandatory pension insurance due to the fact that the pension insurance relationship arises directly from the law (*ex lege*), i.e. this relationship is not of a contractual nature and thus arises neither from a contract nor from an agreement. In this case, the formation of an insurance relationship is not dependent on the will of these individuals.

Entrepreneur's registration duty applies neither in the case where the work for such entrepreneur is performed by any of the mentioned entities subject to the mandatory pension insurance on the grounds of being a self-employed person. A self-employed person is subject to the mandatory pension insurance provided that he/she is also subject to the mandatory health insurance. Unlike an employee, his/her participation in this insurance is dependent on his/her income gained from business activities and other self-employment performed in the decisive period.

The registration duty applies neither in the case where any of the entities mentioned participates in the optional pension insurance. Under the Social Insurance Act, an individual may also be subject to the optional pension insurance on the condition that he/she permanently resides in the Slovak Republic or he/she has been permitted to reside in the Slovak Republic either temporarily or permanently and he/she has already reached the age of 16 years.

In the case that a relative in the direct line, a sibling or a spouse is not subject to the pension insurance, he/she can assist an individual who is an entrepreneur even without the formation of a labour relationship or a civil service relationship provided that he/she receives a statutorily designated pension, e.g. old age pension, disability pension or service pension. In these cases, performance of work does not constitute any illegal work or illegal employment and this entrepreneur is neither subject to the registration duty with respect to the Social Insurance Agency.

This also applies to cases where any of these persons is a pupil or a student whose age does not exceed 26 years, regardless of the fact whether he/she is a secondary or a full-time or a part-time university student.

## Conclusions

Employer's failure to fulfil his/her registration duty with respect to the Social Insurance Agency under the Section 231(1)(b) of the Social Insurance Act, even though the employment preconditions arising from the Labour Code have been met, constitutes one of the four cases classified as the administrative offence of illegal employment. The issue of illegal employment remains a very frequently discussed topic, namely due to the sanctions which the competent inspection body is obliged to impose on employers and also due to the employees. In the case of illegal employment, an individual who would otherwise be an employee does not participate in social insurance relationships and is thus not eligible for any of the allowances, e.g. social insurance, in certain unfavourable situations.

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JUDr. PhDr. Silvia Treľová, PhD.

Faculty of Management  
Comenius University in Bratislava  
Odbojárov 10  
820 05 Bratislava 25  
Slovak Republic  
[silvia.trelova@fm.uniba.sk](mailto:silvia.trelova@fm.uniba.sk)