THE HUMAN RIGHTS DEFENDER
OF THE REPUBLIC OF ARMENIA

AD HOC PUBLIC REPORT

A NUMBER OF LABOR RIGHTS ISSUES ACCORDING TO THE STUDIES OF COMPLAINTS ADDRESSED TO THE HUMAN RIGHTS DEFENDER

YEREVAN
FEBRUARY 2022

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PREFACE

Among the series of the social rights the labor right has its distinctive place as a vital guarantee for his/her or his/her family members' living, welfare, dignified life, social integration, economic stability and development of the society snd State. The labor right is closely interrelated to a person's other constitutional rights, can be a guarantee and essential condition for realization of the latters, and violation of labour rights can lead to the violation of other fundamental rights by a riffling effect. Subject to the importance and specificity of labour relations, the role of the State is great as an entity to control, supervise, regulate, prevent violations, restore and safeguard the violated rights. The said is the State's obligation and mission as stipulated on the basis of obligations assumed by the State and Constitution of the Republic of Armenia.

Subjects of this research are the complaints addressed to Human Rights Defender during the year of 2021 on the cases of alleged violations of labour rights, regulations by the applicable legislation concerning the problems raised and identified in those complaints, and legislative initiatives contemplating amendments of those laws. Those challenges were identified in the light of the criteria existing in International and European Law, by bringing out their differences, existing contradictions, and potential causes.

Taking into account most frequent problems faced in the area of labour legal relations and number of statements addressed to HRD (Ombudsman), three fundamental rights were highlighted (separated), around which this research was conducted:

1. The right of avoiding involuntary unemployment;
2. The right of rest;
3. The right to remuneration.

By means of research in the area of problems related to each of the separated rights also those cases were reflected, which were induced by COVID-19 pandemia and resulted in violation of labour rights. COVID-19 pandemia, by a secondary influence along with numerous challenges of healthcare, social, and logistic nature had brought problems in a number of areas, which had highlighted inadequacy of our legislative system for such situations. Though since the emergence of pandemia the legislative environment has undergove considerable amendments and additions, yet we have no holistic solution of

the problems. Labor relations have not been uninvolved in such problems as well. A variety of restrictions undertaken in the course of combatting the pandemia have directly lead to severe limitations and violations of a number of fundamental human rights, including the labour right. Among the verbal and written applications (complaints) addressed to Human Rights Defender there is a considerable number of such complaints from employees of the State and local government bodies and privite-sector organizations against mandatory vaccination. Notably, in many cases the complaints were submitted jointly by the members of families. It is typical, that in all events the applicants had requested not to pursue their complaints as they feared that would be laid off from their jobs or would not get their wages and benefits. Problems nevertheless exist, to which we will revert below:

RIGHT OF AVOIDING INVOLUNTARY UNEMPLOYMENT

The right of avoiding involuntary unemployment is an important constitutional safeguard, which is one of the manifestations of freedom to choose an employment (RA Constitution, Article 57). Constitutional Court of the RA with its Decisions established the fact that freedom of choosing an employment, among others includes the right to seek an employment, from interpretation of which emerges the right to avoid the loss of the job that has already been obtained, and the right of protection in case of unjustified dismissal from the job that has already been obtained[1].

Various components of the right of avoiding involuntary employment have been fixed in a number of international legal instruments, among which are EU No. 98/59/EC Directive of July 20, 1998, Recommendations No. 119 of 1963 and No. 166 of 1982, European Social Charter (revised), No. 158 Convention of the International Labour Organization "Concerning termination of employment at the initiative of employers", No. 98/59/EC Directive of July 20, 1998 "On the approximation of the laws of the Member States relating to collective redundancies".

Numerous complaints are being addressed the Human Rights Defender of the RA, which are also relted to the right of avoiding involuntary unemployment and redress mechanisms in the event of such dismissals. Taking the specifics of activity and functions of the HRD into account, we believe that first of all it is required to address the problems most frequently faced in the public service field. As a problem fixed during 2021, protection of labour rights of the reorganized structures' employees driven by establishment of the Unified Social Service can be highlighted. A large number of employees dismissed as a result of establishment of the Unified Social Service, reorganization and termination of the activities of social support agencies, Social Security Service, MSAs, and the Employment Agency, applied to the Human Rights Defender during 2021.

It is problematic, that on the basis of new modifications of the RA Law "On Social Assistance" becoming effective from April 1, 2021 the Unified Social Service was entitled with a discretional power in appointing civil servants to the posts, therefore the Service did not have any legislative obligation to offer posts (positions) of civil service with the same or lower grade to the employees of the bodies that have

[1] See the Decisions of the Constitutional Court of the RA No. CCD-902 dated July 7, 2010, and No. CCD-1449, dated March 19, 2019.

terminated their activities resulting from the said changes. Particularly, it is defined by paragraphs 3 and 4 of article 8 of the RA Law "On amendments and additions to the RA Law "On Social Assitance" (HO-97-N of 2021), that after adoption of the Law the servants keep holding their posts until the approval of the positions' list of unified social service and new post profiles (responsibility statements), upon which the latters **may be** offered the civil service posts of the same (equal) or lower grade. In case of their written consent the duty holding civil servants shall be reappointed to the offered posts **on the basis of the results of tender (competition)**.

Persons dismissed complained by applying to the Ombudsman that they participated in competitions announced for the purpose of filling the vacant positions, however were not recognized as winners. As citizens urge, they observed willfulness and subjective approach, as in the process of staffing for duty positions are not appointed those persons who have longer working periods, higher grade rank or performance assessment results, but instead the vacancies are given to an employee who meets those criteria in a lesser extent. The citizens (applicants) urged that continuity or stability of their employment as public servants is not ensured. Besides that, for a long while they are unemployed.

Therefore, conferring of the discretional power by an official, who is reserved with a discretional authority shall have to be legitimate and reasonable. The foregoing is derived from jurisprudence of both the Cassation Court and European Court of Human Rights. Implementation of system or structural changes in the working arrangements of the state authorities should not directly result in the risk of an involuntary unemployment for a public civil servant, and well-defined instruments are required, which shall ensure continuity of holding the duties by state servants, whose professional expertise and experiences correspond to the gven post, and shall allow them to be given an advantage as to continue their service at least under equal conditions.

The issue of lacking the statutory criteria for preference to remain in the employment in the event of staff reductions, and broad discretional rights of employers in that field are interrelated to the above mentioned problem. In previous years the foregoing issue was raised also in the Human Rights Defender's annual submissions (reports). Absence of well-defined statutory criteria provides employers with legal opportunity in the event of staffing reductions, when making decision on a preference to continue working activity, to apply a descretionary approch, which is unpredictable for employees, regardless of the laid off employees' working periods, higher grade ranks or performance assessment

scores, and other advantages. While doing that, when dismissing such employees, as a rule, they were not offered other works, corresponding to their professional qualifications, skills and state of health[2]. Among the most frequently encountered events is the case, when persons who reached their retirement ages are being laid off, or when employers make use of an argument of staff redundancy to terminate the employment relationship with a particular employee, while after which the recovery or reproduction of the redundant position takes place with another title of the given position. This problem exists both in private legal relationship and public administration system. For example, from similar positions available in state non-commercial organizations under subordination of the same ministry and carrying out similar activity only the staff acting in one of those organizations is reduced, while the person holding that staff position is not offered the same kind of work in another position. Such cases are more prevalent in private sector also due to the absence of oversight (supervision) and case detection instruments, and lack of awareness among the employees. Solution of the problem is not only related to awareness and supervision instruments, but also existence of discretional power privided by the law, lack of certain criteria for making selection between the employees holding the reduced staff position, in which case employer will be limited by an employee's practical qualities, professional skills, qualification, and a range of other criteria, of course without disregarding an employer's interests. According to Article 23 of Recommendation No. 166 of International Labour Organization on "Termination of Employment Relations" dated June 2, 1982: "the selection by the employer of workers whose employment is to be terminated for reasons of an economic, technological, structural or similar nature should be made according to criteria, established wherever possible in advance, which give due weight both to the interests of the undertaking, establishment or service and to the interests of the workers"[3]. By means of a number of Judgements by the European Court of Human Rights the concept of prohibition for exertion of willfulness in dicretionary power was developed. According to the mentioned approach, the law which provides for a discretion itself corresponds to the foreseeability requirement, provided that the scope of discretion and the method of its implementation are defined with a sufficient clarity, and in consideration

[2] It was established by the RA Cassation Court's Decision of 04.12.2009 on Civil Case No. EAQD/2378/02/08 of Gayane Danilova against "Armentel" CJSC, that to protect employees whener possible, "professional competency" and "qualification" definitions have to be interpreted in the broadest sense possible by taking into account such an important fact as the position held by a particular employee in the past, his/her work performance, etc.

[3] Can be accessed at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R166

of the legitimate aim of the method in question, thus providing a person with an individual protection from willful interference[4].

Absence of criteria is relevant in the cases, when dealing with the reduction of the number of staffing positions within an internal unit (division, department, other distinct subdivision) of the employer or dissolution of one of the units and formation of another unit instead of it. Like that, according to Article 4 of Convention No. 158 of International Labour Organization on "Termination of Employment Relations"[5] dated June 2, 1982: "employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service"[6].

It is noteworthy that the problem is not new in our law administration practice, this problem has regularly been also addressed in the annual submissions (reports) summarizing the activity of Human Rights Defender[7], there exists a case judicial law of Cassation Court, by which the Court has defined a frame of explicit conditions deriving from the law, in the event of which such basis for terminating an employment contract shall be applicable[8]. Pursuant to sub-clause 4.2 of clause 4 of the list of measures ensuring implementation of the Government's program of activities for the years 2019-2023 approved by the Annex No. 1 of the RA Government Decree No. 650-L of May 16, 2019, the Draft of the RA Law "On Making Amendments and Addenda to the Labor Code of the Republic of Armenia" (hereinafter the Draft) was put in circulation from April 2021 by the Ministry of Labor and Social Affairs of the RA. The Draft too offers a partial solution concerning the aforementioned problem, suggesting to amend the Law by the following provision: "when dissolving a labour contract on the basis provided for under paragraph 2 of

[4] See Decision of March 24, 1988 on the Case of Olsson against Sweden (Olsson v. Sweden (No. 1), Grievance No. 10465/83, clause 61, Decision of November 24, 1986 on the Case of Gillow against United Kingdom (Gillow v. United Kingdom), Grievance No. 9063/80, clause 51.

[5] The same Convention concerns only the cases of termination of employment relations at the initiative of the employer under Article 3 of the Convention.

[6] Can be accessed at https://cutt.ly/mx91qhT as of March 31, 2021.

[7] See the annual submission (report) summarizing the activity in 2018, http://old.ombuds.am/resources/ombudsman/uploads/files/publications/0e3f463c0e6c42f12cb497d483739dec.pdf page 126, the annual submission (report) summarizing the activity in 2019, https://ombuds.am/images/files/15b2661f76d10eb07746d7d4d4dec84f.pdf, pages 153-154.

[8] See the RA Cassation Court's Decision of 04.12.2009 on Case No. EKD/3613/02/09 of Artak Muradyan, Hovhannes Derdzakyan, Srbuhi Harutyunyan, Suren Tadevosyan, and Yevgenia Manukyan against "Gafeschyan Museum" foundation.

part 1 of this article[9], in the event of other equal conditions, preferential rights for remaining in the employment shall be exercised by a former member of the army entitled to a military pension of disability, as well as a family member of a person receiving military pension of first group of disability, or a family member (spouse, children, father, mother, siblings (sister and brother), grandfather, and grandmother) of a killed (deceased) military servant, if he/she:

1) is involved in making care of a person receiving military pension of first group of disability, or children, grandchildren, brothers and sisters of the killed (deceased) untill the latters reach the age of eighteen;

2) has a disability;

3) is the sole family breadwinner"[10].

In our opinion, suggested amendment is meant to tackle a certain social problem, however it does not create legal certainty and predictability in the context of involuntary unemployment right for all those employees, who do not belong to the mentioned social group.

In addition, when it comes to collective redundancies, there exist inadequacy of the RA Labor Code rules in respect of the requirements of international instruments, ratified by the RA. Like this, a concept of "mass dismissals" is provided under Article 116 of the RA Labor Code, according to which liquidation of an organization or reduction in the number of employees and/or staffing positions (scope of such events was expanded by the Draft[11]) shall be considered a mass dismissal, if it is envisaged to dismiss more than ten percent of the total number of employees, but not less than 10 employees during two months. Means, that the RA legislation requires existence of economic, technological, and organizational causes for a

[9] In the event of reduction of the number of employees and/or staff positions necessitated by changes in the volumes of production, and/or economic, and/or technological, and/or conditions of the work activity management, and/or industry-driven neees.

[10] "Package of the Bills (Draft Laws) on making amendments to the RA Law "On Making Amendments and Addenda to the Labor Code of the Republic of Armenia" and *related (accompanying)* laws - e-draft.am

[11] In the events of liquidation of a legal entity with a state registration in the Republic of Armenia, foreign organization registered (incorporated) in a foreign country, as well as in case of termination of activity or state de-registration in accordance with the procedure prescribed by the law of a separate entity or an enterprise of a state body (agency), an enterprise, diplomatic representation of a foreign state, international organization, registered in the Republic of Armenia, organization incorporated in a foreign country or international organization incorporated or registered (recorded) in the Republic of Armenia (except the cases, when the rights and obligations of such entities are assigned to other persons under the law of succession), in case of termination of activity or state de-registration of a private entrepreneur, dismissal of a notary public from the office.

dismissal, actually placing the burden of proofing a presence of such causes on the employer (such a requirement is also available under Article 9 of No. 158 Convention of ILO).

In the EU Law the relations regarding collective redundancies are regulated by No. 98/59/EC Directive of July 20, 1998 "On the approximation of the laws of the Member States relating to collective redundancies". Directives define the concept of collective redundancies and application frameworks, employer's obligation for submission of certain information to the representatives of employees and competent public authority, as well as provide for mechanisms ensuring active involvement of the competent public authority and the representatives of employees for the purpose of identifying the reasons of collective redundancies and seeking alternative solutions[12]. Besides, Court of Justice of the EU, extending formulations of the Directives, has determined that the concept of employer's collective redundancies shall be extended not only to the redundancies carred out as desired by employer, but to any redundancy, which is against an employee's will, and the reason for a dismissal has no connection with the personality of such an employee. At the same time the Court observed that "redundancies have to be differentiated from termination of labour contract, which are identified with the dismissal without consent of an employee"[13]. In other words, the Court admitted that Directive has to be also extended to those cases, when redundancies are driven by external factors. It can be seen, that as compared to the above mentioned broadside approach, the RA legislation has limited the scope of collective redundancies exceptionally due to the cases of liquidation of employer or reduction in the number of employees and/or staffing positions. Taking into account the existence of additional oversight mechanisms for the cases of collective redundancies, establishment of a broad framework in respect of the events of collective redundancies can be an important instrument to prevent violations of the right of avoiding involuntary unemployment.

Within regulations of the said institution inconsistency of the RA legislation with the EU Law is related to the number of cases, in the event of which termination of labour contracts by employer's initiative shall be deemed as a collective redundance. As per the reservations in regard of the numbers

[12] According to the Convention, No. 98/59/EC Directive shall be applicable in the Repiublic of Armenia within 7 years following the Convention's entry into force.

[13] See the Judgment of 12 October, Commission v Portugal, C-55/02.

provided for in the Directive, to be qualified as a collective redundance, number of dismissals, according to the choice of a State, has to be, either:

1) over a period of 30 days, at least 10 dismissal in establishments normally employing more than 20 and less than 100 workers, or 10 % dismissal of the number of workers in establishments normally employing at least 100 but less than 300 workers, or 30 dismissals in establishments mormally employing 300 workers or more, or

2) over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question.

According to the last paragraph of the same article, termination of labour contracts effected by an employer's initiative for one or more reasons not related to any individual employee, shall be qualified as redundancies, if at least 5 employees are dismissed.

What we see, Directive's criteria attach importance to the period of time, during which redundancies take place, and are proportionate to the number of individuals working for an employee.

We believe that a method provided for in the Directive defines more abjective criteria, individual approach for the matter of considering dismissals effected by particular employer as collective redundancies And even though this problem is voiced (expressed) not the first time, the fact of aforementioned inconsistency has not been taken into account, nor included in the Draft of the Law "On Making Amendments and Addenda to the Labor Code of the Republic of Armenia", which was put in circulation in 2021.

In the meantime, especially noteworthy is the fact, that by an existing regulation of the law, the requirement for submission of the data (by occupations and sex/age composition) regarding the number of dismissed employees in case of collective redundancies to the public body authorized by the Government of the Republic of Armenia for employment sector, and representatives of employees, becomes an end in itself in a loose sense, as there exists no such a legislative framework, based on which the competent public authority would be able to interfere in the process of collective redundancies, suspend adoption of decisions or conduct a negotiation process. Moreover, there is a lack of regulations, that would make provision for conducting of a negotiation process between employer and employees (representatives of latters), providing of certain scope of information, as is the case with some countries (such procedures in various formats are available in Poland, Slovenia, Hungary, Bulgaria, Lithuania, Romania, Estonia,

Czechia) and deriving from the Directive's requirements. Availability of regulatory requirements for the above mentioned negotiations and sharing of information is not only meant to foster identification of potential alternative solutions and to prevent large number of layoffs, but also allows the employees to have highest volume of information concerning the grounds for and reasons of dismissals, and most effectively and quickly organize the restoration of their violated rights.

It is important to emphasize that Articles 3 and 4 of the Directive regulate the order of collective redundancies, and legal consequences of both providing by employer a relevant notification about collective redundancies to a competent public authority, and a failure to provide such notification. According to Directive's regulations, the public authority should have an active involvement in the process of collective redundancies, and receiving the required information from participants of the relevant process, and position of the other party regarding that information, develop possible solutions and propose those to the latters. As we can see, legislation of the RA needs those requirements provided for in the approximation Directive, which will raise the effectiveness of the fight against the wretched policy of employers to disguise the proper purpose of collective redundancies.

In terms of the right of avoiding involuntary unemplyment, the issue of dismissal of penitentiary (criminal law enforcement) servants on the basis of their reaching the age limit, is necessary to be addressed as well. Important elements of the freedom of choosing an employment are the certainty and predictability of the labor relationship formed around the selected employment. Though the age limits, on reaching of which the labour relations with a particular servant are subject to termination, privided for under Article 41 of the RA Law "On Penitentiary Service", the aforementioned age limits were amended by No. HO-218-N Law of November 17, 2009 "On Making Amendments and Additions to RA Law on Penitentiary Service", which became effective on January 02, 2010. And so, for those servants who were employed before that law was adopted, shift in their employment period as a material term has taken place, which leads to other problems pertinent to assuring of social security rights (pension right) interrelated with the labour law. Thus, with the application of relevant norms of the RA Law "On Penitentiary Service" it turns out that the required length of service, envisaged for assigning military pensions to penitentiary servants for their long standing service was not satisfied. Consequently, due to dismissals of penitentiary servants from work on the basis that they reach the age limit, the latters have been deprived of the entitlement to pension provisions granted under the law. After amendment of the

age limit by legislation completing of the length of military service provided for under Article 18 of the RA Law "On State Pensions" had become practically impossible for a number of penitentiary servants. It is important to emphasize that re-organization of the executive (employing) authority from Penitentiary Department of the RA MJ body to the Penitentiary Service in the essence of its meaning does not result in formation of new legal labor relationships arising out of that fact irrespective of the instruction method exercised by a state authority. Therefore, the problem persists to be still relevant, for solution of which at least it is necessary to establish such legal instruments, that would be directed toward restoring the labor right of the penitentiary servants which have been dismissed from the service at the result of the abovesaid process, and the period of being dismissed from the penitentiary service will be taken into account in the number of working years entitling to a long service military pension.

The next problematic practice of termination of employment contracts by the reason of completion of the pension age is related to amendment of contracts, where possibility of dismissal of a person from work on the basis of completion of his/her pension age is not specified in the employment, but the employer's actions are aimed at termination of labor relations with an employee who reached his/her pension age. According to paragraph 11 of part 1 of article 113 the RA Labor Code the employer is entitled to unilaterally terminate the employment contract in the event of completion of sixty three year age for an employee who is entitled to receive age pension, and sixty five years for an employee who is not entitled to receive age pension, if an appropriate basis is provided for in their employment contract. In those cases, when such a basis is absent in the contracts concluded for an indefinite term, employers transform the contracts of indefinite term to contracts with fixed term based on agreements concluded with the employees, then terminate those contracts on the basis of expiry of their terms. Though part 3 of article 95 of the Labor Code envisages conclusion of employment contracts for fixed term (for a specified period) with persons entitled to receive age pension and who reached their sixty three year age, or with persons not entitled to receive age pension and who reached their sixty five year age, however the law does not provide for any regulations in relation of turning the employment contracts concluded for an indefinite term into employment contracts concluded for fixed term. Meanwhile, the above said is widely applied in practive, whereas complaints addressed to HRD provide evidence that employers do not duly notify the employees about legal consequences of concluding fixed term employment contracts. And what

is more, often employees do not even know what kind of document they sign, as they are not given chance to read their contents.

With its Decision No. CCD-991 of October 11, 2011 the Constitutional Court has addressed the constitutionality of legal regulation concerning the termination of labor contract on the initiative of the employer upon reaching the employee's pension age by pointing out that the basic form of employment contract to be concluded before reaching a pension age is the contract of indefinite term, the basis of and procedure for its termination must be provided for by the law and defined by force of right, and the termination must stem only from legitimate reasons, which, in its turn, must clearly be set by law. Thus, also based on the legal position of the Constitutional Court it is reasoned that the basis of and procedure for termination of the employment contract concluded for an indefinite term have to be foreseen by law.

The above mentioned regulations have also been addressed by the Draft, according to which conclusion of fixed term employment contracts with persons who reached their pension ages is not defined as a mandatory requirement as is the case with applicable regulations, but as the right of the parties. Summarizing the aforementioed and giving importance to the change proposed by the Draft, we believe that it is necessary to define criteria also by legislation, and only guided by those criteria the employers will be empowered to turn the employment contracts concluded for indefinite term into the fixed term contracts.

Addressing other aspects of concluding fixed term employment contracts, first of all it should be emphasized that such contracts shall have to be considered exceptions from conformity with a law. Though the Labor Code specifies that the fixed term employment contract is concluded, when the labor relations cannot be defined for an indefinite period, nevertheless, widespread application of the contracts concluded for a fixed term in practive suggests that the regulatory mechanisms are still insufficient. Such contracts do not ensure the certainty, predictability and explicity principles of labor legal relations, and result in violation of the right of avoiding involuntary unemployment. Directive 1999/70/EC is a landmark in the EU Law for fixed term contracts, based on which a framework agreement concluded brtween cross-industry organisations was approved. Agreement defines general principles regarding the fixed-term work and minimum requirements, the purpose of which is to improve the quality of fixed-term employment relationships by ensuring application of the discrimination prohibition principle, provide for instruments to prevent abuses while concluding fixed-term employment contracts. It is

imperative for the agreement to have equivalent legal measures that prevent abuses emerging from fixed-term employment contracts or relationships, while in their absence it is recommended to foresee objective grounds, upon availability of which conclusion or renewal of fixed-term contracts will be justified, as well as to specify the maximum period for the fixed-term contracts concluded or renewed with one person, or maximum number of such contracts. As such instrument, a rule is established by Article 111 of Labor Code of the RA: "If the employment contract signed for a definite term is not terminated upon its expiry in the manner defined by this article and labor relationships continue, then the contract shall be considered as concluded between the parties for an indefinite term". We think that regulations of the said problem are still incomplete and to prevent abuses in concluding fixed-term employment contracts it is required to also establish those grounds, in case of which conclusion of fixed-term employment contracts will be prohibited. To conclude a fixed-term employment contract, objective grounds, along with listing the grounds, as an additional reasoning it is necessary to define the maximum period for the fixed-term contracts concluded or renewed with one person, or maximum number of such contracts.

In the meantime, it is noteworthy a new regulation proposed by the Draft, according to which an employment contract shall be considered as terminated through the power of law on the next day upon the expiry of the period defined by that contract, if the employer failed to give the employee at least 10 days notice prior to the expiry of a fixed-term contract period, or to adopt an individual legal act about terminating the employment contract concluded for a fixed-term, and if the labor relationships did not continue, i.e. the employee has not come to the work on the working day following the last day provided for in the employment contract, or the employer did not allow the employee to continue the work.

We believe that the aforementiod regulation is important, as it provides certaintly to employee-employer relationships, and will eliminate numerous problems widespread in practive, resulting from failure to provide proper notifications due to ignorance of the law, or inconsistency.

Violations of the right of avoiding involuntary unemployment are observed also when an employee at least thirty days in advance notifies the employer to terminate the employment contract (for the cases prescribed by the law it is five days in advance), but the employer does not adopt a legal act directed toward termination of the labor legal relations, or does not sign an agreement about termination of the employment contract with the employee, while their labor relationships are continued, or the employee

does not come to the work upon expiry of the period. No consequential regulations for such events are provided under the law, which allows eomplyers to make abusive use of their rights of terminating the contract on their initiative on the basis of a failure to appear for work without valid reason, or adopt an individual legal act about terminating the employment contract on the initiative of employee at any time thereafter. From the point of view of resolving this existing problem it has to be welcomed a regulation in the Draft that upon expiry of the period of notice specified under the parts 1 and 2 of Article 112 of the Labor Code the employee shall be entitled to terminate his/her employment, and the employer must formulate the termination of the employment contract and make final settlement with the employee, and if upon the expiry of the said period the employer fails to adopt a relevant legal act about termination of the labor relationships, then the employment contract shall be considered as terminated from the next day following the expiry period specified by the notice.

In the meantime, it is foreseen by article 51 of the Draft to add a new part (2.1) to article 112 of the Labor Code, according to which in the event the employer has no objection, the employment contract may be terminated at other date specified in an employee's notice (request to terminate employment) missing the periods (dates) established under the parts 1-2 of the same article. Presumably, by a regulation it was meant those cases, when an employee specifies a shorter term, than it is established under the parts 1-2 of article 112 of the Code, as in such situations in practice the employers terminate the contract not on the basis of the employee's initiative, but on the basis of the parties' mutual consent, as foreseen by Article 110 of the Labor Code of the RA. Ambiguous application of the above said norm, and legal position of the RA Cassation Court about it (Decision of 28.12.2015 on Case No. EKD/2335/02/14) bear evidence that legislative initiative can reduce the incidence of the violation of rights and ensure legal predictability and certainty. However, we think that the formulation proposed by the Draft as "at other date" notion is problematic in the context of certainty, it can lead to nearly unpredictable situations, and is subject to a revision. Meanwhile, based on the Draft, there are no regulations for the case, when employer does not accept the other date proposed by employee. In such a case, the absence of regulation in terms of further actions of the parties may intersect (overlap) with the institution of contract termmination on the initiative of the parties, and create contradictions with its regulations.

Massive violations of the right of avoiding involuntary unemployment were observed in 2021 due to COVID-19 pandemia, which occurred due to a number of reasons, either subjective or objective. Some

of the above mentioned violations had been prevented (remedied) by means of amendments made in the Labor Code, that entered into force on May 8, 2020, by which the provisions defining prohibition for termination of the employment contract on the initiative of employer were extended, defining that employment contract cannot be terminated on the initiative of employer (along with other reasons) during the period of prevention or immediate actions for the recovery of consequences of natural disasters, technological emergencies, epidemies, casualties (accidents), fires, and other events of an extraordinary nature, if due to such events an employee did not appear for work, and during the period of scheduled and unscheduled entitlement or unscheduled staggering of vacations envisaged for educational (including preschool) institutions, if due to arrangements for taking care of a child under the age of twelve an employee failed to appear for work. However, even though guarantees by legislative amendments were established to protect the labor rights in pandemic situations, according to which dismissal of employee from work is prohibited in such situations, yet provisions that provide for such prohibition have not been made retroactive, and in fact, these cannot be applied to dismissals that took place from March 16, 2020 until the date when the law came into force, and when employers terminated the employment contracts on their initiative, due to failure by employee to appear for work.

In addition, it should be pointed out that frequent changes in the legal field regularly cause legal uncertainty, and need for the comments of various nature. Order No. 71-N of 27.09.2021 of the Minister of Health of the RA "On Making Amendments to the Order No. 17-N of August 4, 2020 of the Minister of Health of the RA", that came into force on October 1, 2021, imposes an obligation on employees to submit once in every 14 days (in every 7 days as per a subsequent amendment) to the employer a certificate (hereinafter the Certificate) certifying the negative result of the maximum 72 hours old test of polymerase chain reaction (hereinafter the PCR test) of diagnosis of coronavirus disease (COVID-19) specified by Order No. 2688-L of August 10, 2020 of the Minister of Health of the RA, with the exception of employers who have undergone a complete vaccination, received one dose of vaccine, have documented absolute contraindication, or pregnancy. It is mentioned in the Order that the PCR test shall be carried out by an employee at his/her cost. The duty (responsibility) of observing the Order's requirements is vested in the employer. At the time when the Order entered into force, there was no legal regulation that would define a legal consequence for those employees, who would fail to meet the requirement established by the Order. In that situation, as to carry out their responsibilities for meeting the legal

requirement, and avoid penalties imposed by the competent public authority, the employers were applying various techniques, including "threats" of dismissals or their fulfillment, withholding of money, and others. The legal uncertainty was removed at the end of the year by No. HO-389-N Law "On Making Amendments and Additions to the Labor Code of the RA", and the RA Law (HO-390-N) "On Making Amendments and Additions to the Law about Public Service". The above mentioned legal instruments came into force only on December 23, 2021. In accordance with the legislative changes it was established, that:

1. in the event of a failure by an employee to submit the documents provided for by sanitary-epidemiological safety rules aimed at prevention of coronavirus disease (COVID-19), which are necessary condition to appear for work, the employer shall not allow the employee to be at the workplace, perform his/her duties, and shall not pay a salary for that period until submission of the documents stipulated by this paragraph;

2. in the event as specified by the previous paragraph, in case of a failure to perform his/her work duties over the period of more than 10 consecutive working days (shifts) or more than 20 working days (shifts) over the period the last three months as a result of not being allowed to appear for work, the employer shall be entitled to unilaterally terminate the employment contract by notifying the employee about it at least three days in advance.

Similar regulations have also been stipulated in the RA Law "About Public Service".

Even though this legislative change was to establish a legal predictability, and it introduced some certainty within the employer-employee relationships, however on the same day when the above mentioned legislative change entered into force, i.e. on 23.12.2021, the RA Constitutional Court, regarding the case "On determining the issue of compliance of paragraph 3 of part 3 of article 20.1 of the RA Law "About ensuring sanitary and epidemiologic safety of the population of the Republic of Armenia" and Order No. 65-N of August 20, 2021 of the Ministry of Health of the RA with the Constitution", established that the phrase "at his/her cost" of the sentence " the PCR test shall be carried out by an employee at his/her cost" of the Order is not consistent with the regulations of Constitution's parts 1 and 2, and article 39.

The aforementioned decision and its legal and social consequences will be addressed below, in the context of the right to remuneration.

Among the alerts (warnings) received during the pandemia there is a large number of those which state that while employers require the employees to come to work, meantime they fail to meet their obligation of ensuring safe working conditions for employees, which are harmless for their health, as established by the legal acts for the purpose of preventing coronavirus disease (COVID-19). In such situation a failure to appear for work may result in a loss of the job, as the legal ground for this has already been available, while by coming to work employers endanger their own physical health and lives. Therefore, it is necessary to enhance the awareness among employees and employers, as well as to make accessible those mechanisms, by means of which employees will be able "to reach" fulfillment of their employer's obligation of providing them with safe working conditions without running the risk of their right of avoiding involuntary unemployment.

THE RIGHT OF REST

Every employee has the right of reasonable working hours, effective daily, weekly and annual rest. Regulation of working hours is one of the legal safeguards of an employee's constitutional right of rest (Article 82). Thus, the rules governing working hours are inextricably linked with the norms governing rest time, forming the two opposing sides of a common institute of the labor law.

At the international level, the right to rest is guaranteed by Universal Declaration of Human Rights (Article 24), International Covenant on Economic, Social and Cultural Rights (ICESCR) (Article 7) of 1966, a number of conventions adopted within the framework of International Labor Organization (Nos. 14, 106, 135), at European level Revised by the European Social Charter (Article 2) , and at the CIS level by the Charter on Social Rights and Guarantees of Citizens of the CIS Countries (Articles 10-14) of 1994.

An essential source of leisure arrangements is also the EU law when taking into account Armenia's commitments undertaken by Armenia under Armenia-EU Comprehensive Extended Partnership Agreement (CEPA) (entered into force on March 1, 2021). In EU primary law, the legal basis for the regulation of working hours and rest time is the Treaty on EU Activities, the Charter of Fundamental Rights of the EU, and in secondary law, EU Directive No. 2003/88/EC on "Working hours".

Legislation to ensure the balance of working hours and rest time pursues the following objectives: to protect employees' rights and interests, in particular health care, to ensure high productivity of

employees, to ensure the balance of work and private life, to ensure the organization and management of the work process, etc.

Numerous complaints are addressed to the RA Human Rights Defender, which refer to the issues of protection of human labor rights, including the right of rest. In particular, the applications addressed to the Ombudsman refer to the cases of compulsory granting of unpaid leave to employees actually left at downtime, as well as to the events, when employees had to take unpaid leave due to an epidemic situation.

The citizens, applying to the RA Human Rights Defender, informed that due to the epidemic siruation, they are on forced leave, and the employer had forced them to submit leave applications so as not to pay them every such an hour. According to one of the complaints addressed to the Ombudsman, the applicant worked in a private organization and did not report for work for a week due to the epidemia. Then he appeared for work, asked to be granted a paid annual leave, but was informed that he could only be given an unpaid leave. In the specific cases, such issues were resolved with the support of the Ombudsman, but the problem was occuring on a mass scale.

The labor legislation of the Republic of Armenia, as well as the international acts, guarantee the rights of annual and weekly rest, as well as the rest during the working day, and between working days.

The right of annual leave is a fundamental social right, which is the most important component of the right to equal and fair working conditions. According to Article 150 of the Labor Code of the RA, the time off from work is the period of work that an employee uses at his own discretion. Annual leave (minimum, extended, additional) is a type of rest time (Article 158 of the RA Labor Code), is calculated in calendar days, is granted to an employee for rest, maintenance of health and rehabilitation of working capacity by retaining his/her job.

According to Article 82 of the Constitution of the RA, every employee, in accordance with the law, has (...) the right to limitation of maximum working hours, to daily and weekly rest, as well as to annual paid leave. The use of annual leave is the right of a person, and the responsibility for defining the procedure for granting the leave is borne by the state (Decision No. CCD-1424 of July 10, 2018 of the RA Constitutional Court).

It is the responsibility of the state to take the necessary measures which will ensure the right of employees to take at least four weeks of paid annual leave. Discretion in choosing the means is reserved to the states, however, their choice should not lead to a distortion of the essence of that right by providing for any precondition for exercising that right (Judgment of the European Court of Human Rights on the Cases C-350/06 and C-520/06 as of January 20, 2009, Paragraphs 28 and 46).

The Labor Code does not provide any basis that would allow employers in certain circumstances to coerce an employee or decide on behalf of him/her when and in what terms the employee can exercise his or her right of rest.

One of the problems of labor law regulations under changing economic conditions is to ensure a balance between the health and safety requirements by means of protecting human resource management flexibility for the employer and reasonable labor time for employees. In this sense, labor law issues should be discussed within the range between the protection of employer's interests and employees' rights.

The proposed amendments to the Labor Code of 2021 which are implemented in order to comply with the requirements of the Republic of Armenia provided by international treaties[14], are generally welcomed, however, in parallel with the process of implementing the requirements of the conventions and recommendations of international organizations it is necessary to provide solutions to the problems that emerged in the course of the implementation of legislation in complicated situations.

One of the reasons for the massive violations of labor rights was the lack of such provisions in the Labor Code that would ensure the organization of work in extraordinary situations, ensuring the balancing between the employers' interests and the employees' rights.

Annual leave for each working year is granted in the same working year (Article 164 of the RA Labor Code). This means that the transfer of annual leave is allowed in exceptional cases and, as a rule, the transferred annual leave is granted in the same working year, but not later than during 18 months starting from the end of the working year for which the employee was not granted or was partially granted annual leave.

[14] Refer to https://www.e-draft.am/projects/3213/justification?fbclid=IwAR084hytiUDkXPrmO4weXAqQnt9_ehiHZGgfkjVP-0bUn-u0ddMsyOifRZA

Granting of annual paid leave after the scheduled time is, as a rule, possible in cases where the exercise of this right was impossible in the given year due to objective reasons, for example, due to illness. Providing annual leave to a person who has not reported for work due to illness can not be reduced or rejected on the grounds that the latter does not need for a rest due to a long absence[15]. The purpose of these legal arrangements is to ensure that employees take advantage of the leisure opportunities provided to them.

By this logic, the replacement of annual leave with monetary compensation is not allowed, except when terminating the employment relationship. Prohibition of replacing the annual leave with a monetary value is a strong legal guarantee for the exercise of the right of an annual leave.

The purpose of labor law regulations is not to create a dilemma in terms of taking a vacation and receiving monetary compensation in return, but to ensure health and safety. In this respect, EU law provides for stricter conditions for achieving the goal by leaving no choice or discretion for an employee to replace (recover) the leave next year.

The same logic applies to weekly and daily rest. In the cases, where the legislation allows for overtime for longer than the maximum required working hours, the employer must not only pay for the overtime work, but also compensate the employee by reducing the number of working hours per week so that the average working day per week does not exceed eight hours[16].

Weekly consecutive rest, in its turn, should not be less than 35 hours (Article 155 of the RA Labor Code). This norm provides a more favorable condition for the employee than at least 24 hours provided by ILO conventions[17]. However, according to Article 10 of the Charter on Social Rights and Guarantees of Citizens of the CIS countries, the weekly rest should not be less than 42 hours.

International regulations give an opportunity, under impossible conditions, to make temporary exceptions to the minimum weekly rest requirement due to a number of objective circumstances

[15] See General Comments on Article 7 of the UN International Covenant on Social, Economic and Cultural Rights, 2016, p. 41.
[16] See General Comments on Article 7 of the UN International Covenant on Social, Economic and Cultural Rights, 2016, p. 35.
[17] See ILO Weekly Rest (Industry) Convention, 1921 (No. 14), art. 2 (1); and Weekly Rest (Commerce and Offices) Convention, 1957 (No. 106), art. 6 (1).

(accidents, force majeure, urgent need for work, irregular increase in workload, prevention of the loss of perishable goods[18], and with a need to perform the required work specifically on weekends).

According to Article 5 of the EU Directive, a worker is entitled to 35 consecutive hours of weekly rest, which can be reduced to 24 hours if there are objective grounds. In this regard, EU regulations, with a minimum threshold, provide an additional guarantee in case of exception to the general rule.

The current wording of Article 155 of the Labor Code does not allow to make such exceptions, which were practically needed during epidemic, war and other extraordinary situations. Perhaps by applying the principles and other norms of the Labor Code it is possible to ensure the flexibility of labor relations in extraordinary situations, however clear definition of such grounds makes labor relations more predictable, ensuring uniformity in solving problems that arise in similar situation.

In the discussed version of the amendments to the Labor Code restriction of the right to use the leave at his/her own discretion is envisaged only in the cases provided by the parts 4, 6 and 8 of Article 162 of the RA Labor Code; in particular, to pregnant women, caregivers of children under 14 years of age, educators of an educational institution, an employee caring for the sick or disabled at home, as well as an employee suffering from a chronic illness. This means that without the consent of the employee, the employer may unilaterally decide to grant a leave to the employee in all cases where the status of the employee or the peculiarities of the situation may hinder the work. The grounds for insurmountable or extraordinary situations are not intended to restrict the right of rest.

In accordance with Paragraph 42 of No. 23 General Comments on ICECSR, the legislative regulations on such grounds should include two mandatory components: opportunity to provide additional 24-hour days off within seven days period, as well as the agreement of employees and their representative organizations on the possibility of applying such exception, which was adopted through consultations. It means, that even in the cases when legislation provides the employer with an opportunity to enter into the realm of decision-making in relation of making arrangements for the employee's rest, however compensatory legal regulations must be provided for the employee.

The purpose of the provisions on limitation of working hours in terms of the work arrangement is to ensure the employee's rest in favor of maintaining his health and increasing working efficiency. For

[18] ILO Weekly Rest (Commerce and Offices) Convention, 1957 (No. 106), art. 8 (1); see also ILO, "Working time in the twenty-first century", para. 21.

that purpose in the EU secondary law an importance is also attached to the obligation of employer to inform the employee of the change of working hours as soon as possible as to enable the employee to manage his/her rest efficiently, and by his/her intention.

In case of a need to engage in overtime work the employer's obligation to inform the employee within a reasonable time is defined by Paragraph 2 of Article 145 of the RA Labor Code. However, the legislation does not provide sufficient procedural norms to involve the employee in overtime work. As a result, employees who work up to 11-13 hours a day are not paid for overtime because they face the problem of proving the fact of their overtime work. The citizens who applied to the Ombudsman reported that working as a cleaner, worker, driver or in other similar duties at the request of the employer, they often work more than provided for in the Employment Contract, while they are not paid extra payments for it.

The procedural clarification of the requirement to inform the employee for overtime work will burden the employer with the obligation to provide and substantiate the factual and legal grounds for engaging the employee in overtime work each time, ensuring the appropriate remuneration for it provided by the law.

Thus, it is necessary that Labor Code provides for such regulations, which, in case of deviations from the normal course of work will ensure the employee's right of rest, and balancing of the interests of employers and the rights of employees. Notably, such regulations should be aimed at ensuring the opportunity of truly enjoying the rest by means of employee involvement and awareness, when making decisions on changing the work schedules.

According to internationally accepted practice, a time period that does not meet the requirements for working time should be considered as leisure time. Therefore, it is necessary to establish sufficient procedural norms for engaging in overtime work, which will provide guarantees for employee to receive appropriate remuneration for the hours worked, as well as for effective organization of his/her rest.

THE RIGHT TO REMUNERATION

One of the most important directions for proper guarantee of labor rights is the concept of timely and complete equitable remuneration of labor, i.e. the concept of assurance of employee's right. A set of components of this right are enshrined in international law, which, among others, contains the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966 (Article 7, Item "a"), a set of conventions adopted under the International Labour Organization (No. 26 (1928), No. 95 (1949), No. 99 (1951), No. 131 (1970), No. 173 (1992) etc.), the revised Europian Social Charter (Article 4), the Charter on Social Rights and Guarantees of CIS Countries' Citizens of 1994 (Articles 17-26). The right of remuneration under the European Convention on Human Rights can be located within the frames of property right (Article 1 of the first protocol attached to the Convention), provided that this pertains to the already earned remuneration or the reimbursement, for receiving of which the employee has a guaranteed right[19].

With respect to the right of remuneration the most fundamental and systemic problem is that the minimum salary established in Armenia is 68,000 AMD[20], which is apparently insufficient to hold worthy living standard, especially in view of disturbing inflation rates. Simultaneously, the mentioned problem is conditioned by the existing common social and economic situation, and the solution of that lies within the range of drastic improvement of the common situation, but not in the range of applying local instrumentation.

Another problem of common nature is the issue of quite high periodicity of payment for labor remuneration enrooted in legal practice of our country. Although, Paragraph 2 of Part 1 of Article 192 of RA Labor Code provides an opportunity to the employer to pay monthly salary with more than one periodicity, however this practice has not wide spread application in our country. Moreover, neither employers has any motivation to choose labor payment with less frequency, nor the state has adopted this culture with respect to its employees as the largest employer. On the other hand, the smaller the periodicity of payment of salaries, the greater the flexibility to manage the earned income at an earlier

[19] See, for example, Clause 137 of the judgement dated 25.09.2018 in re Denisov v. Ukraine [GC], Application No. 76639/11.

[20] See Article 1 of RA Law "On Minimum Monthly Salary" (2003) with the amendment made by the Law HO-223-N dated 19.11.2019. Before the mentioned law entered into force on January 1, 2020, the minimum salary had been set up as 55,000 AMD.

stage, in order to realize the legitimate interests of the employees. This is also prescribed in the international documents regulating this sphere. For instance, Part 1 of Article 22 of the Charter on Social Rights and Guarantees of CIS Countries' Citizens of 1994 imperatively defines that employees' remuneration shall be paid at least twice in a month. Thus, in our country it is necessary to gradually introduce the culture of paying the wages with lower periodicity based on an employee's application, by involving the largest employers in the initial stage, and applying mostly propaganda and economic instrumentation of stimulation .

As regards the right to remuneration, recently, there has been made two important legislative amendments in RA Labor Code:

1. The Law HO-236-N "On Making Amendments and Additions in Labor Code of the Republic of Armenia" adopted on April 29, 2020, on the one hand, within the frames of overcoming new challenges under the conditions of spreading COVID-19, considers as non-payment of downtime "the temporary restriction by law of the rights and freedoms of natural persons and legal entities within the period of prevention of natural disasters, technological accidents, epidemics, accidents, fires, other emergency situations or immediate elimination of their consequences, in case of which job responsibilities cannot be performed", and on the other hand, it has been established that the employer in such situations is not liable, but is entitled not to pay for downtime, and the amount of payment (two-thirds of average hourly wage) (but not less than the minimum hourly rate prescribed by law) has been turned from stable rate into minimum rate by giving an opportunity to the employer to pay higher amount[21]).

During 2020, in the annual report on the activities of Human Rights Defender of RA and the situation regarding the protection of human rights and freedoms, this amendment made by the Law HO-236-N has been characterized as "minor progress" as compared to qualifying the downtime, conditioned by pandemic, as force majeure, and it has been recommended "to ensure the highest targeting in similar situations"[22]. While applying the mentioned law, there has been confirmed the Human Rights Defender's anxieties, since the employers lacked intention to pay or to pay more than the defined the employees for downtime conditioned by the pandemic[23]. This was completely predictable taking into consideration the

[21] As per Part 1 of Article 2 of RA Law "On the Minimum Monthly Salary" (2003) (with amendment made by the Law HO-223-N dated 19.11.2019), it is established as 406 AMD .

[22] See page 239 of the report, https://ombuds.am/images/files/883f55af65e3c33553139031c7ac0ce6.pdf

[23] In this regard, the Human Rights Defender has received complaints both in 2020 and 2021.

lack of high culture of social responsibility in our country. In view of the mentioned, it is necessary to revise the selected model of legislative regulation by making a matter of discussion the possibility of imposing liability of paying for downtime on the employer conditioned by force majeure cases. Based on the balancing of lawful interests, it is permissible that this payment be lower than the rate established by Part 1 of Article 186 of RA Labor Code.

Thus, in case of remuneration for downtime, there can be defined three separate legislative modes: (a) downtime not attributable to the employee, in case of which it shall be paid at least two-thirds of average hourly wage (b) downtime emerged as a result of force majeure[24], for which it shall be paid at least one-third of average hourly wage, and և (c) downtime attributable to the employee, which is not subject to payment.

It is also worth of mentioning that from the point of view of employee's remuneration, it is welcomed another amendment made by the Law HO-236-N "On Making Amendments and Additions in the Labor Code of the Republic of Armenia", according to which, in case of attending the work for part time with the purpose of arranging care for a child under the age of 12 within the period of unplanned postponement or unplanned provision of holidays provided for educational (including preschool) institutions, the employee's salary is completely preserved, if the employee has not been attending the work for up to 2 hours within a working day. Non-attendance for more than 2 hours within the working day, as well as non-attendance within the full working day, labor is paid at least in accordance with the actually worked time or actually performed work (Article 187.1 of RA Labor Code).

After the law became effective, there have been recorded several times in different settlements; including Yerevan the cases of unplanned postponement or unplanned provision of holidays provided for educational institutions, but the personnel of the Human Rights Defender have not received complaints

[24] It could be problematic also the definition of "force majeure" prescribed in Part 7 of Article 186 of RA Labor Code in a sense that it is unintelligible whether it includes all manifestations of force majeure in the subject matter relations, or only a part thereto. It is implied from the applied legislative technique that it includes only a part of manifestations of "force majeure", whereas in justifications of the project it is directly mentioned that "with the proposed addition it clarifies the provision of Part 6 of Article 186 of RA Labor Code", i.e. Part 7 of Article 186 exhausts the notion of "force majeure" defined in Part 6 of Article 186. See the project justifications on http://parliament.am/drafts.php?sel=showdraft&DraftID=11571&Reading=0 The mentioned issue can obtain practical significance, for instance, within the context of established control over the sovereign territories of the Republic of Armenia by the Azerbaijani armed forces, which obstructs the normal activities of separate entrepreneurs in the Republic of Armenia.

with respect to exercising this right. Simultaneously, it is necessary to properly notify on this right of the employees having children under the the age of 12, in order not to remain any suspicion in terms of its true realization. This notification can be combined with, for example, competent public bodies' notifications of unplanned postponement or unplanned provision of holidays provided for educational institutions.

2. The Law HO-124-N "On Making Additions in the Labor Code of the Republic of Armenia" adopted on March 25, 2021, defines the legal consequences of the application of criminal and judicial coercive measures, i.e. suspension of the employee's term of office (in previous terminology: temporary cessation of officiating), and the legal consequencies of application of taking into custody over the employee, which exclude the actual performance of work duties, including the right of remuneration. In particular, Article 108.1 added in RA Labor Code stipulates that from the moment of suspension of the term of office of a person in public service with the status of a suspect or an accused until the revocation of the decision on suspension, he/she is paid a monthly compensation of 50% of basic salary, but not less than the nominal amount of the minimum monthly salary defined by law, making the remaining payment in case of termination of the criminal case on justifying grounds. On the other hand, Article 108.2 added in RA Labor Code stipulates that within the period of being under custody, the salary of a person in public service is not preserved.

By considering welcomed preserving the part of remuneration of the employee in case of suspension of his/her term of office and generally considering justified the differentiated approach with respect to coercive measures of taking into custody, simultaneously, it is worth mentioning that totally depriving of the right of remuneration of persons under custody is problematic. First, either in case of suspension of term of office, or in case of taking into custody, the presumption of innocence continues to apply to the employee, which dictates to refrain from unjustified restrictions on the rights of the person. Second, legal grounds for taking into custody pertain not to exercising unlawful behavior by the person, but to the probability of exercising such behavior in the future. Third, Article 11 of International Covenant on Economic, Social and Cultural Rights mentioned in the justification of this law[25] stipulates the right to sufficient living standard for not only each person, but also for his/her family members, which includes sufficient food, clothing and accommodation. Under the light of the mentioned above, it

[25] See the following link: http://parliament.am/drafts.php?sel=showdraft&DraftID=11938&Reading=0

shall be defined the possibility of preserving certain amount of remuneration of the apprehended public servants (smaller amount compared to suspension of term of office), especially in cases when other persons are in the care of this person, for example children.

The most common problems observed in the result of review of complaints received by the human rights staff, as well as study of the open sources, that are related to the payment for the work, refer to ***remuneration, including final settlement delays, incomplete payments or non-payments***.

For example, in one of the complaints received in 2021 a citizen informed, that his wife has been dismissed from the work on the basis of her own application. Employer refuses to fulfil some part of the final settlement, particularly refuses to make reimbursement for all leaves not used by the employee. It should be noted, that in this specific, and other cases, the issues raised in connection with final settlement have basically been resolved with the support of the Ombudsman.

By one of the complaints a citizen, who was an employee of a local government body, informed that the employer has not paid his wage for three months.

An issue, raised in a number of letters, is related to the cases of failure by employers to pay remuneration for overtime work. In spite of a clearly defined legislative requirement[26], this issue is very common, as first of all, there exists an awareness problem among employees on legislative regulations, and besides that, employees often do not voice (communicate) this issue due to the fear of losing their jobs.

With a number of complaints an issue was raised that in the evnt of a debtor's bankruptcy the claims of the salary-related creditor in the register of claims maintained by an administrator are entered as subordinate (secondary) unsecured claims, while salary-related claims have to be satisfied in the order of preference.

[26] Articles 184 and 185 of RA Labor Code establish respectively for overtime and night work, as well as day offs and nonworking days (holidays and memorable days), as a pay rise, clear requirement of labor remuneration and calculation mechanism for that remuneration. It has been established by the Law HO-460-N "On Making Amendments and Additions in the Labor Code of the Republic of Armenia" adopted on October 9 2020, an exception from that requirement within the period of military situation, which pertains to the cases of inclusion of employees of state, territorial governance and local government bodies, state and community organizations and establishments, as well as, conditioned by the military situation, organizations and establishments (regardless of the form of ownership) that are under the jurisdiction of the authorized government body, in the activities conditioned by military situation. The complaints addressed to the Human Rights Defender have not pertained to this exception.

Based on the relevant legislation of the Republic of Armenia the requirements arising from labor rights are not subject to priority satisfaction. The problem is that the requirements arising from employment contracts by virtue of the RA Law "On Bankruptcy" are met not more than 6 months preceding the moment of declaring the debtor bankrupt[27], and in case of non-submission of the claim within an established period they are considered inferior (secondary) unsecured claims[28]. At the same time, the RA legislation lacks alternative mechanisms for meeting the requirements arising from the employment relationships.

The Human Rights Defender has repeatedly referred to this issue[29] considering it necessary to legislatively fix the priority of fulfilling the obligations arising from the employment relations over the obligations towards the state. At the same time, it is necessary to establish guarantee institutions by the legislation of the Republic of Armenia to meet the requirements arising from the employment relationships. It emerges directly from the requirements set forth in Articles 5, 8, 12, and other articles of the Convention on the Protection of Employees' Claims in the cases of Insolvency of Employers adopted in 1992 within the framework of the International Labor Organization, and approved by No. N - 171 Resolution of the National Assembly of the Republic of Armenia as of 2005. By the mentioned resolution of the RA National Assembly the Republic of Armenia has undertaken to ensure in the bankruptcy process both the privileged nature of the claims arising from the employment relationship and to establish guarantee institutions for the satisfaction of those claims, having the opportunity to undertake the obligation to invest only one of these two tools. Meanwhile, in practice, neither one, nor the other is embedded, which leads to a systematic violation of the employees' right to remuneration in the process of bankruptcy of the employer.

In case of the problem related to the liability applied when delaying the payment of downtime set by the court in case of impossibility of job restoration: remuneration, including final settlement delays, incomplete payments or non-payments the Decision No. ED / 38/57/02/20 on civil case as of December 10, 2021 by the RA Cassetion Court refer to the unification of legal practice. From the two approaches existing in practice the Cassation Court considered applicable the most unfavorable one for the

[27] Paragraph "c" of Part 1 of Article 82 of the RA Law "On Bankruptcy".
[28] Part 1 of Article 85 of the RA Law "On Bankruptcy".
[29] See, for example, the annual report on the activities of the RA Human Rights Defender during 2020, the state of protection of human rights and freedoms, 260-265 pages; the annual report on the activities of the RA Human Rights Defender during 2019, the state of protection of human rights and freedoms, pages 171-174, etc.

employees, that is, the interest rate defined by Article 411 of the RA Civil Code, and it did not consider applicable the penalty defined by Article 198 of the RA Labor Code (in an amount of 0.15% per day, but not more than the amount to be paid).

One of the most pressing issues during 2021 related to the right to remuneration of employees **referred to the actual reduction of the amount of remuneration for work: of the people who have not been vaccinated against COVID-19 due to PCR testing fees,** based on the relevant substatutory regulative acts of the RA Minister of Health[30]. This issue has been raised many times with the Human Rights Defender, as well as it has become a subject of examination in the RA Constitutional Court.

By the Decision CCD-1621 of the Constitutional Court as of December 23, 2021 the Constitutional Court has clearly emphasized the importance of the observation of regulations (in the system connection) requiring submission by an employee at his/her own expenses, once in every 14 days of a Vaccination Certificate or a Certificate confirming the negative result of PCR test of COVID – 19 diagnosis taken within maximum 72 hours to determine whether the fixation of the requirement to be tested at one's own expense does not disproportionately interfere with a person's right to property safeguarded by the Constitution[31].

As a result of the relevant legal analysis, the Constitutional Court noted that "in the event that a person (employee) chooses from the options of behaviors as defined, not to be vaccinated, but to be tested at his / her own expense", accordingly, to submit the relevant certificate, it leads to an interference with a person's property rights and in these circumstances it is necessary to clarify whether the constitutional principle[32] of proportionality in the restriction of property rights is not violated".

In the context of the analysis of the principle of proportionality the Constitutional Court recorded that "taking into account the frequency of testing defined by the Order (by the Order once in every 14 days,

[30] "Order N 65-N of August 20, 2021 on making amendments and additions in the Orders No. 24 –N of September 18, 2020 and No. 17-N of August 4, 2020 of the RA Minister of Health" and "Order No. N 84-N of December 1, 2021 on making amendments and additions in the Orders No. 24 –N of September 18, 2020 and No. 17-N of August 4, 2020 of the RA Minister of Health" of the Minister of Health.

[31] See Paragraph 4.4 of the Constitutional Court Decision CCD-1621 (pages 38-39 of the Decision) with the following link : https://concourt.am/armenian/decisions/common/2021/pdf/sdv-1621.pdf

[32] See Paragraph 4.4 of the Constitutional Court Decision CCD-1621 (page 44 of the Decision)

starting from December 2 of this year, once in every 7 days), a problem[33] arises in terms of maintaining the necessary proportionality / symmetry between the test prices / values in the Republic of Armenia (. . . the minimum price is 5,000 drams, and the maximum price is from 15,000 to 40,000 drams ») and the amount of the minimum salary (. . . 68000 AMD) at the same time, recording the presence of problems in the field of pricing policy for PCR diagnosis of coronavirus disease (COVID-19)[34]". However, recording this problem: the Constitutional Court did not conclude that the issue has led to the unconstitutionality of the relevant normative acts of the Minister of Health: under the principle of ownership or proportionality".

In this regard, it is necessary to also emphasize that the incorrect and incomplete submission of the decision of the Constitutional Court to the masses of the public, the absence of steps by the competent state bodies aimed at determining the legal uncertainty following the decision aroused different perceptions about the subject paying for PCR testing; up to the commenting that the payment must be made by the employer, the cost of previous examinations should be reimbursed by the State or the employer, etc. Such uncertainty has a direct impact on employees' rights of avoiding involuntary unemployment, on full and fair remuneration rights of the work, as the lack of legal knowledge and high quality legal assistance leads to employers' and employees' unpredictable behavior in respect of each other, and unpredictable consequences.

The Human Rights Defender records, that regardless of the absence of the fact that the Constitutional Court assessed the situation as unconstitutional, the Utate should take measures to reduce this financial burden on workers' remuneration as much as possible, at the same time excluding the option of placing that burden on the employers. The following legal position in the decision of the Constitutional Court can be a guideline in this regard: "...Providing special regulations for a separate group of employees (separate social groups) (in terms of financial burden arising from the requirement to submit a certificate confirming a negative PCR test result) is within the discretion and capabilities of the state, which does not exclude the assumption of financial burden / expenses by the state at all due to a number of objective factors (including in the amount of the minimum salary)[35]".

[33] It has been officially registered that 129-677 out of the employees subject to the relevant intervention, receive a salary / income of up to 68,000 AMD, the 201.604 receive from 68,100 to 100,000 AMD and the 117395 receive from 100,001 to 150,000 AMD.

[34] See Paragraph 4.4 of the Constitutional Court Decision CDO-1621 (pages 51-52 of the Decision).

[35] See Paragraph 4.4 of the Constitutional Court Decision CDO-1621 (page 55 the Decision).

PROPOSALS

1. Implementation of system or structural changes in the working arrangements of the state authorities should not directly result in the risk of an involuntary unemployment for a public civil servant, and well-defined instruments are required, which shall ensure continuity of holding the duties by state servants, whose professional expertise and experiences correspond to the gven post, and shall allow them to be given an advantage as to continue their service at least under equal conditions.

2. For the cases of staff reductions there are no statutory criteria that would ensure employees' rights to remain in the employment. When making decision on a preference to continue working activity, the legislation entitles the employers with wide discretionary rights, which have predictable nature for employees, the laid off employees' working periods, higher grade ranks or performance assessment scores, and others are neglected. While doing that, when dismissing such employees, as a rule, they were not offered other works, corresponding to their professional qualifications, skills and state of health, and most frequently the persons who reached their retirement ages are being laid off, or employers make use of an argument of staff redundancy to terminate the employment relationship with a particular employee, while after which the recovery or reproduction of the redundant position takes place with another title of the given position. In order to exclude the mentioned problems, it is necessary to define explicit legislative criteria, introduce effective control and supervision mechanisms over the process, extend the scope of collective redundancies, to bring the requirements of the legislation in line with international standards[36].

3. By No. HO-218-N Law of November 17, 2009 "On Making Amendments and Additions to the RA Law on Penitentiary Service" (became effective on January 02, 2010) shift in the servants' employment period as a material term has taken place, particularly the required length of service, envisaged for assigning military pensions to penitentiary servants for their long

[36] Article 9 of No. 158 Convention of ILO, No. 98/59/EC Directive "On the approximation of the laws of the Member States relating to collective redundancies" of ILO

standing service has not been ensured. Consequently, due to dismissals of penitentiary servants from work on the basis that they reach the age limit, the latters have been deprived of the entitlement to pension provisions granted under the law. Resolving the issue requires making the necessary legislative changes by which for employees who were dismissed on the basis of their reaching the age limit, it will practically be possible to ensure full realization of the latters' pension rights.

4. It is necessary to define such legislative criteria, guided by which only the employers will be empowered to turn the employment contracts concluded for indefinite term into the fixed term contracts.

5. To prevent abuses in concluding fixed-term employment contracts it is required to clearly establish those grounds, in case of which conclusion of a fixed-term employment contract will be prohibited.

6. It is necessary to establish such legislative instruments, by regulations of which an employment contract concluded for a fixed term shall be considered as terminated through the power of law on the next day upon the expiry of the period defined by that contract. The same requirement refers to those cases, when the employer failed to give the employee at least 10 days notice prior to the expiry of a fixed-term contract period, or to adopt an individual legal act about terminating the employment contract concluded for a fixed-term, and if the labor relationships did not continue, i.e. the employee has not come to the work on the working day following the last day provided for in the employment contract, or the employer did not allow the employee to continue the work.

7. It is important to adopt by making a legislative change the norm contained in the Draft, according to which upon expiry of the period of notice specified under the parts 1 and 2 of Article 112 of the Labor Code the employee shall be entitled to terminate his/her employment, and the employer must formulate the termination of the employment contract and make final settlement with the employee, and if upon the expiry of the said period the employer fails to adopt a relevant legal act about termination of the labor relationships, then the employment

contract shall be considered as terminated from the next day following the expiry period specified by the notice.

8. Most clear legislative regulations are required, that will ensure a balance between the employees' right to rest and the employer's ability of coercing the employee to exercise that right. Any such regulation must be built within the range between protection of the employer's interests and the employees' rights.

9. The regulations of the RA Labor Code related to uninterrupted weekly rest (Article 155) provide no possibility for making exceptions from the established norms in the presence of objective grounds, the need for which practically emerged during the pandemia, war, and other extraordinary situations. Perhaps by applying the principles and other norms of the Labor Code it is possible to ensure the flexibility of labor relations in extraordinary situations, however clear definition of such grounds makes labor relations more predictable, ensuring uniformity in solving problems that arise in similar situation.

10. Though maximum limits for overtime work are defined by the labor legislation, there are no sufficient procedural norms to involve the employee in overtime work, which provides the employers with significant possibilities for abuse. It is necessary that Labor Code provides for such regulations, which, in case of deviations from the normal course of work will ensure the employee's right of rest, and balancing of the interests of employers and the rights of employees. Notably, such regulations should be aimed at ensuring the opportunity of truly enjoying the rest by means of employee involvement and awareness, when making decisions on changing the work schedules.

11. It is necessary to gradually introduce the culture of paying the wages with lower periodicity (for example, twice a month) based on an employee's application, by involving the largest employers in the initial stage, and applying mostly propaganda and economic instrumentation of stimulation.

12. The chosen model of legislative regulation, adopted on April 29, 2020 by No. HO-236-N Law "On Making Amendments to the Labor Code of the Republic of Armenia", needs to

be reviewed by making the discussion's subject matter a possibility for imposing an obligation (not granting a right) on the employer to pay for the downtime in the cases driven by insurmountable force (force majeure). On the basis of balancing the legitimate interests, it is permissible for that payment to be lower than the rate set forth in Paragraph 1 of Article 186 of the RA Labor Code (for example, it can be set at a rate of one- third of the salary.

13. In case of unscheduled staggering or unscheduled entitlement of vacations envisaged for educational institutions it is necessary to combine relevant notification to the competent public authorities with a notice, that according to the Labor Code, for that particular period an employee attending a part-time job due to a need of making arrangements to take care of a child under the age of 12 shall continue to be paid a full salary, if the employee was absent from work up to 2 hours during a working day.

14. Ensuring compliance with the requirements of Article 11 of the International Covenant on "Economic, Social and Cultural Rights" it is necessary to provide for the possibility of maintaining a certain amount of remuneration of detained public servants (a smaller amount compared to the suspension of powers), especially for the cases when other persons, such as children, are in the care of the given person.

15. The priority of meeting the obligations emerging from employment relationships within the frames of bankruptcy proceedings over the obligations to the State has to be fixed legislatively. At the same time it is also necessary to envisage by the RA legislation guarantee institutions to meet the requirements arising from employment relationships. The need for these two important warranty arrangements arises also from the requirements defined in Articles 5, 8, 12, and other articles of the Convention "On protection of employees' claims in case of insolvency of the employer" adopted in 1992 within the framework of International Labor Organization and ratified by the Republic of Armenia in 2005 by Resolution No. N-171-3 of the National Assembly.

16. No matter how rapid change of the situation caused by COVID-19 pandemia requires fast response from the competent authorities, and rapid changes in applicable measures

and restrictions, it is necessary to exclude possible legal contradictions and gross violations of human rights arising as a result of application of such measures and restrictions, and to show a deeper and more systematic approach.

17. In the struggle against violations of human rights, including labor rights it is important the prevention of such violations, while in case of violation, a quick response is important. In order to solve this problem, it is necessary to increase the level of awareness among employees and employers, establish prompt awareness mechanisms on legislative changes and new institutions, expand the limits on dissemination of information on the bodies and institutions having the required powers and tools to restore the violated rights, make information on the procedures and powers for applying to the latters more accessible and affordable.