

ЦИВІЛЬНЕ І ТРУДОВЕ ПРАВО

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NATIONAL APPROACHES OF DETERMINING THE LEGAL STATUS OF SELF-EMPLOYED PERSONS UNDER THE LEGISLATION OF UKRAINE AND FOREIGN COUNTRIES

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Purpose: compare national approaches to determining the legal status of self-employed persons in the legislation of Ukraine and foreign countries. **Methods:** documentary analysis and synthesis, comparative analysis, objective truth, cognitive-analytical, etc. **Results:** established that self-employment is a phenomenon which is not thoroughly studied, not fully worked out, have not created a clear rod, which would have built the structure of this concept stated different approaches to the legal status of self-employed in the legislation of different countries. **Discussion:** identified the urgent need for legislative legislation to maintain and develop the sphere of self-employment of the population of Ukraine and unambiguous and complete definition of the legal status of self-employed persons in the legislation of Ukraine.

Keywords: self-employed person; employee; labor relations; economic dependence of self-employed persons; legislation of Ukraine and foreign countries.

Problem statement and its urgency. Self-employment as a social phenomenon is recognized as a powerful means of economic development and easing of social tensions. This approach is implemented in Article 8 of the Law of Ukraine "On Principles of Domestic and Foreign Policy", according to which one of the main principles of domestic policy in the social sphere is to overcome poverty and reduce social stratification, in particular by promoting self-employment [1].

The preconditions for improving all the parameters of the formation of labor potential in the country that chose the European path of development should be to create the opportunities for the productive use of labor on the basis of gender equality, based on the appropriate economic basis of incentives for work, as well as the implementation of social guarantees of the employed and unemployed

population in conditions of formation of market relations [2, p. 45].

Self-employment is a complex socio-economic phenomenon. On the one hand, this is evidence of the lack of other ways and opportunities for formal employment. Self-employment in some way stimulates the further development of the informal sector of the economy. On the other hand, the bearers of social and labor potential independently provide themselves with socially useful types of work, contribute to the creation of a competitive environment, create a natural social support for the social order and form a new social class of entrepreneurs.

According to N. Azmuk, self-employed persons have significant incentives for self-expression and self-affirmation, which allows them to receive income much higher than the average salary in the industry [3, p. 37].

Due to a long period of economic development and the process of improving the current legislation of Ukraine, the category of "self-employed person" has not received its proper development and legal consolidation. Currently, there is no holistic view of the concept, and there is a lack of an integrated approach to determining its classification features, there are insufficient theoretical and legal developments on the formation of the legal status of a self-employed person as a subject of social security law.

Analysis of recent research and publications.

Publications on the labor market are devoted to publications A. Barsuchenko. Normative and legal support of self-employment was studied by O. Grabovetska, theoretical bases of self-employment were studied by O. Kuznetsova, and theoretical and methodological bases of self-employment research in Ukraine were analyzed by O. Pozniak.

The **purpose** of the article is to compare national approaches to determine the legal status of self-employed persons in the legislation of Ukraine and foreign countries.

Presenting main material. The very definition of "self-employment" is still debatable. SN Sobol notes that self-employment is a relatively new phenomenon in the domestic economy, which began to develop in the transition period to market conditions. In the scientific literature and statistical practice of different countries, the terms "self-employment" and "a person pursuing an independent professional activity" are used to denote employment without legal registration of employment contracts. According to the definition of the International Classification of Employment Status (ICSE-93), self-employment means working in your own enterprise, when remuneration directly depends on income from the production of products and services [4, p. 45].

It is worth noting the opinion of A. Barsuchenko, who argues that self-employment - is a specific form of economic activity, the essence of which is that the citizen himself finds a source of income that will ensure his proper existence as a result of his economic activity [5, p. 11].

However, there is currently no single approach to understanding this phenomenon, despite the large number of scientific papers on the legal status of the self-employed person. In the current Labor Code of Ukraine there is no legal regulation of the activities of self-employed persons as participants in labor relations.

A self-employed person who performs work on behalf of another person and is a party to a civil contract is not considered to be subject to labor law. Only in some cases can a self-employed person be equated with an employee with a corresponding taxation of income received by him as a salary. That is, if the relationship under the relevant civil contract is recognized as an employment relationship, and the parties to the contract can be equated to an employee or employer, then, in accordance with paragraphs 14.1.195 and 14.1.222 paragraph 14.1 of Article 14 of the Tax Code of Ukraine, self-employed person to the employee, acquires the appropriate legal status [6].

The transformation of relations from civil to labor is supported by Ukrainian scholars in the field of labor law, pointing out that "the science of labor law has long formed the idea that labor relations arising from civil contracts or services should be governed by labor regulations. rights. And that this fact should be considered as a differentiation of relations that are the subject of labor law [7, p. 120].

For comparison, we note that in Poland, regulations allow to unambiguously qualify any legal relationship that has certain characteristics of labor, as an employment relationship [8]. The Supreme Court of Poland has ruled that when a natural person is an entrepreneur but enters into a contract that has certain features of an employment contract, such a person does not act in the course of his business, and therefore there are no obstacles to recognizing that person as an employee [9].

Thus, a self-employed contractor or sole proprietor who has entered into a civil contract as a contractor, the subject of which is the performance of works or the provision of services, may be recognized as an employee if national labor law contains rules similar to those in Poland.

One of the main distinguishing features of the employee is the lack of independence of his work.

In addition, not only in the understanding of controllability and control by the employer, but also in organizational dependence on the latter [10, p. 490]. While the entrepreneur independently organizes his own activities, carries it out at his own risk. Although in real life not everything is so clear. An individual entrepreneur, performing work or providing services under a contract of a civil nature, may, under the terms of the contract, perform work from materials and with the help of the customer, under the control of the customer and, moreover, interact with the same customer for a long time the vast majority of their income.

In order to determine the specifics of the legal status of economically dependent on the customer self-employed person, recognition of his labor rights in foreign law adopted the use of such terms as "dependent self-employed", "economically dependent self-employed" (Spain), "dependent contractor" (Sweden), "dependent entrepreneur" and "self-employed dependent" (UK), "self-employed", "employee-like" (Austria) and "employee-like" (Germany) or "quasi-employee" (Belgium), etc.

In 2007, Spain adopted the first piece of legislation in the EU specifically designed to regulate the contractual working conditions of self-employed persons, which provided them with legal protection very similar to the protection of employees [11]. The law establishes a separate category of dependent self-employed workers [12, p. 22-23], including those who usually and personally carry out economic or professional activities, directly and mainly for a natural or legal person, called a client on whom he is economically dependent, receiving from him at least 75% of income.

To be considered a dependent self-employed person, you must:

1) not to have employees and not to conclude subcontracts, ie not to transfer the performance of part or all obligations to third parties;

2) not to perform work identical to the services provided by employees hired by the client (otherwise it will be about imaginary self-employed persons, to whom this law does not apply, but they are recognized by the court as employees);

3) have its own production infrastructure and materials necessary for the implementation of its activities, regardless of the infrastructure and materials of the client, when they have economic significance for the specified activity;

4) carry out their activities using their own organizational and technical resources;

5) receive remuneration agreed with the client depending on the results of activities carried out at your own risk.

In a number of countries, some labor laws contain rules that apply (usually to some extent) to the self-employed. National legislation in such cases sets out the criteria according to which a self-employed person is considered dependent. For example, in Austria, economically dependent self-employed persons are those who perform work (provide services) at the expense of another person without concluding an employment contract. The work is performed in favor of one or a very limited number of people, do not use their own production resources, reward is the main source of livelihood [13, p. 43]. Such persons are not fully equated with workers, they are subject only to certain rules of labor law, such as labor courts, non-discrimination, labor protection and some others.

German law presents the category of "employees-like persons" who have the status of entrepreneurs, perform work personally for one client or earn at least half of their income from another source only. Such employers have access to certain institutions of German labor law, they can enter into labor disputes and enter into collective agreements, or similarly to employees in individual labor disputes, which are considered in court on labor disputes. Such persons (similar to employees) may also be recognized as members of the social security system on an equal footing with employees. At the same time, they enjoy a certain autonomy of self-employed persons, as employers (customers) cannot dictate to them the place and time of work. Unlike Spanish law, there is no independent law in German law, but the relevant provisions are contained in the Law on Tariff (Collective Agreement) [14], which also applies to self-employed persons. In addition, German law establishes a lower level of economic dependence of the self-employed compared to Spanish law,

requiring that more than 50% of an employee's income be received from a single customer. In addition, German law contains some general provisions that apply to both employees and the self-employed. For example, there is a 24-day paid leave specifically for dependent self-employed persons [15].

Thus, the form of dependence of self-employed persons often resembles traditional labor relations in the absence of social guarantees.

To improve the regulatory framework for the development of self-employment in Ukraine, obstacles to the organization of small business should be removed.

There is an urgent need to legislate the support and development of self-employment, in particular the protection of the rights and interests of self-employed persons, their state social insurance.

Conclusions. Based on a comparative analysis of the legislation of different countries, we can conclude that the ways to respond to the challenges of expanding the scope of economically dependent self-employment in different countries are different - from complete disregard for the problem at the legislative level with the possibility of resolving disputes on self-employed persons with the provision of economically dependent self-employed persons with labor rights and guarantees comparable to the rights and guarantees of employees (Spain). Between these two seemingly extreme ways, there are many options, for example: the inclusion in labor laws of rules that apply certain rules to employees to dependent self-employed persons (Germany, Sweden); establishing opportunities for self-employed persons to participate in collective bargaining (Netherlands); formation of a system of court precedents that allow to qualify relations as labor (USA) with simultaneous normative consolidation of signs of labor relations (USA); legislative prohibition on concluding civil contracts for the purpose of regulating labor relations with the possibility of renewal of the violated right as a result of violation of this prohibition in court (Poland).

In all cases, the scope of labor law is actually being expanded, albeit by various means. Therefore, there is an urgent need for an unambiguous and complete definition of the legal

status of self-employed persons in the legislation of Ukraine. In particular, it is necessary to develop the legal concept of self-employment, a clear definition of the categories of persons belonging to this segment of the labor market; legislative regulation of issues of self-employment, registration, accounting, social insurance, pensions, simplified taxation and other protection; supplementing labor legislation with regulations in accordance with the conditions of a market economy and stimulating economic activity of the population.

It should be concluded that the essence of self-employment as a type of economic behavior is that a person finds a source of income, provides adequate to his needs level and living conditions as a result of economic activity, which is regulated by social and economic norms. Summarizing the above, it should be noted that self-employment is a phenomenon that has not been thoroughly studied, not fully studied, not created a clear core on which to build the structure of this concept. Self-employment is a constant dynamic process that depends on the economic situation in the country, and therefore this concept needs constant reform in approaches to understanding its essence.

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НАЦІОНАЛЬНІ ПІДХОДИ ДО ВИЗНАЧЕННЯ ПРАВОВОГО СТАТУСУ САМОЗАЙНЯТИХ ОСІБ У ЗАКОНОДАВСТВІ УКРАЇНИ ТА ЗАРУБІЖНИХ КРАЇН

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Мета: порівняти національні підходи до визначення правового статусу самозайнятих осіб у законодавстві України та зарубіжних країн. **Методи дослідження:** документального аналізу і синтезу, порівняльного аналізу, об'єктивної істини, пізнавально-аналітичний та ін. **Результати:** встановлено, що самозайнятість є явищем, яке досконало не вивчене, до кінця не опрацьоване, не створено чіткого стержня, на якому би будувалася структура даного поняття, констатовані різні підходи до визначення правового статусу самозайнятих осіб у законодавстві різних країн. На підставі порівняльного аналізу законодавства різних країн зроблено висновок, що способи реагування на виклики розширення сфери застосування економічно залежної самозайнятості в різних країнах різні – від повного ігнорування проблеми на рівні законодавства з можливостями судового вирішення спорів про визнання відносин трудовими (ПАР) до видання спеціального закону про самозайнятих осіб із наданням економічно залежним самозайнятим особам трудових прав і гарантій, порівнянних із правами і гарантіями найманих працівників (Іспанія). Між цими двома, здавалося б, крайніми способами, існує багато варіантів, наприклад: включення в закони про працю норм, які поширюють дію окремих правил для найманих працівників на залежних самозайнятих осіб (Німеччина, Швеція); встановлення можливостей участі самозайнятих осіб у колективно-договірному регулюванні (Нідерланди); формування системи судових прецедентів, які дозволяють кваліфікувати відносини як трудові (США) з одночасним нормативним закріпленням ознак трудових відносин (США); законодавча заборона на укладення цивільних договорів з метою регулювання трудових відносин з можливістю поновлення порушеного права в результаті порушення цієї заборони в суді (Польща). **Обговорення:** з'ясована нагальна необхідність законодавчого закріплення підтримки та розвитку сфери самозайнятості населення України та однозначного і повного визначення правового статусу самозайнятих осіб у законодавстві України.

Ключові слова: самозайнята особа; найманий працівник; трудові відносини; економічна залежність самозайнятих осіб; законодавство України та зарубіжних країн.