

UDC 349.2

DOI <https://doi.org/10.32849/2663-5313/2023.3.02>**Oleksandr Husarov,***PhD in Law, Head of Pechenizka ATC, Postdoctoral Student, Kharkiv National University of Internal Affairs, 27 Lev Landau avenue, Kharkiv, Ukraine, postal code 61080, [oleksandrhussarov@ukr.net](mailto:oleksandrhussarov@ukr.net)***ORCID:** [orcid.org/0000-0001-7493-1789](https://orcid.org/0000-0001-7493-1789)

Husarov, Oleksandr (2023). The essence and content of principles of the regulatory framework for atypical forms of employment with the use of borrowed labour. *Entrepreneurship, Economy and Law*, 3, 13–18, doi <https://doi.org/10.32849/2663-5313/2023.3.02>

## THE ESSENCE AND CONTENT OF PRINCIPLES OF THE REGULATORY FRAMEWORK FOR ATYPICAL FORMS OF EMPLOYMENT WITH THE USE OF BORROWED LABOUR

**Abstract. Purpose.** The purpose of the article is to establish the scope, as well as the essence and content of the principles of the regulatory framework for atypical forms of employment with the use of borrowed labour. **Results.** The article, relying on the analysis of scientific perspectives of scholars and provisions of current legislation, establishes the scope and reveals the content of key principles of the regulatory framework for atypical forms of employment with the use of borrowed labour. It is noted that today, the principles of the regulatory framework for borrowed labour have not actually found their legislative consolidation, which is undoubtedly due to a poor and inefficient regulatory framework for labour relations with the category of employees under study, and therefore this gap needs to be addressed. It is revealed that the essence of the principle of legal liability is that legally liable may be: a) borrowed employees who do not perform or improperly perform their labour duties; b) employers, in case of violation of the applicable labour law (in relation to employees) and civil law, in case of violation of a civil law agreement with intermediary entities; c) private employment agencies that have violated the applicable provisions of law in the relevant field. It is emphasised that the growth of labour efficiency ensures an increase in real product and income, and therefore it is a very important indicator of enterprise growth. Therefore, the essence of the above principle is to ensure the most efficient use of labour resources within the enterprise, which should be facilitated by such atypical form of employment as borrowed labour. **Conclusions.** The author concludes that as of today, the principles of the regulatory framework for atypical forms of employment with the use of borrowed labour have not actually found their legislative consolidation, which is undoubtedly due to a poor and inefficient regulatory framework for labour relations with the category of employees under study. This gap needs to be addressed through the adoption of a modern Labour Code, which should focus on regulating of atypical forms of employment in a separate chapter.

**Key words:** principles, regulatory framework, atypical forms of employment, borrowed labour.

### 1. Introduction

An analysis of the current state of the Ukrainian labour market reveals that the use of borrowed labour is spreading, which already covers about 2.5% of the employed population of Ukraine, while the scope of standard employment is steadily shrinking (Vasylenko, 2018). The widespread use of borrowed labour is currently confirmed by a large number of cases of application of this practice at Ukrainian enterprises. A striking example of the functioning of the borrowed labour system is the use of out-staffing schemes, which are widespread in heavy industry and metallurgy, whereby employees remain at their previous jobs (or vice versa) and enter into labour relations with

another institution (or recruitment agency) (Krasylshchykov, 2011). Moreover, in order for the regulatory system of the labour of borrowed workers to be effective and efficient, it must be based on a system of starting points, input ideas, which are commonly called principles.

The problem of the regulatory framework for atypical forms of employment with the use of borrowed labour has been studied by various scholars. In particular, it has been under focus by: A.O. Demchenko, P.S. Yeshchenko, M.L. Zakharov, M.M. Klemparskyi, V.P. Komarova, M.O. Mishchuk, O.I. Momot, Yu.I. Palkin, E.H. Tuchkova, I.Yu. Philipp, A.M. Tsiatkovska and many others. However, despite the considerable scientific heritage, scholars have paid

rather little attention to the issue of understanding the principles of the regulatory framework for atypical forms of employment with the use of borrowed labour.

That is why the purpose of the article is to establish the scope, as well as the essence and content of the principles of the regulatory framework for atypical forms of employment with the use of borrowed labour.

## **2. The regulatory framework for the conclusion of an employment contract**

It should be noted that the system of principles of the regulatory framework for atypical forms of employment with the use of borrowed labour is represented by a large number of principles of both general legal and intersectoral nature. However, in our opinion, it is most appropriate to focus on special principles that most meaningfully characterise the essence and content of the regulatory framework.

First of all, the principle of duality of contractual regulatory mechanism for labour should be highlighted. All scholars agree that, as an institution of labour law, an employment contract in a market economy occupies a central place in this branch of law, and, according to M. Mishchuk, the legal and economic significance of an employment contract is that it is: 1) the main legal form of involvement of employees in the labour sector, distribution, consolidation and rational use of labour resources of Ukraine; 2) an important prerequisite for the parties to it to have labour rights and obligations provided for by other labour law institutions (working time, rest time, remuneration, etc.); 3) the ground for inclusion of an employee in a labour team and the legal form of inclusion of an employee in social labour cooperation; 4) protective, i.e. protects an employee from harmful working conditions, his/her honour and dignity in labour activities (Mishchuk, 2008; Tsesarskyi, 2011).

The purpose of an employment contract is to receive remuneration in the form of a salary, «the amount of which depends on the complexity and conditions of the work performed, the employee's professional and business qualities, and the results of his or her work». In the course of work, the employee reaches the appropriate professional level. N. Hetmantseva emphasises that, given the fact that money is a special type of movable property, the purpose of a civil contract is «to obtain a certain property result of work». The purpose of any contract determines its subject matter as one of the essential terms of the contract. The author emphasises that judicial practice also follows this path. The subject matter of an employment contract is labour, while the subject matter of a civil law contract is the performance

by a party of a certain amount of work (Letter from the Ministry of Labour and Social Policy of Ukraine regarding the staff list, 2007).

Therefore, as we noted above, the principle of contractual labour regulation has a dual nature. On the one hand, it means that the category of employees under study shall perform their work exclusively on the basis of an employment contract, and the employer cannot allow them to perform their work duties without signing the relevant contract. On the other hand, the meaning of this principle is that the parties to the agreement on the use of borrowed workers (employers and private employment agencies) also act on the basis of the relevant agreement.

The next principle we will focus on is the principle of an optimal balance between specialisation and universalisation of production processes. A production process is a complex technological interaction between employees, labour and nature for the purpose of producing a certain end product that will meet the needs of the consumer. The main component of the production process is a set of actions aimed at changing and determining the state of the object of labour in the technological process, its characteristic features inherent only in this stage of the production process. Production is the creation of a final, socially and economically justified product by synthesising it through manufacturing at each stage of the production process, which is specific to that stage of the product (Buzhyn, 2006). The principle of specialisation is a form of division of labour characterised by the manufacture of a limited range of products, minimisation of types of work, processes, operations, processing modes and other elements of the production process. Specialisation increases the degree of homogeneity of production at workplaces, sites and workshops; increases the output of homogeneous products; simplifies the organisation of production and creates an enabling environment for mechanisation and automation of all processes; promotes the efficient use of equipment and production space, improves economic performance through the use of special, more efficient equipment, and reduces costs and improves product quality. In turn, universalisation is a kind of antithesis of specialisation. In this case, the activities of a business entity with a natural form of production are aimed at meeting its own needs. Moreover, manual labour is the dominant type of labour: each worker performs all the basic work with the simplest tools (hoes, shovels, axes, etc.). However, within the subsistence economy, labour is divided between individuals and their groups (Ieshchenko, 2005). Therefore, the essence

of the above principle is that by using borrowed labour, an employer can optimise production processes and promptly and efficiently provide staff with professional specialists.

Closely related to the above principle is the principle of legality and stability of labour relations with the category of employees under study. In general, legality is a legal expression of legitimacy: the ability to be embodied in the provisions of law, to function within the law (Skakun, 2001). Therefore, legal labour is work that is recognised and permitted by law, which in turn clearly defines the obligations and rights of the parties to labour relations, and guarantees that the state will take care of their fulfilment by each party: both an employer and an employee. The most appropriate guarantees include the following: clearly defined and enshrined in the employment contract working conditions (place of work, working hours, job duties, salary); payment of salary twice a month, in the amount not less than the minimum established by law; the possibility of training, retraining, and professional development at the expense of the employer; insurance period for unemployment benefits and pensions; the right to paid leave: annual leave (at least 24 calendar days), social and additional leave as provided for by the Labour Code of Ukraine; the right to sick leave pay; social services and payments in the event of an accident at work and occupational disease; protection against unlawful dismissal, transfer to another position, change of working conditions (without notice and consent of the employee); severance pay in case of dismissal at the initiative of the employer; a number of other rights and social guarantees provided for by the current legislation (Official website of the State Employment Service, 2021).

Therefore, despite the fact that an employee formalises labour relations with an agency and performs a labour function for another employer, he or she shall have all basic labour rights on an equal footing with other employees of this enterprise. The salary of such employee shall not be lower than the salary received by the employee directly from the employer. Therefore, if a private employment agency complies with the requirements of the employment legislation, job seekers will be employed in legal jobs (Official website of the State Employment Service, 2021).

### **3. The regulatory framework for atypical forms of employment**

The next important principle of the regulatory framework for atypical forms of employment with the use of borrowed labour is the principle of ensuring dynamic sustaina-

bility of labour relations. In general, scientists characterise the concept of sustainability as: a) a high level of organisation (clear and strict discipline, coherence of actions of all group members, perfect subordination of all group members to its leader); b) stability (unchanged composition of participants over the long term of its operation, common views, life values, common social orientation of group members) (Brazhnyk and Tolkachenko, 2000). The principle of sustainability of the management system assumes that the management system should not undergo radical changes when the external and internal environment of the company changes. Sustainability is determined by the quality of strategic plans and management efficiency, the adaptability of the management system to changes in the external environment (Website of the National Academy of Internal Affairs, 2021). Therefore, the essence of the principle of ensuring the dynamic sustainability of labour relations is that borrowed employees are used for the purpose of: a) covering the need of an enterprise, institution, organisation for certain categories of employees with a certain set of special knowledge, skills and abilities; b) reducing the risks of negative external impact on the business entity's activities.

An equally important principle of the regulatory framework for atypical forms of employment with the use of borrowed labour is the principle of combining labour productivity and management efficiency. In general, according to A.O. Demchenko and O.I. Momot, efficiency is an indicator of development. It is also its most important incentive. In an effort to improve the efficiency of a particular type of activity and their combination, we identify specific measures that contribute to the development process and cut off those that lead to regression. As a category, it has two sides - qualitative and quantitative. The qualitative side reflects its logical, theoretical content, i.e., the essence of the category. The quantitative side reveals the effect of the law of time saving, namely, it reflects the time savings in achieving the goals of social production in the course of the entire reproduction process and at its individual phases on the scale of the entire national economy, its individual regions, industries, and economic entities. In other words, at all historical stages of human society's development, it should spend its efforts economically, achieving an increase in output with minimal expenditure of funds. This is an objectively existing criterion of economic efficiency at all levels of society development (Demchenko, Momot, 2013). S.M. Rohach argues that labour productivity is the ability of a particular labour to create a certain amount of output per unit of working time.

Labour productivity increases when output per unit of working time increases or labour costs per unit of output decrease (Rohach, Hutsul, Tkachuk, 2015). Thus, the growth of labour efficiency leads to an increase in real output and income, and therefore it is a very important indicator of enterprise growth. Therefore, the essence of the above principle is to ensure the most efficient use of labour resources within the enterprise, which should be facilitated by such atypical form of employment as borrowed labour.

The principle of prohibition of any pressure on an employee should be analysed comprehensively, in particular, with regard to changing the terms of the employment contract, working conditions, which, especially, are unfavourable for him or her. The content of this principle is derived from the provisions of the Labour Code of Ukraine. Thus, Article 9 of the Labour Code prohibits forcing an employee to enter into an employment contract containing terms and conditions on which the employee and employer have not reached a mutual agreement. It is prohibited to engage in night work (Article 55): 1) pregnant women and women with children under the age of three (Article 176); 2) persons under the age of eighteen (Article 192); 3) other categories of employees provided for by law. Women may not work at night, except as provided for in Article 175 of the Code. Work by persons with disabilities at night is allowed only with their consent and provided that it does not contradict medical recommendations (Article 172) (Code of Labour Laws of Ukraine, 1971).

The next in the list, but not in importance, is the principle of inadmissibility of narrowing the content and scope of employees' rights and freedoms when adopting new or amending existing regulations. International and national legislation does not allow any limitations on human rights, in particular on the grounds of race, colour, gender, political, religious and other beliefs, ethnic and social origin and other grounds. However, the Universal Declaration of Human Rights states that in the exercise of his/her rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. Moreover, the main condition for the application of legal limitations is that they shall not contradict the principles of a democratic legal state established by the Basic Law. The regulatory framework for labour relations imposes restrictions on employees' labour rights by

establishing limitations on certain actions, excluding certain powers from these rights, as well as by establishing a certain procedure for exercising the guaranteed right (Filipp, 2011). It should be underlined that certain rights of citizens, including labour rights, may be restricted under martial law. This issue is regulated by the provisions of the Law of Ukraine «On the Organisation of Labour Relations under Martial Law».

The principle of interaction is interesting from the perspective of application. Interaction is a general form of connection of objects, phenomena of objective reality, as well as the connection of thoughts, which reflects objects, phenomena and their connections and relations in the human mind. Interaction is not just an external collision of objects, but a connection of internal moments, not just a causal relationship, but also a transformation of interacting objects into each other (Kondakov, 1971). Therefore, the content of this principle within the framework of the presented issue consists of several aspects: a) joint activities in the format of an employment agency and an employee; b) cooperation between employers and entities that search for and/or «give» their employees to work for another enterprise.

And the last principle to focus on within the scope of the presented issues is the principle of legal liability. According to Yu.S. Shemshuchenko, legal liability is a type of social responsibility, the essence of which is to apply to offenders (individuals and legal entities) sanctions provided for by law and enforced by the State. Legal liability is a legal relationship between the state, represented by its specially authorised bodies, and the offender, who is subject to legal sanctions with negative consequences for him/her (Shemshuchenko, 1998). Therefore, the essence of the principle of legal liability is that legally liable may be: a) borrowed employees who do not perform or improperly perform their labour duties; b) employers, in case of violation of the applicable labour law (in relation to employees) and civil law, in case of violation of a civil law agreement with intermediary entities; c) private employment agencies that have violated the applicable provisions of law in the relevant field.

#### 4. Conclusion.

As a result, the author's research enables to state that as of today, the principles of the regulatory framework for atypical forms of employment with the use of borrowed labour have not actually found their legislative consolidation, which is undoubtedly due to a poor and inefficient regulatory framework for labour relations with the category of employees under study. This gap needs to be addressed through

the adoption of a modern Labour Code, which should focus on regulating of atypical forms of employment in a separate chapter.

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#### **Олександр Гусаров,**

кандидат юридичних наук, голова Печенізької ОТГ, докторант, Харківський національний університет внутрішніх справ, проспект Льва Ландау, 27, Харків, Україна, індекс 61000, [oleksandrhusarov@ukr.net](mailto:oleksandrhusarov@ukr.net)

ORCID: [orcid.org/0000-0001-7493-1789](https://orcid.org/0000-0001-7493-1789)

## СУТНІСТЬ ТА ЗМІСТ ПРИНЦИПІВ ПРАВОВОГО РЕГУЛЮВАННЯ НЕТИПОВИХ ФОРМ ЗАЙНЯТОСТІ З ВИКОРИСТАННЯМ ЗАПОЗИЧЕНОЇ ПРАЦІ

**Анотація. Мета.** Мета статті полягає у встановленні кола, а також сутності та змісту принципів правового регулювання нетипових форм зайнятості з використанням запозиченої праці. **Результати.** У статті, спираючись на аналіз наукових поглядів учених та норм чинного законодавства, встановлено коло та розкрито зміст ключових принципів правового регулювання нетипових



форм зайнятості з використанням запозиченої праці. Відзначено, що сьогодні принципи правового регулювання запозиченої праці фактично не віднайшли свого законодавчого закріплення, що, безумовно, пов'язано з неякісним та неефективним регулюванням трудових правовідносин із досліджуваною категорією працівників, а отже, ця прогалина потребує усунення. З'ясовано, що сутність принципу юридичної відповідальності полягає у тому, що до юридичної відповідальності можуть притягуватися: а) запозичені працівники, які не виконують чи неналежним чином виконують свої трудові обов'язки; б) роботодавці – у разі порушення ними норм чинного законодавства, як трудового (по відношенню до працівників), так і цивільного, у разі порушення цивільно-правової угоди із суб'єктами, які є посередниками; в) приватні агентства з працевлаштування, які порушили норми чинного законодавства у відповідній сфері. Наголошено, що зростання ефективності праці забезпечує підвищення реального продукту і доходу, а тому воно є дуже важливим показником зростання підприємства. А отже, сутність окресленого вище принципу полягає у тому, щоб забезпечити якомога ефективніше використання трудових ресурсів у межах підприємства, чому, власне, і повинна сприяти така нетипова форма зайнятості, як запозичена праця. **Висновки.** Зроблено висновок, що сьогодні принципи правового регулювання нетипових форм зайнятості з використанням запозиченої праці фактично не віднайшли свого законодавчого закріплення, що, безумовно, пов'язано з неякісним та неефективним регулюванням трудових правовідносин із досліджуваною категорією працівників. Зазначена прогалина вимагає вирішення шляхом прийняття сучасного Трудового кодексу, у якому регулюванню нетипових форм зайнятості має бути приділено особливу увагу шляхом виділення окремого розділу.

**Ключові слова:** принципи, правове регулювання, нетипові форми зайнятості, запозичена праця.

*The article was submitted 17.10.2023*

*The article was revised 08.11.2023*

*The article was accepted 28.11.2023*