

LEGAL REGULATION OF THE RIGHT TO WORK FOR PEOPLE WITH DISABILITIES AT THE INTERNATIONAL AND NATIONAL LEVELS¹

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The article is devoted to the analysis of legal regulation of the right to work of people with disabilities. This article analyzes the stages of formation of international standards of the rights of people with disabilities in the sphere of employment, and puts emphasis on the measures that states should implement in domestic law to create equal opportunities, equal treatment, an integrated approach and social inclusiveness. Problematic areas of realization of labour potential are outlined and solutions are proposed as a result of the analysis of the legal regulation of the right to work of people with disabilities in the Republic of Belarus. The proposal to replace the system of workplace reservation for people with disabilities with a quota system, which has proved to be practically effective in a number of countries, has been substantiated. The article emphasizes that the basis for effective employment of people with disabilities is a balance between the guarantees of their rights in the area of employment relations and tax benefits, which encourage employers to provide employment to people with disabilities. The article formulates proposals to improve tax legislation in the Republic of Belarus.

Keywords: people with disabilities; the right to work; implementation of the labour potential; international standards of the right to work; domestic guarantees of the right to work; workplace reservation; job quotas; tax incentives for employers.

ПРАВОВОЕ РЕГУЛИРОВАНИЕ ПРАВА НА ТРУД ЛЮДЕЙ С ИНВАЛИДНОСТЬЮ НА МЕЖДУНАРОДНОМ И НАЦИОНАЛЬНОМ УРОВНЯХ

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Исследуется правовое регулирование права на труд людей с инвалидностью. Анализируются этапы становления международных стандартов прав людей с инвалидностью в сфере занятости и расставляются акценты на мерах, которые страны должны реализовать во внутригосударственном праве с целью создать равные возможности, равное обращение, обеспечить комплексный подход и социальную интеграцию. В результате рассмотрения правового регулирования права на труд людей с инвалидностью в Республике Беларусь обозначены проблемные зоны реализации

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трудового потенциала и предлагаются пути решения данной проблемы. Аргументировано предложение заменить систему бронирования рабочих мест для людей с инвалидностью системой квотирования, которая доказала свою практическую эффективность в ряде стран. Подчеркивается, что основой эффективной занятости людей с инвалидностью выступает баланс между гарантиями их прав в сфере трудовых отношений и налоговыми льготами, которые бы стимулировали нанимателя трудоустраивать людей с инвалидностью. Сформулированы предложения по совершенствованию налогового законодательства Республики Беларусь.

Ключевые слова: люди с инвалидностью; право на труд; реализация трудового потенциала; международные стандарты права на труд; внутригосударственные гарантии права на труд; бронирование рабочих мест; квотирование рабочих мест; налоговое стимулирование нанимателя.

Topic relevance

Population aging, new diseases emerging and spread of chronic diseases, environmental degradation, industrial accidents, increasing number of armed conflicts, natural and man-made disasters, illegal use of drugs and other factors are responsible for the increase in the number of people with disabilities². According to the World Health Organization, more than 1 bln people (nearly 15% of the world's population) have a certain form of disability [1]. The International Labour Organization (ILO) estimates that 386 mln of the world's population of working-age people are disabled. In some countries, the unemployment rate among people with disabilities is as high as 80 %. Employers frequently believe that people with disabilities are incapable of performing work [2]. In Europe, one of the wealthiest regions in the world, the employment rate among the fully employable population is 66 %, while among the partially disabled the rate drops to 47 %. Only a quarter of severely disabled people are employed [3].

The consideration of domestic regulation of the right to work for people with disabilities should be

based on a review of the international legal standards in the relevant area, which should in turn affect national legal systems. There is no comprehensive analysis of international legal instruments relating to aspects of employment of people with disabilities, nor of studies that could influence the formation of national policies of states towards the implementation of the labour potential of people with disabilities. For instance, O. V. Glikman investigates the protection of human rights in the labour field in the framework of the ILO without focusing on the problems of implementation of the labour potential of people with disabilities [4]. E. N. Yakovleva's research is the consolidation of the right to work of people with disabilities only in the ILO documents [5]. There is no comprehensive analysis of international legal acts relating to the employment aspects of people with disabilities which is capable of affecting the formation of national policies of states towards realizing the labour potential of people with disabilities.

Establishing the right to work of people with disabilities at the international level

Enforcement of the right of people with disabilities in the employment was addressed back in the first half of the 20th century in the documents of the ILO. The Workmen's compensation (accidents) convention of 1925 No. 17, and the Recommendation No. 22 on the minimum level of compensation for workers were adopted by the ILO to regulate the payment of compensation at the national level in case of labour capacity loss in the amount not lower than specified in the recommendations. ILO R043 – invalidity, old-age, and survivors' insurance recommendation of 1933 No. 43 has established compulsory insurance for listed persons employed, including those with modest assets, working on their own in the industrial, commercial or agricultural sectors.

Invalidity insurance (industry, etc.) convention of 1933 No. 37 and Invalidity insurance (agriculture) convention of 1933 No. 38, also testify to the standard-set-

ting actions of the ILO in employment and social rights of persons with disabilities.

Hence, ILO international legal acts have initiated the development of international labour and social rights standards for people with disabilities. The acts established compulsory social insurance in case of disability, vocational guidance and training, protection against discrimination at work, guarantees for workers in case of disability due to an industrial accident or an occupational disease, additional guarantees for employees with disabilities. The rights of persons with disabilities in the employment have further been regulated by international law after the World War II with the creation of the United Nations.

The International bill of human rights declares the human rights of persons with disabilities, without taking into account the special needs of this category of individuals. In the first decades of the United

²The term "people with disabilities" is used in the article, referring to people with persistent health disorders; individuals who while interacting with social and domestic barriers need special facilities for their ability to engage effectively in society on an equal basis with other citizens. This definition corresponds to the norms of the UN Convention on the rights of persons with disabilities of 2006 and reflects first of all the social approach, then the medical one.

Nations work, the rights of people with disabilities were not singled out as a separate group, there was no comprehensive document on the rights of people with disabilities in the employment relationship, but certain international regulations in the mentioned direction were adopted. For instance, the United Nations Economic and Social Council (ECOSOC) Resolution 309E (XI) on social rehabilitation of the physically disabled of 1950, ECOSOC Resolution 1921 (LVIII) on prevention of disability and rehabilitation of disabled persons of 1975, ILO Recommendation No. 99 on the recruitment of persons with disabilities of 1955, ILO Convention No. 159 on vocational rehabilitation and employment of persons with disabilities of 1983 aiming to ensure vocational rehabilitation and social integration of persons with disabilities (para 2 of Art. 1).

The Declaration on the rights of mentally retarded persons of 20 December 1971 adopted by the General Assembly of United Nations stated that persons with intellectual disabilities have the right to work productively or in any other useful capacity. On 9 December 1975, the UN General Assembly adopted the Declaration on the rights of persons with disabilities. In the employment policy it established the right of persons with disabilities to vocational training and rehabilitation, education, employment services and other services that will enable them to maximize their potential and accelerate their social integration or reintegration.

The next stage in the establishment of international legal regulation of the right to work of people with disabilities is a shift of emphasis from the proclamation of the right to work in international legal instruments to the necessity for states to take the required measures to implement the labour capacity of socially vulnerable population groups. This move, with a focus on the social dimension, has been consolidated by the United Nations General Assembly on 3 December 1982 with the adoption of the World programme of action concerning disabled persons (the WPA). “Disability is predetermined by the relationship between the disabled and the environment. It is revealed when they face cultural, physical or social barriers that prevent them from accessing different social life spheres that are accessible to other citizens”³. Disability is, therefore, a loss or limitation of the ability to participate in society on an equal basis with others. The WPA pays considerable attention to the aspects of restoring work capacity.

The WPA calls on “member states to promote the inclusion of persons with disabilities in the commercial marketplace through such measures as quota incentive schemes, preferential or targeted employment, loans or subsidies to small businesses, preferential contracts or production entitlements, tax benefits, contract compliance and other forms of technical or financial assistance to businesses employing workers with disabilities. Member states are encouraged to

support the development of technical facilities and to ensure that persons with disabilities have access to the assistance they need to perform their work” (para. 129). It should be noted, however, that the WRA is of a recommendatory nature.

The second part of the article is addressed to the analysis of the quota system and substantiation of the necessity of its adoption in the Republic of Belarus. It is also devoted to the tax benefits for the employers in order to stimulate them to employ people with disabilities. In particular, specific measures of the program to promote inclusion of people with disabilities in open labour markets will be studied.

On the basis of a comparative legal analysis of international regulations securing the right to work of people with disabilities, it can be observed that there has been a transition from the establishment of the rights of people with disabilities in labour sphere to the development of the requirements to society.

Similar recommended provisions for the active involvement of states in the commercial marketplace by persons with disabilities were set out in the Standard rules for the equalization of opportunities of persons with disabilities (Rule 7) approved by UN General Assembly Resolution 48/96 of 20 December 1993.

At this stage, it can be said that there are no legally binding international legal acts concerning aspects of employment of people with disabilities, which would be valid to determine the national policy of states in the implementation of the labour potential of people with disabilities.

The adoption of UN General Assembly Resolution 56/168 on 13 December 2006, the Convention on the rights of persons with disabilities (Convention) and the Optional protocol have changed the attitude of society to this socially vulnerable category of population, singling out their rights into a separate group, and in the international legal regulation of their rights the social aspect has prevailed over the medical one. The purpose and the content of the Convention is studied by R. M. Khakimov [6].

The Convention concerns labour and employment issues in Art. 27: “The states parties recognize the right of persons with disabilities to work on an equal basis with others, in an environment in which the labour market and working environment is open, inclusive and accessible to persons with disabilities”. States are committed to provide and enhance the work potential of persons with disabilities through the elimination of discrimination on the ground of disability, to protect the rights of persons with disabilities on an equal basis with other individuals to work in a fair and decent work environment, to improve labour market opportunities for their employment and professional advancement, to facilitate self-employment, entrepreneurship, co-operative development, to arrange comfortable workplaces for people with disabilities, etc.

³The World programme of action concerning disabled persons [Electronic resource]. URL: https://www.un.org/ru/documents/decl_conv/conventions/prog1.shtml (date of access: 12.05.2020).

Domestic regulation of the right to work of people with disabilities

As noted in the Global report submitted under the ILO Declaration on fundamental principles and rights at work, the general trend has been to adopt the laws with supportive obligations to prevent discrimination and promote equality, rather than the laws that simply prohibit discrimination [7]. Such an approach seems more effective in addressing hidden discrimination. Specific measures are needed to integrate people with disabilities into open labour markets. States are responsible not only for ensuring that people with disabilities have access to adequate social protection, but also for implementing measures that provide them with economic rights and opportunities to participate fully in the labour market. Without actionable measures to both protect and assist people with disabilities, no country in the world can achieve sustainable development-related goals [8].

The Republic of Belarus undertook obligations to ensure the rights of people with disabilities, including employment, ratifying in 2016 the UN Convention on the rights of persons with disabilities of 13 December 2006. According to 1 May 2020, the number of disabled people in Belarus is 574 555 [9].

Public relations concerning the prevention of disability, social protection of disabled people, their professional and labour rehabilitation are regulated by the Constitution of the Republic of Belarus, by the Law of the Republic of Belarus of 11 November 1991 No. 1224- XII “On social protection of disabled people in the Republic of Belarus”, by the Law of the Republic of Belarus of 23 July 2008 No. 422-3 “On prevention of disability and rehabilitation of disabled people”, by the Labour Code of the Republic of Belarus (LC), which provides a wide range of guarantees for people with disabilities in the sphere of labour relations. For instance, there is no trial period for recruitment (para 4 of the part 5 of the Art. 28, part 1 of the Art. 287 of the LC), overtime, night work, work during public holidays and weekends are allowed only with the consent and on condition that such work is not prohibited by individual rehabilitation programmes (part 3 of the Art. 120, part 5 of the Art. 117, part 5 of the Art. 287 of the LC), delegation of employees with disabilities on a business trip is allowed only with consent (part 6 of the Art. 287 of the LC), the duration of the general work vacation lasts 30 calendar days (part 2 of the Art. 155 of the LC, annex 2 to the Resolution of the Council of

Ministers of the Republic of Belarus of 24 January 2008 No. 100), replacement of work vacation with monetary compensation is not allowed (part 2 of the Art. 161 of the LC), in the event of a reduction in the number of employees with equal productivity and qualifications, people with disabilities are given the preferential right to remain at work (para. 3 of the part 2 of the Art. 45, part 8 of the Art. 287 of the LC), a fixed-term employment contract is to be terminated before the due date at the employee’s request in the event of a disability that interferes with the performance of work under the employment contract (para. 1 of the Art. 41 of the LC), the obligation of the employer to establish a part-time or part-time work week, if it is provided by an individual rehabilitation program (para. 2 of the part 2 of the Art. 289 LC), the duration of a work shift cannot exceed seven hours (para. 3 of the part 2 of the Art. 115 of the LC), prohibition to establish an irregular working day (para. 2 of the part 1 of the Resolution of the Council of Ministers of the Republic of Belarus of 10 December 2007 No. 1695 “On Categories of employees not established an unregulated working day”) and others.

Despite the guarantees of labour rights, social policy measures and the state programmes, the problem of employment of people with disabilities is an urgent concern in the Republic of Belarus. Belarus today has a high percentage of people with disabilities of working age, while the employment rate remains quite low. Of the more than 574 000 people with disabilities, only 18 % of working age are involved in professional activities, over 80 % are unemployed. Involvement in labour activity is especially low among the people with disabilities of the 1st and 2nd groups, unemployment in these groups reaches 90–95 %. Among those with the 3rd group of disability, about 50 % are employed. In comparison, 29 % of the 54 mln people with disabilities are employed in the USA, 40 % of the 5 mln people with disabilities in the UK and 80 % of the 60 mln people with disabilities in China [10].

According to the head of the department of labour, employment and social protection of Gomel City Executive Committee, A. P. Kluchynski, there are unemployed people with disabilities in Gomel in 2016 – 295 people, in 2017 – 256 people, in 2018 – 189 people, and in 2019 – 195 people.

Job quotas for people with disabilities

Although there are a number of guarantees of the rights of people with disabilities in the sphere of labour relations, it should be noted that there are certain problematic issues in the implementation of the right to work of people with disabilities. The workplace reservation system for employing people with disabilities that is currently in force in the Republic of Belarus is far from being efficient. Learning from the experience of developed European states, such as Germany for example, it has been shown that it is more economically

efficient to integrate people with disabilities into the work environment than to pay disability allowance, Belarus should endeavor to promote conditions for people with disabilities to fulfill their work potential.

It would be expedient to formulate proposals for effective employment of persons with disabilities on the basis of the balance between guarantees of their rights in labour relations and tax incentives that would encourage employers to take on people with disabilities.

The procedure of establishing reservations for employing citizens who are in special need of social protection and are unable to compete on equal terms on the labour market is regulated by the Regulation approved by the Decision of the Council of Ministers of the Republic of Belarus of 29 November 2006 No. 1595. According to the department of labour, employment and social protection of the Gomel City Executive Committee, the ratio of reservations for employing people with disabilities and the actual number of people contracted for the last four years is expressed in 2016 – 95/4; in 2017 – 95/4; in 2018 – 95/13; in 2019 – 95/20. This ratio indicates the inefficiency of the reservation system in the implementation of the right to work for persons with disabilities.

Upon the results of the inspection in 2019, the Prosecutor General's Office of the Republic of Belarus revealed serious shortcomings in the legislative execution aimed to protect the rights and legal interests of the disabled. It was emphasized that the reservation of the workplaces for people with disabilities should be more effective. It was found that the "reserved" workplaces for the disabled were frequently not vacant. In other instances, the vacant workplaces were not used due to medical contraindications for this category of employees. As a consequence, only a small percentage of the disabled were employed on the reservation account [11].

The solution to this issue is to set quotas for the employment of people with disabilities. It is planned that in 2020–2022 Belarusian specialists will study the possibility of establishing quotas, which is specified in the National action plan for the implementation of the Convention on the rights of persons with disabilities in the Republic of Belarus for 2017–2025. The mechanism of job quotas for organizations employing people with disabilities has proved to be effective as a measure for the implementation of the labour potential of this category of the population.

The percentage of job quota in respect of the total number of employees in an organization is generally set between 3 % and 6 % in different countries of the world. Thus, in France it is 6 %, in the Russian Federation from 2 to 4 %, in Germany – 5 %, in Ukraine – 4 %, in India, Spain, Ireland – 3 %. In different countries this indicator is set for organizations with 20 employees (Germany, Hungary, France), 50 people (Spain). In Russia, for employers with more than 100 employees, the entity of the Russian Federation establishes a quota for employing people with disabilities in the range of 2 to 4 % of the average number of employees. For employers with at least 35 employees and no more than 100 employees the entity may set a no more than 3 % quota [12].

Tax incentives for employers to promote employment of people with disabilities

Employees with disabilities exercise their labour potential in the context of the employer's additional responsibilities for the arrangement of working conditions and a decrease in performance due to physical (or mental) factors

Job quoting obliges employers to provide employment to a specified percentage of people with disabilities, to adapt the main and auxiliary equipment, to adapt technical devices to the individual capabilities of this category of employees. If the established standard is not met, the employer bears administrative responsibility. The draft of the law "On the rights of persons with disabilities and their social inclusion" proposed for public discussion on 23 October 2018, at the National legal internet portal (pravo.by), does not provide for measures of responsibility of employers in case of failure to respect quotas (Chapter 6). Nor does the draft act establishes a correlation between the standard of job quotas and the minimum number of employees of the organization, actually obliging to apply quotas when the number of employees is 34. This estimate is based on the quota for employing people with disabilities envisaged in the draft law at the rate of 3 % of the average number of employees. The Art. 54 "Entry into force of this law" introduces the job quotas from 1 January 2023.

The experience of job quota mechanism in the Russian Federation demonstrates that a number of employers avoid employing people with disabilities and prefer to pay a fine. In particular, obligation default by an employer to create or allocate jobs for employment in compliance with the established quota, as well as refusal by an employer to employ a person with a disability within the established quota leads to an administrative fine under part 1 of Art 5.42 of the Administrative Code of the Russian Federation in the amount of 5000 to 10 000 rubles. In order to circumvent the law, employers establish several organizations so that the average number of employees in each organization does not exceed the relevant threshold [13, p.139].

The Law of Ukraine of 21 March 1991 No. 875-XII "On the bases of social protection of persons with disability in Ukraine" establishes measures of responsibility for default of quotas, particularly, if the average number of working people with disability is less than established, the employer annually pays to the Fund of Social Protection administrative and economic penalties: the average annual salary at the corresponding enterprise for each job assigned for the employment of people with disability and not occupied by the last.

These circumstances demonstrate the need to balance tax incentives for employers that encourage the employment of people with disabilities, job quotas and effective accountability measures.

It is reasonable for Belarus, taking into account the number of able-bodied people with disabilities and economic realities in the economic sphere, to set a 3 % job quota, while the number of employees of organizations exceeds 100 people.

of the employee's activity. At present, the vast majority of organizations that could employ persons with disabilities do not have any additional advantages in this regard. It is therefore prudent to analyze the tax incentives provided

for an employer who employs people with disabilities, as such benefits can serve as an economic stimulus.

The analysis of existing tax incentives shows that relevant preferences are granted to employers if there are people with disabilities at least 30 % of the list of employees. Before the application of the Decree of the President of the Republic of Belarus of 31 December 2019 No. 503 "On taxation", that is, until 1 January 2020, the percentage was higher – 50 %.

So in Belarus the exemption from the profits tax in the employment of people with disabilities concerns only a minor number of employers – organizations with at least 30 % of employees with disabilities (here gross profit is exempt from taxation, except for profit received from trade, purchasing and agency) and public associations Belarusian Society of the Disabled, Belarusian Society of the Deaf and Belarusian Association of the Visually Impaired (exempt from taxation of dividends charged by unitary enterprises whose property is owned by these associations). Therefore, there is no benefit in terms of gross profit if the list of people with disabilities is less than 30 % of the average number of employees or profit is received from trade, purchasing and agency activities, and not all public associations of people with disabilities setting up unitary enterprises are accounted for dividends (for example, the non-governmental organization Belarusian Association of Assistance to Disabled Children and Young Invalids is the founder of four unitary enterprises where people with disabilities are employed).

In this respect, it is proposed not to impose income tax on dividends that are charged to public associations of people with disabilities by unitary enterprises, where the property owners are the public associations.

The expansion of this tax incentive will increase the income of public associations of people with disabilities, encourage the development of production and lead to an increase in jobs for people with disabilities [14, p. 84].

The above-mentioned criterion of the profit tax exemption is also hardly stimulating, as it is impossible to reach the level of employees of an organization with 30 % of the total number of employees with disabilities, except for specialized organizations. In order to introduce an effective incentive system for employers to employ people with disabilities, it is advisable to optimize the tax burden (on the payment of income tax), not providing for restrictions on certain businesses and the minimum threshold for its application with full tax exemption when the average number of employees with disabilities reaches 30 % or more. The above criterion of exemption from the profit tax is objectively hardly stimulating, as to reach the percentage of employees with disabilities in 30 % of the total number of employees, except for specialized organizations, which is almost impossible. In order to introduce an effective incentive system for employers to engage people with disabilities, it is advisable to optimize the tax burden (on the payment of income tax), which does not impose any restrictions on the types of business activities and the minimum threshold for its application. For this purpose it is required to establish a proportionally decreasing rate of the profit tax at a proportion increase of employees with disabilities with full exemption from the profit tax at the proportion of people with disabilities in the staff of 30 % and more.

Conclusions

The historical and substantive analysis of the international legal consolidation of the right to work of people with disabilities made it possible to highlight the following stages: the establishment of a number of rights of people with disabilities in the labour sphere in general international legal instruments, the elaboration of state requirements to guarantee the right to work of people with disabilities, the adoption of a special international legal instrument concerning the employment of people with disabilities, which imposes on states the obligation to formulate national policies.

International legal standards governing the right to work of people with disabilities suggest a quota system and tax incentives as a means of implementing the labour potential of the vulnerable category of society. Of more than 574 000 people with disabilities in Belarus, only 18 % of working age are involved in professional activities, over 80 % are unemployed. Involvement in labour activity is especially low among the people with disabilities of the 1st and 2nd groups, unemployment in these groups reaches 90–95 %. Among those with the 3rd group of disability, about 50 % are employed. As shown in this article, in the Republic of Belarus, there are good reasons to proceed from the currently ineffi-

cient system of reserving workplaces for people with disabilities to the quota system. It is reasonable for Belarus, taking into account the number of able-bodied people with disabilities and economic realities in the economic sphere, to set a 3 % job quota, while the number of employees of organizations exceeds 100 people.

In order to introduce an effective incentive system for employers to engage people with disabilities, it is advisable to optimize the tax burden (on the payment of income tax), which does not impose any restrictions on the types of business activities and the minimum threshold for its application. For this purpose it is required to establish a proportionally decreasing rate of the profit tax at a proportion increase of employees with disabilities with full exemption from the profit tax at the proportion of people with disabilities in the staff of 30 % and more. The implementation, in the Republic of Belarus, of a quota mechanism for workplaces for people with disabilities, based on economically justified incentives for employers in the sphere of taxation, will be a practical realization of the state obligations to create effective measures to integrate people with disabilities into open labour markets.

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