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RECOMMENDATIONS FOR PREVENTION OF LABOUR EXPLOITATION

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In the period since April 2019, when the recommendations of the working group for the prevention of labour exploitation of young people were formulated, until September 2020, when the final version of the extended recommendations covering the entire working population was created, the labour market was characterized by continuation the known forms of labour exploitation, and by existence, i.e. further escalation of other ways of labour exploitation. As before, labour exploitation occurs both due to the application of the legislation which allows for it, and due to the violations of labour regulations.

Deficiencies in the normative framework and the practice of its application that lead to labour exploitation of the widest circle of persons, this time were investigated having in mind not only the most important systemic problems, but also the problems that arise in various types of employment relationships.

The recommendations formulated in view of the aforementioned, long-term employment policies, general labour market trends, as well as new specific circumstances arising from the global emergence of COVID-19 virus, include a brief analysis of the problem and offer a concrete solution to mitigate the current situation or completely solve the situation. Some of them are focused on short-term solutions, while others require more complex and long-term steps in several sectors within the executive and state administration.

All the problem areas that contained the recommendations in 2019 were kept, primarily due to the fact that none of the analysed problems were solved. In addition, newly identified challenges that emerge in the labour market and that directly or indirectly bring workers into a position of labour exploitation have been added.

Bearing in mind the newly adopted Action Plan for Chapter 19 and the forthcoming activities for its implementation, which will inevitably lead to changes in certain regulations, some of which may be announced as key and systemic, this document should primarily be viewed as a proposal for a starting point in standardizing certain aspects of new labour relations, in a way that would enable all workers to exercise the right to decent work and prevent the largest number of observed mechanisms of labour exploitation.

In Belgrade, August 20, 2020

1. POSSIBILITIES FOR IMPROVING THE PROTECTION OF EMPLOYEES WHEN BEING SENT TO TEMPORARY WORK ABROAD

Having in mind a wide range of potential abuses, as well as the experience of the competent inspection authorities, the following measures are recommended:

1. It is necessary to introduce the obligation of the labour inspectorate to perform **extraordinary inspection** after receiving information from the Central Registry of Compulsory Social Insurance, when **more than one business entity registered at the same address sends employees to temporary work abroad,** due to potential abuse. These abuses are the most common when two or more business entities registered at the same address send employees to temporary work abroad with the same foreign employer. In that sense, the CRCSI Rulebook should be amended, so that the obligation to inform the labour inspection when detecting suspicious reports of this type is introduced, as well as to sign the Protocol on Cooperation between the Ministry of Labour, Employment, Veterans and Social Affairs and the Central Registry of Compulsory Social Insurance, which would regulate in more detail the above and similar situations in which CRCSI may provide the information relevant to the extraordinary inspection of employers to the labour inspectorate.

2. **Re-establishment of the obligation of the employer who sends employees to temporary work abroad to submit a notification on assigning the employees to temporary work abroad to the Ministry of Labour, Employment, Veterans and Social Affairs** in the Law on requirements for temporary assigning employees to a foreign country and their protection. It is also necessary for the Ministry of Labour to start publishing the mentioned notices again on the website of the Ministry of Labour.

3. **Publishing the list of employers where irregularities or unregistered employees have been identified during the temporary assignment of employees to work abroad on the website of the Ministry of Labour,** similar to the List of employers where persons are found working illegally.

4. **Introduction of the obligation of the employer to provide a certificate of application for compulsory social insurance** to the employee prior to assigning him to temporary work abroad, in accordance with the annex to the employment contract signed in accordance with the Law on requirements for temporary assigning employees to a foreign country and their protection.

5. **Including the period spent working abroad in the limited duration of fixed-term work engagement**, i.e. deleting or otherwise regulating the matter that is the subject of the provisions of Article 8, paragraphs 2 and 3 of the Law on requirements for temporary assigning employees to a foreign country and their protection.

2. POSSIBILITIES FOR IMPROVING THE SYSTEM OF SUPPRESSION OF ILLEGAL LABOUR

Given the prevalence of undeclared work in all age categories of working-age population, and the particular vulnerability of young people in this position, as well as the limited work they can do, and the lack of work experience and knowledge of their labour rights, the following potential improvements to the legal framework are recommended regarding the suppression of work without legal basis ("undeclared work"):

1. **A labour inspector may order an employer to hire a worker without an employment contract, or other labour contract, whom the inspector found at work.** This authorization should be expanded and regulated in detail in the Labour Law with a possibility that a worker who has not concluded a contract with the employer may independently address a labour inspector, outside the workplace, when the labour inspector can determine the existence of undeclared work based on the enclosed documents. This is significant primarily due to the inability of labour inspectors to find illegal employees with the employer (inspectors announce their visit and the employer removes such workers, or after the arrival of the inspector workers run off, or pretend there is some other reason for their presence in the employer's premises etc.), as well as due to the fact that illegal workers often do not want to declare their status during the inspection, for fear of retaliation by the employer, while the employer often gives various reasons for the non-compliance with the obligation to keep the employment contract at workplace. At the same time, these workers often have very extensive documentation proving their regular presence at work and participation in the work process (attendance lists - for coming to and leaving work, lists of work performance, other signed documents, such as receipts etc.; it happens sometimes that workers who work without a contract with the same employer are willing to give a statement about each other regarding the employment status they have) so this way of suppressing the undeclared work should be enabled, which would certainly benefit both labour inspectors and the workers in that situation.

2. **Introduction of a special misdemeanour penalty if the employer does not fulfil the order of the labour inspector to hire an illegal employee.** This penalty should be specifically standardized in the misdemeanour provisions of the Labour Law and would be calculated per undeclared employee, regardless of whether the labour inspector filed one or more misdemeanour charges in that regard. Misdemeanour penalties for the employers for failure to declare workers should be prescribed without the possibility of reduction below the legal minimum, especially for repeated offenses.

3. **Introduction of the possibility for the labour inspector to order re-employment of the worker who worked illegally (by signing a permanent employment contract) and with whom the employer terminated the undeclared employment relationship**; explicitly standardizing the possibility that a worker who claims to have worked illegally may, within 60 days from the date of termination of undeclared work, initiate a labour dispute in order to determine the employment status and return to work due to illegal dismissal (procedural position of this person would be equal to Article 191 of the Labour Law). This is also important because in practice neither the labour inspection nor the courts are sympathetic to the illegal worker who seeks to determine his employment status after the employer "dismisses" him, i.e. terminates the undeclared employment relationship that existed.

4. **Introduction of the right to compensation in the amount of 12 average salaries at the country level or 12 average salaries, which an employee would have received if he had worked** (depending on what is better for the employee) **if the employer, after an order of the labour inspector, does not conclude a contract with the employee, but terminates their undeclared employment relationship**. This right would relate to the employee whose undeclared work was terminated after the labour inspector had ordered the employer to conclude a permanent employment contract with him, as a compensation for damages (alternative: if the right of an employee to initiate a labour dispute is adopted, then this compensation could be seen as the right to substitution of reintegration, in terms of Article 191 of the Labour Law).

5. **Unannounced inspections by labour inspectors must be the rule in case of suspected undeclared work**. Announcements make them pointless. Also, the Law on Inspection Supervision should be re-examined in the part that introduces the announced controls as a rule - it certainly applies to regular inspections, but it can in no way apply to extraordinary inspections. The International Labour Organization's Committee for the Application of Standards concluded at a conference in June 2019, that the announcement of supervision violates ILO Convention 81 on Labour Inspection. Although the Republic of Serbia had a short deadline to react by adopting amendments to the Law on Inspection Supervision and enabling unannounced controls by labour inspectors, even a year after the deadline, the state authorities have not responded to this international obligation.

3. RESPONSIBILITY OF EMPLOYMENT INTERMEDIARIES FOR THE VERACITY OF ADVERTISED WORKING CONDITIONS AND IMPLEMENTATION OF SUPERVISION IN THE EMPLOYMENT PROCEDURE

Bearing in mind a large number employers' abuses when advertising vacancies, both through mediation of the National Employment Service, and through direct advertising or mediation of other employment agencies, as well as systemic shortcomings that do not provide for more responsible behaviour of the employment intermediaries, the following recommendations are highlighted that are directed to the necessary changes in the regulations and practices in order to reverse the negative trend of fraudulent advertising, which results in the exploitation of persons.

1. **Determining the responsibility of the National Employment Service for the legality of advertisements it publishes**

Possible measures are:

- mandatory verification of the legality of advertisements (employers cannot automatically place advertisements on the NES website and advertise vacancies in any other way). There is an advertisement form approved by the Ministry of Labour, Employment, Veterans and Social Affairs;
- obligation of the employment intermediary to warn the employer of the illegality of the advertised employment conditions;
- termination of cooperation with the employers (up to one year) who do not respect the warning of the employment intermediaries, and continue to publish (or try to publish) advertisements of illegal content, or otherwise violate the obligation to fully and truthfully advertise working conditions;
- notifying the market inspectorate of illegal advertising.

2. **Determining the responsibility of the employer and the National Employment Service for the veracity of the advertised working conditions**

Possible measures are:

- the employer and the NES should conclude an employment mediation contract;
- the jobseeker and the NES should conclude an employment mediation contract;

- if the working conditions are unlawful, disciplinary proceedings must be initiated against the employment agent or another person who facilitated such advertising in accordance with the Labour Law;
- the employer should be liable for the misdemeanour if he offered to the employee working conditions that are not in accordance with the advertised. In the Law on Advertising, connect violations of the obligation from Article 6 of the Law (currently it can be requested by a decision that the employer corrects the working conditions that exist in relation to the advertised). There is already a misdemeanour liability for Article 11 of the same Law, but it is not clear whether it can be applied in this situation. Proposal: link these two situations (6 and 11) and stipulate the misdemeanour liability for Article 6, by phrasing Article 78, paragraph 1, item 2) of the Misdemeanour Law as follows: "2) acts contrary to Articles 6 and 11 of this Law".

3. 3. Supervising employment mediation abroad

Possible measures are:

- an employment agency contract should be a mandatory element of the contracting services with employment agencies; the contract should stipulate the working conditions that will be provided to the person seeking a job abroad;
- obligation of the agency should be to inform the NES about the employment mediation abroad and to submit the mediation contract with the job seeker and the contract concluded by the employee and a foreign employer with mediation of the agency.

4. **Amend the Law on Employment and Unemployment Insurance so that an employer whose accounts are blocked for more than 30 days, which can be checked in the relevant NBS records, may not place advertisements through the NES, given that the account block indicates that the employer does not meet the obligations regarding the payment of wages and contributions. The same measures should apply to the employment agencies.**

5. **Ban youth and student cooperatives from registering as employment agencies. Currently, two youth cooperatives have licenses for employment mediation, and there is a growing tendency. Also, it should be banned that a person who has lost the license for employment mediation participates in establishment of a student-youth cooperative.**

6. **Explicitly ban youth and student cooperatives from sending their cooperative members to work temporarily abroad. This is also currently prohibited, as the law allows for referral of only employed persons and the persons engaged through cooperatives are not employed, however, the prohibition should be explicitly**

emphasized in the law given the negative practices observed, as well as potential changes in the mode of work of the cooperatives (see the section on suppression of abuse in the field of youth-student cooperatives).

7. A misdemeanour agreement must have the force of an enforceable document - Article 41 of the Law on Enforcement and Security must me amended so that a misdemeanour agreement is an enforceable document, in accordance with the Misdemeanour Law. Thus, it is proposed that a new item 8) in Article 41 of the Law on Enforcement and Security is added, which would read: "8) misdemeanour agreement, in accordance with the law governing misdemeanours ", while the current point 8) would become point 9).

4. RECOMMENDATIONS REGARDING SUPPRESSION OF ABUSE IN THE FIELD OF YOUTH-STUDENT COOPERATIVES

In the activities of student-youth cooperatives, many irregularities have been noticed that affect the position of employed persons through cooperatives, but also inevitably lead to labour exploitation, constant violation of laws and other regulations and circumvention of the principles of cooperatives. Having in mind these circumstances, a brief elaboration of the existing normative and factual situation and some conclusions and recommendations follow.

1. 1. Normative framework for organizing student-youth cooperatives

1.1. General Rules of youth and student cooperatives have been declared unconstitutional and illegal

General Rules of youth and student cooperatives (Official Gazette of the FRY, No. 20/98 and 7/2000 - Decision of the SUS, Official Gazette of Serbia and Montenegro, No. 1/2003 - Constitutional Charter and Official Gazette of the RS, No. 47/2010) have lost the legal basis of their existence after enactment of the Law on Cooperatives (Official Gazette of RS, No. 112/2015). The Law on Cooperatives does not provide for the existence of General Rules governing the legal field of cooperatives. This is logical, because the General Rules were written for the previous legal solution when there was one cooperative union; now the Law on Cooperatives allows for more of them, and each cooperative union can make its own rules.

Also, there is no basis for the General Rules to regulate issues because it was adopted on the basis of public powers of the cooperative union that do not exist in the current Law on Cooperatives. Article 2 of the General Rules stipulates that "General Rules are an act adopted for the implementation of legally prescribed public authorisations". The Law on Cooperatives, however, does not provide for public authorisations of this type.

Decision of the Constitutional Court IUo-1231/2010 of 20/02/2018 (Official Gazette of RS, No. 15/2018) determined that the General Rules of youth and student cooperatives are not in accordance with the Constitution and the Law, and they have ceased to apply. It is very disturbing that, regardless, the text of the General Rules still exists in the databases of valid regulations, and that student-youth cooperatives apply them in their daily work.

Having in mind aforementioned, the area of activity of the student-youth cooperatives should be regulated by another act. This is especially important bearing in mind that the issue of activities of these cooperatives is currently practically regulated only by a few provisions of the Law on Cooperatives, which are far from sufficient to ensure the performance of cooperatives in a manner consistent with the law and the idea of the cooperatives system.

1.2. Law on Cooperatives

The Law on Cooperatives should undergo several changes that are necessary in order to protect cooperatives' members from abuse and to stop their labour exploitation contrary to the law and the meaning of cooperatives.

Article 11, paragraph 8 of the Law on Cooperatives reads: "Student-youth cooperatives, in an organized manner provide their members with temporary and occasional work with legal entities in accordance with the regulations governing the field of work, in order for them to acquire additional funds for education and meet basic social, cultural and other personal and common needs.".

Article 23, paragraphs 5 and 6 of the Law on Cooperatives reads:

"The status of a member of a student-youth cooperative can be acquired by a person who is not younger than 15 years of age or older than 30 years of age."

"A member of a student-youth cooperative under the age of 18 may perform temporary and occasional work under the conditions prescribed by the provisions stipulating the rights, obligations and responsibilities arising from the employment relationship, i.e. on the basis of work."

If a review of the current situation is made, and if Article 23 paragraph 5 of the Law on Cooperatives is interpreted, there are three legal situations:

- work of children aged 15-18 years,
- work of students aged 18–26 years and
- work of other persons aged 26–30 years.

According to our regulations, the first two categories are exempt from paying taxes and social security contributions, and in that sense they represent the most interesting groups for labour exploitation. If compared, a 25-year-old student is by far cheaper for a cooperative or an employer than a 27-year-old student because the latter is liable for all contributions, and in that sense, from the point of view of contributions, there is no

difference between his work and the employment. If two students did the same job, one is 25, the other 27, they would be paid unequally, because the 27-year-old would have to pay taxes and contributions, which the 25-year-old would be exempt from, so he would get less money in the final payroll. This issue is especially interesting from the point of view of the value of these contributions, i.e. whether it is "worth" for someone to "pay" his contributions for the three days he worked. It is almost certain that a large number of students would accept not to pay contributions for a job that lasts so short, and get more money. Precisely for the reason of not making a difference that can be understood as discriminatory, the proposal is to reduce the years of age from 30 to 26, as is the duration of regular schooling. This is in line with the regulations on social insurance, as well as the Law on Personal Income Tax (Article 13 paragraph 2: "For the purposes of the present Law, wage/salary shall also be understood to mean the remunerations and other receipts earned on the basis of temporary and occasional work done on the basis of contracts made with employers directly, as well as on the basis of contracts made through youth and student cooperatives, with the exception of those with persons up to 26 years of age who are attending secondary, college and university education establishments").

Regular schooling means regular and continuous fulfilment of obligations stipulated by the study program curricula for the purpose of professional development of students, during full-time studies, regardless of whether the student is enrolled in the budget or self-financing part of the list, at a private or a faculty founded by the state and regardless of the level and type of studies. It is important that a person attends school continuously, that he fulfils his study obligations within the given deadlines (it does not matter whether the average grade is 6 or 10).

Also, the proposal is that Article 23, paragraph 7 of the Law on Cooperatives reads: "A member of a student-youth cooperative who performs temporary and occasional jobs that have the characteristics of an employment relationship, has all the rights and obligations arising from the employment relationship".

Participation of student-youth cooperatives in tenders should be explicitly prohibited, as they by their nature cannot hire workers for permanent jobs, as well as bearing in mind that the tax reliefs given to cooperatives automatically place them in a more favourable position compared to other potential bidders. In addition, tenders that apply exclusively to the bidders that are student-youth cooperatives - and this practice is already well documented and frequent – should be prohibited. In this regard, advertising of jobs that last longer than the maximum duration of the contract for the performance of temporary and occasional jobs should also be prohibited - this is obviously illegal advertising.
Finally, the proposal is to ban student-youth cooperatives from sending their members to work abroad. Although this is currently prohibited by the very nature of temporary and occasional contracts, there is a contrary and legally unfounded practice of student-

youth cooperatives. This ban should remain even if temporary and occasional jobs are considered a form of fixed-term employment in the future.

1.3. Amendments to the Labour Law

It is necessary to amend the following articles in the Labour Law:

Article 197 reads: "An employer may perform work that is such in nature that it does not last longer than 120 working days in a calendar year..." The temporary nature of the engagement cannot be such as to extend for a period longer than a few months. Hence, the extension of the potential duration of the contract for temporary and occasional work to 120 days, and even longer according to some proposals that appeared in public, cannot correspond to the nature and character of this contract, i.e. the nature of the work for which it is concluded. Any duration of work longer than three or four months requires conclusion of an employment contract.

Attention must also be paid to Article 198: "An employer may, for the performance of temporary and occasional work, conclude a contract with a person who is a member of a youth or student cooperative in accordance with the regulations on the cooperatives." There is a rational space left here for youth and student cooperatives to be regulated by a special law or bylaw. However, it can no longer be regulated by General Rules, for the reasons set out above, so it cannot be interpreted as a legal basis for the adoption of some new general rules that would apply to all cooperative unions (since the Law on Cooperatives itself provides for the possibility of establishing several cooperative unions).

1.4. Law on Personal Income Tax

Control over the work of cooperatives should start from the Tax Administration, according to the Law on Tax Procedure and Tax Administration, because thus the work of persons older than 30 years of age through a cooperative can be effectively prevented. The Tax Administration in the control procedure knows whether a person who performs activities through youth and student cooperatives is older than 30 years or not, through the unique personal identification number (JMBG), and accordingly it may initiate misdemeanour proceedings. In that sense, an internal *Instruction for the procedure for issuing a misdemeanour order, submitting a request for initiating a misdemeanour procedure and for the procedure before the misdemeanour* court was issued. The tax authorities should be authorized to impose fines on cooperatives, as business entities, if their founders or members are older than 30 years (or 26 years, according to the proposal of the working group).

1.5. Law on Higher Education

The Law on Higher Education does not recognize the area of student-youth cooperatives. At the same time, it does not provide any benefits for students who work and study at the same time. The problem is relevant as it is known that a large number of science students often, at the final year of undergraduate studies or during master studies, try to find a full-time job. The Bologna process, mandatory attendance of lectures and seminars often do not allow for flexibility, because this area is not regulated.

2. 2. Proposals for improving the system of youth employment

2.1. Version 1

In this version, the starting point is to keep the term and the expression "youth and student cooperatives", and that, as before, these tasks are performed by cooperatives with possible corrections of the existing legal solutions. Some of them are listed in the text above. The emphasis is on the application of regulations and control of their implementation.
It is also important to emphasize that the Action Plan for Chapter 19 envisages the termination of work outside an employment relationship (measure 1.2.4 in the framework of harmonization with Directive 1999/70 / EC on the framework agreement on fixed-term employment), which should also terminate the contract for temporary and occasional jobs, or reduce them to one of the versions of the fixed-term employment. Both of these solutions are appropriate for raising the quality of the working position of cooperatives' members, so they should be welcomed and it should be ensured that the changes in the Labour Law are complemented by adequate and simultaneous amendments to the Law on Cooperatives. A mere denotation of a cooperative member as an employee, i.e. employed person, would prevent most of the mechanisms of labour exploitation that take place, but would not lead to its eradication without the introduction of strict control over the work of the cooperatives, which currently does not exist.

2.2. Version 2

In this version, the starting point is to treat school students' work and college students' work separately. There is no single concept for youth and student cooperatives.

Work of school students could be called a "contract on occasional work of school students." Employment mediation in this situation would be performed by the high schools for their students. The Ministry of Labour and the Ministry of Education should adopt the Rulebook on Mediation in School Students Employment, based on the Law on Employment and

Unemployment Insurance (which needs to be amended). The contract would be signed by the minor with the co-signature of their legal representative and the employer. The contract would contain mandatory elements: the amount of salary, limited working hours, vacations and leave, supervision, etc. Important: the school student could be engaged only during the winter, spring and summer holidays, the duration of which is prescribed by the Minister of Education for each calendar year.

The work of college students aged 18–26 would be under the auspices of student centres. It is necessary to amend the Law on Higher Education, specifically Article 69, where each university would have its own student centre. The procedure would be regulated by the Rulebook on Mediation in College Students' Employment, according to which an employment contract would be concluded for temporary and occasional jobs (it is necessary to amend the Labour Law and envisage a new type of employment that would apply to students). Employed students would be protected by the norms of labour legislation regarding vacations, working hours and so on, but the wages they earn would not be considered a taxable income.

5. RECOMMENDED CHANGES IN THE REGIME OF TEMPORARY AND OCCASSIONAL WORK, INCLUDING SEASONAL WORKERS

Given the current massive abuses of temporary and occasional contracts, the fact that this regime of non-employment relationship is being abused, both in the private and public sectors, and that it is an outdated, comparatively exceptional concept leading to the collapse of employment rights of engaged persons, it is proposed that - in accordance with the Draft Action Plan for Chapter 19 and the process of harmonization of labour law with the EU acquis communautaire - the contract for temporary and occasional work is considered a form of fixed-term employment in the future standardization, whereby its specificity would be in the extremely short duration of such engagement. Necessary amendments to other laws (Law on Contributions to Compulsory Social Insurance, Law on Simplified Work Engagement on Seasonal Jobs in Certain Activities, etc.) were not considered, the changes of which, i.e. potential repeal, would have to be implied if the proposed amendment to the Labour Law is adopted.

It is also important to emphasize that the Action Plan for Chapter 19 envisages the termination of work outside employment (measure 1.2.4 in the framework of harmonization with Directive 1999/70 / EC on the framework agreement on fixed-term employment), which would also abolish the contract on temporary and occasional jobs, or reduce it to one of the versions of the fixed-term employment.

Changes in the legal nature, i.e. the abolition of contracts for temporary and occasional work as a form of work outside employment, and its eventual regulation as a subtype of fixed-term employment, would eliminate the need for the Law on Simplified Work Engagement on Seasonal Jobs in Certain Activities (Official RS Gazette, No. 50/2018). According to this Law, seasonal workers are in a special regime of work on temporary and occasional jobs, which allows significantly longer working hours compared to the standards of the Labour Law and international standards (seven days a week for 12 hours a day) with a minimum break of 30 minutes only if they work eight hours a day or longer. Also, the employment status of seasonal workers is extremely uncertain, having in mind the so-called verbal employment contract, which does not even provide the minimum of legal security and allows possibilities of great abuses. In the Law itself, there is also an abuse of the institute of minimum wage, which was used contrary to its purpose from the Labour Law. These shortcomings speak in favour of the termination of this law, which will be necessary if seasonal workers find themselves in the status of employed persons after the aforementioned harmonization of the Labour Law with Directive 1999/70 / EC.

1. In the Labour Law, Article 37 paragraphs 1 to 3 are amended, and read:

An employment contract may be concluded for a definite period of time, for the establishment of an employment relationship whose duration is determined in advance by objective reasons that are justified by the deadline or the execution of a certain job or the occurrence of a certain event, during existence of these reasons.

For the performance of temporary and occasional work, which does not last longer than 90 days during a calendar year, the employer may conclude a fixed-term employment contract for the purpose of performing temporary and occasional work.

The employer may conclude a maximum of two employment contracts referred to in paragraph 1 of this Article, on the basis of which the employment relationship with the same employee is established for a period that cannot be longer than 24 months with or without interruptions.

2. Articles 197 and 198 of the Labour Law are removed.

6. RECOMMENDATIONS FOR AMENDING CRIMINAL LEGISLATION

Given the experience of the inspection authorities and the organization ASTRA, as well as avoidance of criminal sanctions for violations of labour and social legislation in practice, changes, which would include at least two interventions under the Criminal Code, are necessary.

1. **Amendment of the criminal offense under Article 163 of the Criminal Code, so that a special form of violation of employment rights and social security rights is determined more precisely, through non-payment of salaries.**

Violation of labour rights and social security rights.

Article 163

Whoever deliberately fails to comply with law or other regulations, collective agreement and other general acts on labour rights and on special protection of young persons, women and disabled persons at work, or on social insurance rights and thereby deprives or restricts another's guaranteed right shall be punished with a fine or imprisonment for up to two years.

The penalty under paragraph 1 of this Article shall be imposed on a person who knowingly fails to pay three or more salaries within a period of six months.

There is no criminal offense referred to in paragraph 2 of this Article if the non-payment of wages occurred due to the bankruptcy of the employer.

The penalty under paragraph 1 of this Article shall be imposed on a person who provides incorrect data in the calculation of salary.

The proposal related to the amendment of this criminal offense reads:

The Labour Law should regulate the payment of wages exclusively through a bank account.

2. Introduction of a new criminal offense that would recognize, incriminate and sanction the illicit practice of employers that leads to labour exploitation of persons.

Labour Trafficking

Article XXXX.

Whoever fraudulently advertises, misrepresents, conceals facts, misleads or misleads in terms of working conditions, by abuse of authority, trust, relationship of dependence, retention of identity documents or use of difficult opportunities of another, and in order to obtain illegal property gain for himself or others, exploits another person shall be punished by imprisonment from 2 to 11 years.

For the offence under paragraph 1 of this Article, a person who is a participant, or who must have known he were a participant, in the commission of the criminal offense under paragraph 1 of this Article shall be punished by imprisonment for 1 and 10 years.

For the offence under paragraph 1 and paragraph 2 of this Article committed against a minor, the perpetrator shall be punished by imprisonment for a term not less than four years.

If, due to the offence under paragraphs 1 to 3 of this Article, a serious bodily injury of a person occurred, the perpetrator shall be punished by imprisonment for 5 to 10 years, and if a serious bodily injury of a minor occurred due to the offence under paragraph 3 of this Article, the perpetrator shall be punished by imprisonment for a term not less than 7 years.

If, as a result of the offence under paragraphs 1 to 3 of this Article, one or more persons died, the perpetrator shall be punished by imprisonment for a term not less than 10 years.

Whoever engages in the commission of the criminal offense under paragraphs 1 and 2 of this Article, or the offense is committed by a party, shall be punished by imprisonment for a term not less than 5 years.

If the offence under paragraphs 1 and 3 of this Article is committed by an organized criminal group, the perpetrator shall be punished by imprisonment for a term not less than 9 years.

The consent of a person to labour exploitation does not affect the existence of the criminal offense under paragraphs 1 and 3 of this Article.

NOTE: The term "labour exploitation" used in this Article is not defined by the Criminal Code and in assessing what labour exploitation is, experiences of application and interpretation of the provisions of the Criminal Code regarding the criminal offense of "Trafficking in Human Beings" will be used.

7. POSSIBILITIES FOR IMPROVING THE FIXED-TERM EMPLOYMENT

Fixed-term work has lost its original purpose, provided by the Labour Law. Although a fixed-term employment relationship may, on the basis of Article 37 of the Labour Law, be concluded exclusively for the purpose of performing work "whose duration is determined in advance by objective reasons that are justified by the deadline or the execution of a certain job or the occurrence of a certain event, during existence of these reasons ", in practice, a fixed-term employment contract is concluded almost as a rule. Often, a malicious and false interpretation of the provisions of Article 37 paragraph 4 item 4) is used, according to which a newly established company can conclude a fixed-term employment contract with an employee for up to 36 months, without any restrictions. This provision is an exception but only in terms of the duration of fixed-term work (36 instead of the general rule of 24 months) and not in terms of the reasons for concluding a fixed-term employment contract. However, the Labour Inspectorate does not control this type of illegal conduct, i.e. it interprets the Labour Law in the same way as the unscrupulous employers, which leads to an absurd solutions in practice that all, or almost all, employees of one employer have fixed-term employment contracts. This is especially controversial in cases of foreign direct investment, where hundreds of new jobs are opened - and all of them are seemingly uncertain and only last for a certain period of time.

How does this illegal behaviour of the employer affect labour exploitation? By using the uncertainty of the extension of employment as a blackmailing potential, so employees "voluntarily" waive some of their rights, including those that cannot be waived by law. Contracts with employees are concluded for a month to three months - the law does not recognize the limits in the dynamics and number of contracts that can be concluded successively as long as their total duration is up to 24 months, but this is the most common practice. Thus, employees are brought into a state of constant worry whether they will keep their jobs. If the fixed-term employment contract expires, the employment is terminated automatically, which means that there is no need for a dismissal procedure or the existence of a legally permitted dismissal reason. There is no notice period, nor does the employee have any right to terminate the employment (no severance pay or any other compensation). Employers use this position to force employees to work in the conditions that are different from those agreed, and often below the legal minimum. This leads to the practice where employees waive the working time restrictions (work overtime longer than the legal maximum), the right to daily and weekly rest (working hours are such that the minimum hours of rest between two working days or two working weeks are not respected) and even annual leave (which they are not allowed to request and do not object to the employer's disregard of this right, even though the law gives them the

opportunity to seek compensation), the right to paid overtime work (which is either not paid or fewer working hours are paid compared to what the employee actually did), and so on. Particularly dangerous are the situations in which employees waive their rights to safety and health protection at work and perform work in conditions that are harmful to health or are life-threatening. Finally, they also waive collective rights - the right to strike and the right to get organized and act in unions are in fact prohibited. All of the above places employees in an extremely difficult factual position, without adequate and effective protection, so that there are cases of continuous and planned exploitation.

Having in mind the above, it is recommended to amend the Labour Law so that the fixed-term employment is reduced to the level of an exception, as provided and as appropriate for its nature:

- First of all, the practice of tolerating the conclusion of fixed-term employment contracts with employees must be stopped, even when the conditions for such an action are not met. Currently, there is a tendency not to employ for an indefinite period, with an active and passive support of state bodies and institutions, which must stop. First of all, it is necessary for both the labour inspection and the courts to take clear positions that fixed-term employment contracts are inadmissible when the conditions provided for in Article 37, paragraph 1 of the Labour Law are not met.
- It is necessary to limit the duration of fixed-term employment to 12 months, as was the case before the amendments to the Labour Law of 2014. The exceptions that now exist in Article 37, paragraph 4 of the Labour Law should be reduced to the most basic, namely to those that were clearly defined as necessary in the previous period, in legislation or judicial practice - such as the replacement of absent workers and employment relationship with foreigners.
- It is necessary to limit the possibilities of concluding successive employment contracts with the same person, not only in terms of the total duration (proposal 12 months) but also in terms of the number of contracts concluded. There are different solutions in comparative law, but it seems logical that an employer cannot conclude more than two successive fixed-term contracts. If it happens that the need for the work of an employee is of such a nature that it is necessary to extend the contract for the third time, it must be considered that there is a continuous need to perform a certain job, i.e. that the employment contract must be concluded for an indefinite period.
- It is necessary to limit the duration of work to a certain time according to the type of work performed and not according to the personality of an employee. Current solution allows that after the expiration of 24 months of work of one person for certain jobs, another person is employed for the same jobs for a certain period of time, which resets the term of the fixed-term employment contract to zero. According to a new normative solution, such a situation would not be possible even after the expiration of the maximum period of fixed-term employment, the employer would have to employ a

person for an indefinite period, regardless of how many persons previously performed those jobs (during the maximum legal duration of fixed-term employment).

- It is necessary to develop a mechanism for the protection of an employee whose fixed-term employment contract has expired, and the need for his work still exists. In that case, the employer should be obliged to explain why, instead of the previous employee, he has hired another person - this is currently one of the basic mechanisms of abuse of the existing vague legal solution.

8. POSSIBILITIES FOR IMPROVING EMPLOYMENT THROUGH AGENCIES FOR TEMPORARY EMPLOYMENT

The Law on Agency Employment (Official Gazette of the RS, No. 86/2019) formalized the position of agency employees (so-called "leased employees") who worked for more than ten years in an unregulated area of labour law, contrary to the law but with an active role of the state permitting such a factual situation. Adoption of the Law and the beginning of its implementation on March 1, 2020 marked the end of the period, but did not bring about a satisfactory regulation of the position of agency employees (seconded employees).

The same restrictions that have already been analysed in the previous text and which apply to the general fixed-term employment regime, also apply to the seconded employees who work through agencies for a definite period. In addition, these employees are in an especially difficult position based on the fact that the agency extends their fixed-term employment contracts while they work with the employer, who is a client, which inevitably leads to a conflict between the Labour Law and the Agency Employment Law. For example, it is debatable whether the duration of the fixed-term employment of 36 months is possible if the agency is a newly established company, if the employer is a newly established company, or is it necessary for both of them to meet this condition? In such vague situations, most often it is acted on the expense of the seconded employee, while the supervisory authorities (labour inspection) are not sure how to interpret the inconsistent legal norms.

Seconded employees who are permanently employed are only seemingly in a better position. Based on the solution from the Law on Agency Employment, their status can also be marked as precarious because it is very easy and there is almost no financial obligations by the agency (and by the employer-client). This is particularly easy if the institute of "redundancy" is used between two assignments of an employee (Article 24). Such standardization not only effectively equates the seconded permanent employees with the assigned fixed-term employees in terms of the uncertainty of the employment relationship endurance, but it also legalizes the assignment of the employee as a permanent employment status, although by its nature it should be temporary. Finally, the fact that the permanent employment relationship does not carry special financial obligations of the agency to the seconded employee and at the same time allows the abuse of the legal solution which circumvents the provisions of the law on the seconded employee, puts these seconded employees in a particularly difficult position, which inevitably leads to labour exploitation at the minimum of legally guaranteed rights, regardless of the type of

work they perform and the value of the work they invest with the employer-client.

The events during the state of emergency caused by the COVID-19 virus epidemic, especially in March and April 2020, showed extreme vulnerability of this category of employees - they were, only a few weeks after the implementation of the Agency Employment Act, in the first groups of dismissed workers, and this tendency continued with employers who dismissed their employees in later months. This was primarily due to the fact that the tripartite relationship between the agency, the employer-client and the seconded employee is regulated in such a way that there is no direct link between the seconded employee and the employer-client where the employee works, which is completely contrary to the classical understanding of the employment relationship, and which also puts the employer-client in an extremely favourable position when it comes to the treatment of these employees, which is formally permitted but in fact exploitative and immoral. Most of the risk due to illegal actions is taken by the agency, which is quite visible in the Law on Agency Employment - in case of illegal dismissal, the assigned employee can sue the agency but not the employer-client (Article 23).

Having in mind the obligation that the agency work is standardized in the labour legislation of the Republic of Serbia as it is on the international level, and which makes its complete abolition currently impossible, it is recommended that more attention is paid to the protection of the seconded employees and the possibilities of limiting agency work.

Accordingly, it is especially recommended:

› Complete prohibition of agency work for minors.

› Complete prohibition of using the services of employment agencies for temporary employment by all public budget beneficiaries.

› Prohibition of work through agencies for the listed professions in which there is an increased risk to the life and health of employees, as well as those jobs where it is necessary for the employer to perform complex and lengthy additional training of the employees, so that they perform the job properly.

› Introduction of a general limit of 10% of seconded employees in relation to the total number of all employed persons with the employer-client, regardless of the nature of the secondment contract (fixed-term or permanent employment) or the number of employees at the employer-client (with the potential exception of small companies who have up to 20 employees with any employment contract).

› More detailed and precise regulation of collective rights of seconded employees, so

that the regulation is not only nominal but is expected to be used in practice in order to improve their employment position with both the agency and the employer-client.

› Improving the position of seconded fixed-term employees whose employment contract was terminated before the expiration of the period for which it was concluded, i.e. improving the position of seconded permanent employees whose work is no longer needed.

› Introducing stricter conditions for dealing with the activity of assigning employees and standardizing the possibility of creating professional associations of agencies for seconding employees with public authorizations (supervising the work of agencies, initiating procedures for revoking licenses of agencies that act illegally).

› Tightening the mechanisms of liability of employers-clients in case of illegal treatment of the assigned employee.

9. LABOUR EXPLOITATION THROUGH INTRODUCTION OF WORK OBLIGATION IN THE STATE OF EMERGENCY

Work obligation is conceived as a specific way of work engagement in exceptional situations in which there is a real and significant danger to the population. Accordingly, the work obligation can be introduced only in a state of war and emergency (Article 50 of the Law on Defence, Official Gazette of RS, No. 116/2007, 88/2009, 88/2009 - other law, 104/2009 - other law, 10/2015 and 36/2018). It is regulated by the Law on Defence and the Law on Military, Labour and Material Obligation (Official Gazette of RS, No. 88/2009, 95/2010 and 36/2018). This way of regulating creates significant problems, since the system of work obligation is adjusted to the state of war, and not to extraordinary circumstances such as an epidemic of infectious diseases that occurred during 2020. The manner of regulating the work obligation is disputable for two reasons, and both lead to the labour exploitation outcome, which implies excessive and inadequate work regime, i.e. violation of a number of labour standards in the circumstances where there is obviously no need for such measures.

First, the work obligation is adjusted to the state of war. This is not unexpected because it is regulated by laws proposed by the Ministry of Defence. Although such regulation is standard and expected for a state of imminent military danger or the need to defend the country, it is inapplicable in peacetime emergencies, such as in an epidemic of infectious diseases. For example, a work obligation is introduced in accordance with a person's war schedule - it is unrealistic to expect that a work obligation introduced in this way will be of any use to defend against a qualitatively different security threat, such as a health matter. Furthermore, the laws that regulate it are so focused on the military threat that in Article 50 of the Law on Defence, the work obligation is tied exclusively to the jobs and tasks of defence, in accordance with the Defence Plan. It is quite clear that something like this is inapplicable to various situations, such as natural disasters (floods, earthquakes), medical threats (infectious diseases) and other circumstances that can lead to the introduction of a state of emergency.

However, the work obligation during the state of emergency was determined in that particular manner and in accordance with the analysed regulations. Although it was extremely inadequate, the interpretation, which was devoid of formalism and focused on the real needs of protection of the population, established the work obligation of most medical workers, but also some other persons who worked on the tasks important for the implementation of medical - epidemiological measures and other tasks associated with the treatment of diseased persons.

However, the employment status of persons in the regime of work obligation is very debatable. Although the provisions on labour rights seem relatively rational when it comes to the state of war and the necessity to act in the field of defence against a military threat, they are in no way in line with the work performed during the state of emergency. Persons who are under employment obligation remain in employment relationship with the parent employer, but may be seconded to another employer to perform work. At the same time, a large number of their labour rights are suspended. Thus, in the work obligation regime, it is possible to work longer than full time working hours, as well as longer than the general limit of the overtime work. This automatically means that neither the rules on vacations nor absences apply (except for those caused by temporary incapacity for work). Although military regulations refer to labour regulations, the application of the Labour Law is not guaranteed. A person who is in the regime of work under the work obligation, works longer and is paid less than he/she would be paid for the same work in the employment relationship (Article 52 of the Law on Defence and Article 92 in connection with Article 68 of the Law on Military, Labour and Material obligations). Laws allow a person to refuse to perform a work obligation only for reasons explicitly provided by law. Any other reason, as well as a refusal without explanation, leads to the termination of employment of the person - which is a distinctive consequence and a special reason for dismissal that does not exist in regular circumstances.

These solutions are not completely uncommon. Extraordinary circumstances (not only the state of war) require a special organization of work, which is undoubtedly necessary in cases of epidemics and in other circumstances where there is a great danger to the population. However, it is unreasonable to leave the legal gaps that currently exist, when it comes to regulating the work obligation. They can lead to new controversial situations and further deterioration of the employment status of persons in the regime of work obligation. Thus, for example, during the state of emergency from March to May 2020, a person employed in health care could receive a verbal order, within the work obligation regime, and rotate practically on a daily basis with various employers. This led not only to a confusion due to the lack of centralized records of rotation (or any records) of medical workers in health institutions, which was obviously being determined on a daily basis without prior planning, but also to disputes related to labour rights during the work obligation regime after the state of emergency was lifted – for example, some medical workers could not prove in which health facilities they spent a certain number of working days, as there were no records of their secondment and work.

Another type of negative practice has emerged in relation to the work obligation regime. Namely, the Ministry of Health and the Government of the Republic of Serbia apply the work obligation regime to health workers (on the basis of verbal instructions and written instructions of the so-called Crisis Committee established by the Government in an unlegislated manner) even in regular circumstances after the state of emergency is lifted.

This is unconstitutional and illegal, not only due to the fact that the Crisis Committee and verbal orders of the ministry and the government officials are not founded on valid legal bases, but also due to the fact that it is impossible to introduce the work obligation by law without declaring a state of war or emergency. The declaration of an emergency situation has no common ground with the introduction of work obligations, and any action based on such orders will lead to a number of labour disputes in the future, and there is a real basis for criminal liability of those who impose such factual solutions as legally grounded. Based on the analysed, it is possible to make certain recommendations:

› The practice of introducing the work obligation in regular circumstances should stop, and the medical workers should get compensated for the damage caused by unlawful actions of the Ministry of Health and of directors of medical institutions who applied apparently illicit decisions of the Crisis Committee and verbal orders of the Ministry of Health officials.

› It is necessary to normatively separate the work obligation in a state of emergency from the work obligation in a state of war. Some form of work obligation in extraordinary circumstances can be standardized if it is considered that such a thing is necessary. The ideal space in the legal system for standardizing these issues is in the Law on Disaster Risk Reduction and Emergency Management (Official Gazette of RS, No. 87/2018).

› It is necessary to pay more attention to the labour rights of those obliged to work in the state of emergency. First of all, this implies a clear reference to the Labour Law in relation to all the rights a person retains in the circumstances of performing the work obligation. Then, in relation to specific aspects of work, such as working hours, limits must be set and a basic schedule of working hours determined in accordance with international standards, as well as the circumstances in which a responsible person may, with a written record, temporarily suspend those standards. Finally, the compensation received must correspond to the work invested, and any reduction in the amount of the compensation in relation to the salary received by the person, which is possible under the current regulations even if the person works more working hours than in employment, must be impermissible. Although it is important to react quickly in certain situations, the solution that was applied during the state of emergency from March to May 2020 on verbal orders for the transfer of persons is not good and must be changed. Also, the list of reasons why someone can refuse to perform a work obligation should be reconsidered, and a (currently non-existent) mechanism of independent external supervision should be provided over the application of labour regulations related to persons in the work obligation regime (labour inspection seems to be an obvious solution).

10. LABOUR EXPLOITATION OF FOREIGN CITIZENS WORKING IN THE REPUBLIC OF SERBIA

The situation on the labour market in the Republic of Serbia has changed significantly over the past ten years, primarily due to a drastic increase in the outflow of labour abroad, unfavourable demographic trends, as well as due to the emergence of more insecure and poorly paid jobs in unfavourable working conditions. These factors combined have led to a lack of certain professional profiles in the labour market, primarily in the field of crafts and manual jobs, as well as jobs that require lower formal education. There is also a lack of personnel in certain professions for which higher education is required (such as health care), but these tendencies are still less distinct for now due to less demand for these educational profiles. The aforementioned tendency is not typical only for Serbia, and has been extant earlier in the region, first in the countries that became members of the European Union, but in recent years in other countries that are considered large sources of labour migration to the European Union (Bosnia and Herzegovina, Macedonia). Disorders in the labour market lead to formation of two processes that take place in parallel - the improvement of working conditions for those workers whose professions are in the domain of high demand and low supply, as well as the import of labour from other countries. The latter process has led to the emergence of another very specific model of labour exploitation of foreign nationals coming to work in the Republic of Serbia.

The mechanism used is the following: foreign citizens (usually from Asian countries, such as Turkey, India, and China) come to work for foreign companies operating in Serbia. The employment status of these persons is seemingly clear, and so far has not constituted a questionable issue. Namely, these workers should have the same minimum working conditions, i.e. the same labour rights, as domestic workers - after going through the procedure of obtaining a work permit. They are protected by Article 2 of the Labour Law, paragraphs 1 and 4: "Provisions of this law shall apply to employees who work on the territory of the Republic of Serbia, with a domestic or foreign legal or natural persons (hereinafter: employer) and employees referred for work abroad by the employer, unless the Law stipulates otherwise" and "provisions of this law shall apply to employees who are foreign nationals and stateless persons who work with employers on the territory of the Republic of Serbia, unless the law stipulates otherwise; and Article 4, paragraph 1 of the Law on Employment of Foreigners: "A foreigner who is employed in the Republic in accordance with this law, has the same rights and obligations in terms of work, employment and self-employment as citizens of the Republic, if the conditions are met in accordance with the law."

However, practice shows several irregularities in their engagement:

› Many workers who turned to the labour inspection or who were encountered by the labour inspection during regular or extraordinary supervision, do not have work permits and cannot work legally in the Republic of Serbia.

› Some of them had their documents (passports) taken away, allegedly in order to obtain work permits.

› Many of them, practically as a rule, receive their salary in their home countries, while their employer in Serbia gives them a minimal part of their salary or does not give them anything at all – this puts them in a position that apart from not knowing the language and regulations, they do not have the means to travel from Serbia.

› During the supervision, the labour inspection waives its authority over these workers, stating that they are only responsible for checking their work permits, while foreign labour law is applied to these workers and their position is the responsibility of the labour inspectorate at the place of the employer's origin. This interpretation is not only contrary to the law, but can also be seen as a renunciation of the sovereignty of the state of Serbia over certain persons and certain territories (as a rule, the construction sites where foreign nationals are engaged). The whole problem is even more drastic when it is kept in mind that these companies, as a rule, fake foreign labour (allegedly legal entities are registered abroad, but the workers they hire are not citizens of those countries nor have work permits in those countries) and in a large number of observed cases, such abusers use the state, budget funds of the Republic of Serbia because they are engaged as contractors on infrastructure projects that are directly or indirectly financed by the state.

› Since this is a dangerous trend of interpreting the regulations in an illegal and unconstitutional manner, which is indirectly supported by the Ministry of Labour, in the coming period an urgent action must be taken to stop and prevent further abuse of labour of foreign nationals, which certainly has forms of labour exploitation and in some cases indications of trafficking and enslavement.

› It is necessary to specify the cited legal provisions, so as to remove any doubt and prevent malicious interpretation that the Republic of Serbia has no jurisdiction over the working conditions of foreign nationals.

› It is necessary to issue, without a delay, a binding instruction to labour inspectors that in these cases, according to the relevant legislation, they are competent to react and to leave employers a reasonable deadline to adjust the agreed working conditions to the relevant domestic labour legislation.

› It is necessary to sanction any further repetition of these offenses, as well as to engage the competent public prosecutor's office to initiate pre-trial proceedings to determine the existence of the commission of crime of trafficking in human beings and the establishment of slavery.

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