# CASES IN WHICH THE PATRIMONIAL LIABILITY OF THE EMPLOYER CAN BE ESTABLISHED

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**Abstract**
*The employer's patrimonial liability can be triggered if the employee was subject to a moral or material prejudice. Most often, the material damage caused to the employee consists in the denial of material rights, case in which the employer also owes an interest. The moral prejudice represents a harmful consequence, with a non-economic content determined by the violation of the non-patrimonial personal rights, such as: harming the honour, dignity, prestige or reputation. In this context, between the guilty employer and the prejudiced employee there could be an obligational report.*

***Keywords:*** *patrimonial liability, the employer, the moral prejudice, the material damage, personal right.*

## Preliminary

The situations in which the employee could be prejudiced from the material or moral point of view, from the employer's fault are numerous and this is why just a part of them have express provisions under the norms of the labor legislation. In many cases, the employer's patrimonial liability is triggered based on the interpretation of the existing texts from the normative acts which regulate the social relationships included in the object of the labor law or in the conventional sources (collective labor contracts, internal regulations, organization regulations, etc)

Irrespective of the nature of the provision (express or implicit) which has been ignored in the phases of the execution of the juridical labor report, we believe that the following cases in which the employer's patrimonial liablility can be established could present a theoretical and practical interest:

## 1.Forcing the employee to perform a certain work under threat

According to art. 4 align. 1 from the Labor Code[1], „The forced labor is forbidden". If the employer imposes an employee to perform an activity in a certain job by using the threat should the employee refuse (for instance, the employee is threatened that they will be fired), the instance may establish the patrimonial liability of the employer and oblige him to indemnify the employee for the material and/or moral prejudice suffered subsequent to the performance of that labor, for which he had not given the agreement. The employer's patrimonial liability is possible if all the below conditions are met:

a. the employee and the employer had conclused a written individual labor contract;

b. the employer asked the employee to perform another work, even in another job than the ones provided in the individual labor contract (according to the clauses „kind of labor" and „job/position");

c. the employee refused the employer's proposal;

d. the employer tried to determine the employee to perfom the work using the threat, even if the employee did not agree;

e. the employee performed a certain labor imposed by the employee for fear that the threat could be applied and have consequences;

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[1] Law 53/2003, Law 40/2011.

f. the employee suffered a prejudice, either material (for example, his payment was lower than the one negotiated) or moral (for example, he was obliged to perform an activity with an inferior level than his professional training or on a job with dangerous conditions which bring harm to his professional dignity or state of health) when performing a different activity than the one provided in the job description.

**2.Establishing the amount of wage in a discriminating way**

The employer is obliged, within the work relations, to respect the principle of equal treatment to all the employees, namely not to commit any direct or indirect discrimination in regards to an emloyee, based on gender, sexual orienation, genetical features, age, nationality, race, colour, ethnicity, religion, political opinions, social origin, handicap, familial situation or responsibility, union membership or activity.

In this case, art. 6 align 3 from the Labor code establishes as a necessity: „For equal labor or of equal value it is forbidden any type of discrimination based on gender regarding all the elements and payment conditions". Thus, if an employee received an inferior wage than the one of another employee from the same unit, who performs „equal labor or of equal value" based on gender discrimination, the employee will be patrimonially liable, being obliged to indemnify the employee whose right to equal treatment has been violated, both for the material prejudice and for the moral one. In this case, the material prejudice will be fixed by obliging the employer to pay an indemification equal with the difference between the two salary amounts comparable in the given situation, for the entire period in which the gender discrimination produced effects.

**3. Establishing the amount of wage under the minimum level set by normative acts or collective labor contracts**

The employer who is a legal entity, natural entity authorized to perform an independent activity, as well as the familial association have the obligation to conclude, in written, the individual labor contract prior to the beginning of the labor relationship. Before concluding the individual labor contract, the employer is obliged to inform the person he selected to hire about the essential clauses which he intends to include in the contract, among which the „basic salary, other elements that constitute the salary".

According to art 11 from the Labor Code, „the clauses of the individual labor contract cannot contain contrary provisions or right under the minimum level set by normative acts or collective labor contracts".

In conclusion, the employer is patrimonially liable if she sets for his employee a salary under the minimum level set by normative acts or, after case, by the collective labor contracts. The material prejudice suffered by the employee consists in the difference between the due salary according to the normative act or collective labor contract and the effective salary paid for the entire period.

**The term** in which the employee can lawsuit the employer in order to oblige him to pay indemnifications is 3 years from the date when the right to action appeared.

**4. The denial of the non-competition monthly allowance**

By this specific clause, the employee is obliged that „after ceasing the contract, he would not perform, in his own interest or for a third party, an activity that comes in competition with the one performed by his employer, in exchange of a non-competition monthly allowance paid by the employer during the entire non-competition period.

A specific of the non-competition clause is the fact that it is negotiated and mentioned in the individual labor contract only during the period when the juridical labor report is executed, but the effects of the respective clause take place subsequent to the moment when the individual labor contract ceased. According to the law, the period during which the non-competition clause takes place is of maximum 2 years from the date when the individual labor contract ceased.

**5. The denial of the additional benefits established by the mobility clause**

Among the specific clauses that the parties can negotiate and mention in the individual labor contract there is also the mobility clause, by which – according to art. 25 from the Labor Code – the parties establish, by taking into account the specific of the labor, that performing the job obligations is not done in a stable work place by the employee. In this case, the employee benefits from additional benefits cash or in kind[2, 3].

In case that the employer does not grant the employee the additional benefits cash or in kind, in the negotiated amount and in the presence of the mobility clase, he is patrimonially liable for the material prejudice he caused, under the provisions of art. 25 and art 253 align. 1 from the Labor Code.

**6. The unilateral reduction of the salary amount**

The unilateral reduction of the salary provided in the individual labor contract represents an illegal measure which may bring the patrimonially liability of the employer, if all the below conditions are met:

a. the employee benefited from a salary whose amount has been established through negotiation or, as appropriate, by law (if a written individual labor contract has not been concluded, the parties can prove the contract provisions and the labor performed by any way of proof);

b. the employer decided to reduce the salary amount without executing the obligation to inform the employee in written prior to the modification, regarding the intention to reduce the salary;

c. no additional act has been concluded to the individual labor contract within 15 days from the date of the employee's information in written;

d. the reduction of the salary amount does not prove to be possible, from the legal provisions or from the provisions of the applicable labor contract.

e. for the labor he performed in the same job or in another (subsequent to the employer's decision of unilateral modification of this element), the employee received a reduced salary.

If all these conditions are met, the employer will be patrimonially liable to pay the indemnifications equal to the difference between the salary rights established by negotiation or law and the reduced salary he received.

**7. The unjustified suspension of the individual labor contract**

The employer can be patrimonially liable if he decides the suspension of the employee's individual labor contract and the measure is proven to be unjustified. The employee could suffer a material prejudice in two situations of suspension of the individual labor contract from the employer's initiative:

a) during the prior disciplinary research;

b) in case that

- the employer has filed a criminal complaint against the employee or,
- the employee was sent to the court for criminal deeds incompatible with the position he held, until the juridical court decision.

In this view, art. 52 align 2 from the Labor Code established, by referring to the two situations we presented: „if the one in cause proves to be not guilty, the employee takes back the position and will be payed – under the norms and the principle of the contractual civil liability – an indemnification equal to the salary and the other rights from which he was restrained during the suspension of the contract".

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[2] Alexandru Țiclea, *Treaty of Labor Law*, Editura Universul Juridic , București, 2008.

[3] Ion Traian Ștefănescu, *Treaty of Labor Law*, vol. II, Editura Lumina Lex, București, 2004.

**8. The denial of the rights in case the employee is delegated or detached.**

The delegation is a measure disposed by the employer, based on which the employee will execute labors or fulfill labor tasks outside the work place provided in the individual labor contract during at most 60 days in 12 months. The duration of the delegation can be prolonged for successive periods of at most 60 days only if the employee agrees with this proposal formulated and argumented by the employer.

The detachment is the measure by which the employer disposes the change of the work place to another employer, for which the employee will perform activities in his interest and suborder.

The duration of the detachment is of at most one year, and it can be prolonged only for objective reasons and only with the agreement of the employee, every 6 months.

According to art 44 align 2 and art. 46 align. 4 from the Labor Code, the employees of the units who were sent in delegation (inside the country or abroad) or in detachment, benefit from the following rights:

a) the reimbursment of the transportation and accomodation expenses, according to the conditions established by the applicable collective labor contracts;

b) delegation or detachment allowance, whose amount is established by negotiation, the minimum level being the one established by the applicable normative acts from the public institutions.

Thus, the employer is obliged to reimburse the transportation and accomodation expenses, according to the employee's act of delegation or detachment, and the denial to execute this obligation triggers patrimonially liability[4].

**9. The unjustified and unlawful dismissal**

According to the legal definition, "The dismissal is the ceasment of the individual labour contract from the employer's initiative".

If the employer exerts his right to fire the employee and proceeds in an unjustified or unlawful way, the provisions of art. 78 align 1 from the Labor Code become applicable, according to which the instance will dispose the cancellation of the dismissal „and will oblige the employer to pay an indemnification equal to the salaries, raised and updated and with all other rights from which the employee would have benefited".

**10. The denial of the rights for the over time and for the hours worked during holidays and free days.**

If the employee performed over time, the employer has the following obligations:

- **the main obligation**, to compensate the duration of that respecive labor with free hours, paid in the next 60 days from its occurence (art 122 align 1 from the Labor Code)

- **the subsequent obligation**, in case that the compensation by free paid hours is not possible within the next 60 days, case in which he will pay the employee the over time he performed, by adding an increase to the salary, which is established by negotiation, and it cannot be lower than 75% of the basic salary (art 123 align 2 from the Labor Code)

At the same time, the employees who perform an activity during holidays benefit from compensations: 1st and 2nd of January, the first and second day of Easter, 1st of May, the first and second day of Pentecost, the Assumption, 1st of December, the first and second day of Christmas; 2 days for each of the three annual religious holidays, declared by the legal religions, other than the Christian ones, for the people belonging to them[5].

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[4] Alexandru Athanasiu, Luminița Dima, *Legal regime regulating labor relations in the new Labour Code –* Partea I – Pandectele Române, nr. 2/2003.

[5] Alexandru Țiclea, *Commented Labor Code, Second edition revised and enlarged,* Editura Universul Juridic, Bucureşti, 2011, 278 – 283.

In case that, from justified reasons, the employer cannot give the corresponding free time in the next 60 days, the employees will benefit for the work they performed during the holidays, from an increase of 100% from the basic salary (art 142 align 2 from the Labor Code)

**11. The denial of the benefit for the night shift**

In the Labour Code, we use the wording "night employee" to name (art 125 align 2):

a)the employee who performs the night shift for at least 3 hours from his daily work time or, as appropriate,

b) the employee who performs the night shift for at least 30% of his monthly work time.

The night employee benefits from:

a) either a work schedule reduced with 1h compared to the normal duration of the work day, for the days when he performs at least 3 hours of night shift, without leading to the reduction of the basic salary;

b) or a 25% increase to the basic salary for each night hour he worked.

**12. The denial of the salary rights in the amount established by law or by negotiation**

According to art 166 align 4 from the Labor Code: „The unjustified delay in paying the salary or the unpaid salary can oblige the employer to pay indemnifications – interests to repair the prejudice produced to the employee". This legal provision establishes a constraint to the employee, with a view to have the salaries paid **on time and fully[6].**

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