

Workers' Protection in Covid at the Employers' Expense: Russian Experience

Elena Sychenko

Labour and social law department, Saint Petersburg State University, Russian
Federation
e.sychenko@mail.ru

**Paper prepared for presentation at the
“7th Conference of the Regulating for Decent Work Network”
Virtual Conference, International Labour Office Geneva, Switzerland
6-9 July 2021**

Abstract

The pandemic has been a great challenge for the authorities. It has very quickly become evident that the traditionally restricted regulation of labour in Russia is not suitable for such situations, that labour law had huge gaps in the fields of regulating the transfer of workers for remote work, and of the exchange of documents between the parties of employment contract in the electronic form. Furthermore, it is not suitable for regulating shift work during quarantine. The restrictions to business operations imposed to ensure public safety made the Government reflect about the possible amendments to labour regulations. Provided that during the Covid year the legislator and the Government brought a number of important changes to the regulation of work and employment there is a need to evaluate the efficiency of norms, introduced to protect workers and unemployed during the pandemic. The acts adopted by the Government and the Labour Ministry during Covid provided certain flexibility for the regulation of employment relations in Russia. However, these norms should correspond to the hierarchy of the sources of law, and should be complemented with the new supportive measures for the unemployed. The introduction of the regime of “non-working” days, where the employers were obliged to pay the full salary for two months, exposed thousands of small and medium enterprises at the risk of bankruptcy. We presume that the burden of the crisis under the present regulations is largely placed on business, whereas it should be distributed between the State (through providing special measures of support to business and workers/unemployed) and the employers. Workers, as the most vulnerable party, should be protected either by the means of labour law or social security law. The regime of “non-working” days, in our opinion, will have

a deep and long-lasting effect on the employment market, increasing unemployment and informal work.

Keywords: non-working days, unemployment benefits, temporary rules, Covid-19, distant work.

Copyright 2021 by author(s). All rights reserved. Readers may make verbatim copies of this document for non-commercial purposes by any means, provided that this copyright notice appears on all such copies.

Labour relations and the issue of wage payment have immediately become one of the key problems for the authorities all over the world during the pandemic. The response of the Governments often included the adoption of a flexibility mechanism for changing employment contacts,¹ new mechanisms of state support for the payment of wages² and the introduction of special unemployment benefits for temporary laid-off employees.³ None of these ways was followed by Russian authorities though.

Russian labour law is traditionally one of the most conservative branches of Russian law. Rooted in Soviet labour law it remains very protective for workers and little flexible for the employers. While these qualities of regulation are not necessarily bad per se, in the times of pandemics they have turned out to be real problem. The state has adopted a very particular way for coping with the issue of labour relation in the times of quarantine: the President announced a series of non-working days (from 28th March to 11th May 2020, in 2021 – from 3 May to 8 May) all over Russia which should have been paid as working time⁴. In this paper the new concept of non-working days will be considered and the amendments adopted in the labour legislation due to the pandemic.

1. Non-working days regime – a new concept in Russian labour law

¹ See Belorussian experience or Hungarian one: Kirill Tomashevski, COVID-19 and Labour Law: Belarus, Tamás Gyulavári, COVID-19 and Labour Law: Hungary. Italian Labour Law e-Journal Special Issue 1, Vol. 13 (2020). Available at: <https://illej.unibo.it/article/view/10793> (accessed 20/05/2020)

² See in the same special issue: German, Austrian or Italian experience: Martin Risak, COVID-19 and Labour Law: Austria, Chiara Gaglione, Ilaria Purificato, Olga P. Rymkevich, COVID-19 and Labour Law: Italy; Rüdiger Krause, Jonas Walter Kühn, COVID-19 and Labour Law: Germany.

³ See in the same special issue: Bernard Johann Mulder, COVID-19 and Labour Law: Norway.

⁴ Decree of the President of the Russian Federation of 25.03.2020 N 206 " on declaring non-working days in the Russian Federation"; Decree of the President of the Russian Federation of 28.04.2020 N 294 " on the extension of measures to ensure the sanitary and epidemiological well-being of the population on the territory of the Russian Federation in connection with the spread of a new coronavirus infection (COVID-19)"

Under the Russian Labour Code the Presidential decrees should comply with the Code (article 5 of the LC), which does not provide such a type of non-working time as “paid non-working days”⁵. Scholars had to improvise and connect the new concept with the system of labour law. It was established that "non-working days", in terms of the public interest they protect, are a type of exemption from work. In terms of the amount of work from which employees are exempt, they are complete exemptions from work. Such classification permits to have a starting point for dealing with the consequences of non-working days.⁶

This decision, dictated by the emergency circumstances, evidently lead to the restriction of the right to work (article 37 of the Constitution) and the right to engage in entrepreneurial activity (article 34). Article 55 of the Constitution provides that the rights may be limited by the federal law only to such an extent to which it is necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defence of the country and security of the State.

However, taking into account that the state of emergency was not declared in Russia we suppose that the measure announced by the President is very questionable from the legal point of view. The adoption of this decree gave a start to the serious challenges to the very basics of labour law, to its principles and in particular to the system of sources. Labour law scholars were joking that the interviews of the president spokesman, Alexander Peskov, have become the new source of labour law. Indeed, after the adoption of the first “non-working days decree” a lot of questions were born. Employers were puzzled: should they also stop the activities if the workers already switched to the distant working, how should the time of people working during these days be paid and so on. The journalists referred these questions to the Press Secretary of the Russian President. He stated, for example, that those who switched to remote mode of work should continue to work. This position was immediately fixed in the revised letter of the Ministry of labour. It should be noted that these letters and recommendations have become the main source of regulations in the quarantine as they provided if not totally clear but a more detailed and comprehensive guidelines.⁷ The lack of clarity and predictability of

⁵ See more about the measures adopted by Russia in Iuliia Ostrovskaja, COVID-19 and Labour Law: Russian Federation Italian Labour Law e-Journal Special Issue 1, Vol. 13 (2020) Covid-19 and Labour Law. A Global Review

⁶ M. V. Filippova, R. E. Khokhlov, On the question of the legal nature of "non-working days" Yearbook of Labor Law. 2021 : a collection of scientific works / responsible editor E. B. Khokhlov. - St. Petersburg : SPbSU, 2021 - Issue 11 - 2021. P. 80.

⁷ For example, Recommendations to employees and employers in connection with Presidential Decree No. 206 of 25 March 2020 "On declaring non-working days in the Russian Federation", Letter of the Ministry of Labor of the Russian Federation No. 14-4/10/P-2696 adopted on 27.03.2020, Letter N 0147-03-5 adopted on 09.04.2020. Database Consultant Plus.

regulation, the lack of legal certainty also contributed to the problems business had to face after the start of pandemic.

It should be noted that the regime of non-working days did not cover all the organizations. As there has been several presidential decrees on this point the trend of broadening the list of organizations which can keep working can be traced. Generally speaking, already the first decree divided all organizations into four groups⁸:

- organizations that should stop activities (all unless pointed in any other group);
- organizations which were required to determine the number of employees to ensure their functioning (Mass media, civil and municipal servants);
- systemically important, as well as scientific and educational organizations for which the regime of non-working days might be spread only in coordination with the Government of the Russian Federation;
- organizations which do not stop the activities and are not covered by the decree.

The last group in the final Decree on non-working days⁹ was determined in the following way:

- Continuously operating, having equipment designed for continuous technological process;
- medical and pharmacy organizations;
- providing the population with foodstuffs and basic necessities;
- performing urgent work in an emergency situation and/or when there is a threat of spreading a disease that poses a danger to others, otherwise endangering the life, health or normal living conditions of the population;
- carrying out emergency repair and loading and unloading operations;
- providing financial services for urgent functions;
- other organizations determined by the subject of the Russian Federation.

In May 2020 the President adopted a decree¹⁰ which finished the period of non-working days and granted the power of suspension (restriction, including by means of defining peculiarities of the work regime, number of employees) of business activities, based on the sanitary and epidemiological situation, to the subject of the Russian Federation.

The policy of non-working days in 2020 significantly influenced the labour market and the rights of workers. The number of registered unemployed for non-working days increased by almost 30%. Here, however, it is important to bear in mind that for the first time in post-Soviet

⁸ The same pattern was followed by the following decrees: Presidential Decree No. 239 adopted on 2.03.2020, and No. 294 adopted on April 28, 2020. Database Consultant Plus.

⁹ Decree of the President of the Russian Federation N 294 adopted on 28.04.2020

¹⁰ Presidential Decree No. 316 of 11 May 2020. Database Consultant Plus.

history the amount of the maximum unemployment benefit was equal to the living wage. This increase in the benefit paid upon the registration, the temporary simplification of procedure convinced people to go out of shadow and get registered as unemployed even if before they had this status only de-facto.

The evaluation of the outcomes of Covid measures for business was also very pessimist. The Chamber of Commerce and Industry commented that around 3 million entrepreneurs could stop operating putting more than 8.6 million people at risk of unemployment.¹¹

The ban on dismissals during non-working days lead to the abuse by the employers who wished to start redundancy procedures. Among the most common illegal practices used by the employers were forced resignation, decreasing wages and forcing employees to take unpaid leave for the duration of “non-working” days.¹² According to the expert’s calculations about 30% of the companies which stopped working under Presidential Decree did not pay to employees, about 10% reported about redundancy procedures.¹³

It should be noted that the Ministry of labour¹⁴ forbids the dismissal of workers during the period of non-working days upon the will of employer in one of the materials published on the official site in the form of questions and answers. Such a ban, however, is a logical outcome of treating non-working days as suspension from work.

In the organization which remained functioning the employer had to undertake additional measures to ensure occupational health: to organize measurement of body temperature of workers at work places with the mandatory removal of persons with elevated temperatures and further control of an employee calling a doctor to provide primary care at home¹⁵.

The most recent non-working days were introduced by the President of Russia in the period from May 4 to May 7, 2021 “in order to maintain the trend of reducing the spread of the new coronavirus infection (COVID-19), to strengthen the health of citizens of the Russian Federation”. In contrast with the decrees adopted in 2020, this one did not list the organizations exempt from this regulation. It included a very controversial sentence permitting all the

¹¹ Maria Efimova, “Either the Budget Cracks or People”. In Russian. 17 April 2020. <<https://novayagazeta.ru/articles/2020/04/17/84949-libo-byudzhnet-tresnet-libo-lyudi>> accessed 01 June 2020.

¹² Ibid.

¹³ Ekaterina Sabelnikova, “Operational monitoring of social processes”. Center of macroeconomic analysis and short-term prognosis. In Russian. <www.forecast.ru/_ARCHIVE/MON_SC/2020/sm2.pdf> accessed 01 June 2020.

¹⁴ Ministry of Labour. Q&A on work organization and employee rights during the non-working week. In Russian. <<https://rosmintrud.ru/employment/54>> accessed 01 June 2020.

¹⁵ Letters of Federal Service For Supervision of Consumer Rights Protection and Human Welfare (Rospotrebnadzor) dated 03.03.2020 N 02/3401-2020-27 and N 02/3633-2020-29 adopted on 06.03. 2020. Database Consultant Plus.

organizations which remain functioning in the period of May 1 through May 10, 2021 (1 May and 9 May are public holidays) to determine the number of employees ensuring the functioning of these organizations.¹⁶ Thus the majority of private organizations did not stop functioning and included the majority of employees to the list of those who are exempt from the regime of non-working days.

2. Support of unemployed people

With the growth of unemployment caused by the stoppages of business activities the support of unemployed people has become one of the main concerns for the authorities. This field has been for many years a pain point of Russian labour law as the levels of unemployment benefits were far beyond the subsistence level in the country. Though the law provided for the calculation of the benefit on the basis of the certain percent of the previously received average wage the maximum sum was limited. Before the pandemic the limitation was equal to 8000 rub¹⁷ (about 100 USD) no matter what was the sum of the previous wage gained by the person, no matter the reason for the dismissal, the level of minimum unemployment benefit was set at the sum of 1500 rub (25 USD). The minimum sum is still paid to 45% of unemployed¹⁸ as the Russian Law "On employment of the population" includes a number of exceptions to the rule of calculating the unemployment benefit on the basis of the average wage of an employee.¹⁹

This problem of insufficiency of such benefits has been twice pointed out by the European Committee of Social Rights but their opinions were completely ignored by the authorities.²⁰

In the time of pandemic this problem could not be silenced any more. Already in the first speeches upon the beginning of the pandemic the President promised to raise the unemployment benefits to the sum of living wage (about 160 US dollars). The Government

¹⁶ Presidential Decree No 242 of 23.04.2021 on the establishment of non-working days in the territory of the Russian Federation in May 2021.

¹⁷ Except for the unemployed people of pre-retirement age, for whom a different maximum unemployment benefit has been set - 11,280 rubles (the sum of the living wage at that time).

¹⁸ Transcript of the meeting headed by the President and dedicated to the situation at the Labour Market. 27 May 2020 <<http://kremlin.ru/events/president/news/page/2>> accessed 01 June 2020.

¹⁹ According to the article 34 of the Law of the Russian Federation of 19.04.1991 N 1032-1 (edition of 07.04.2020) "On Employment in the Russian Federation" the minimum amount of the unemployment benefit is paid to the citizens looking for a job for the first time (previously not working), to citizens striving to resume working activity after a long (more than one year) break, to citizens who have stopped individual business activity in the order established by the legislation, to citizens fired for violation of labor discipline or other guilty actions provided by the legislation of the Russian Federation, to citizens fired on any grounds within 12 months preceding the beginning of unemployment and those who during this period were in an employment (service) relationship of less than 26 weeks, citizens sent by the employment services for training and expelled for culpable actions, citizens who left a peasant (farm) household, as well as citizens who did not submit a certificate of average earnings for the last three months at the last place of work (service).

²⁰ ECSR, Conclusions 2017 - Russian Federation - Article 12-1 2017/def/RUS/12/1/EN; Conclusions 2013 - Russian Federation - Article 12-1 2013/def/RUS/12/1/EN;

adopted the temporary rules of registration of unemployed²¹ which provided the mechanism of electronic application to the employment service, regardless of place of residence in Russia, as well as the mechanism of distant interviews with the potential employers. In order to be registered as an unemployed the person should be registered first for seeking employment and offered suitable employment opportunities.²²

Another Government Decree has increased the maximum amount of unemployment benefits to the sum of the subsistence level, as required by the President, by the Decree № 346 adopted on 27.03.2020.²³ However under para. 16 of this decree the minimum sum was still paid to first-time jobseekers (except for orphans); people who did not work more than one year; those who were dismissed for misconduct or other wrongful acts; those who worked less than 26 weeks; who stopped individual business activities; citizens who do not have information about their average earnings. It was also fixed that the period of payment of unemployment benefits to these categories of citizens may not exceed 3 months in total for 12 months.

These regulations evidently could not ensure the support of a large part of the unemployed. This is why in April 2020 the President instructed the government to ensure that the amount of unemployment benefits to be paid in April-June 2020 to persons who lost their jobs after March 1, 2020 would be equal to the subsistence level. It was immediately fixed by the Decree N 485 adopted on 12.04.2020. The mentioned para 16 of the Decree № 346 was suspended till the 1 July.

It was also established that the unemployed will receive payments for each minor child in the amount of 3000 rubbles per month in the period April-June 2020.

However, the main problems remain: the unemployed who lost jobs before 1 March 2020 are still in many cases receiving only minimum sum of the benefit, the period of payment of the increased sum under the most recent Decree N 485 is too short (3 months), the general maximum periods of payments are too short.²⁴

3. A push for changes

Pandemic has been a great challenge for the authorities. It had very fast become evident that the traditional restricted regulation of labour is not suitable for such situations, that labour law

²¹ Decree of the Government of the Russian Federation from 08.04.2020 № 460. Database Consultant Plus.

²² Law of the Russian Federation of April 19, 1991 N 1032-1 "About employment of the population in the Russian Federation". Database Consultant Plus.

²³ Decree of the Government of the Russian Federation of 27.03.2020 No. 346 "On the Amounts of the Minimum and Maximum Unemployment Benefit for 2020". Database Consultant Plus.

²⁴ Under article 31 of the Law of the Russian Federation of 19.04.1991 N 1032-1 the period of payment is no more than 6 months in the 12 months period, while for certain categories of unemployed it is decreased to 3 months in 12 months period.

had huge gaps on the fields of regulating the transfer of workers for the remote work, of the exchange of documents between the parties of employment contract in the electronic form, it is not apt for regulating work on rotational business in the quarantine.

These issues made the Government reflect about the possible amendments. First the Federal law No. 122-FZ adopted on April 24, 2020 provided basis for the experiment on the use of electronic documents related to work without duplicating on paper documents related to work. This experiment will run till March 31, 2021 and is aimed at establishing the conditions for the further changes to Labour Code substituting the needed written form of all the documents related to work and “live” signatures with e-documents and e-signature of both employer and employee. The participation of employers and employees in this experiment is voluntary and the employee can at any time withdraw his consent.

In January 2021 the new norms of the Labour Code regulating distant work came into force. They provide for the inclusion in the employment contract of the possibility of a temporary or partial performance by an employee of his work in remote form and fixes certain requirements to this agreement. It is now possible to work remotely based on either an employment contract or an additional agreement to the employment contract. In exceptional cases such as a pandemic, for example, this regime might be fixed in a local act adopted by the employer at his initiative. Other important changes concern the provision of the necessary equipment for a distant worker. The amendments provide that the employer shall provide the employee with the equipment, software and hardware, information protection tools, etc. necessary for the performance of the work function. If the employee, with the employer's consent and in his/her interests, uses his/her own or leased equipment and the aforementioned means, the employer shall pay him/her compensation and reimburse the expenses related to the use of such property.

Revolutionary changes might be traced in the approach to the termination of an employment contract with the distant worker. If under much-criticized previous norms such a contract might have been dissolved by the employer at any reason stipulated in the contract and this group of workers was exempt from the general very restrictive regulation of dismissals, since 1 January 2021 no such opportunity exists. The legislator though included two new grounds for the termination at the will of an employer in the new Article 312.8 of the Labour Code. They are the following:

the employee fails to interact with the employer for more than two consecutive working days without good reason from the employer's request (unless a longer period is set);

the employee has changed the place of work and this has made it impossible for him/her to fulfil his/her duties under the previous conditions (for permanent contracts of distant employment).

There had been a discussion about the inclusion of the right to disconnect to ensure a better balance between the work and private life of a distant employee, as recently enacted in France and Spain. However, this proposal did not find support. Overall the new regulation of distant work is a bright example of changing the law in the right direction, ensuring fairer and more flexible regulation. It is also an example of the state's attention to academic opinion, as new norms are largely determined by the criticism of the former regulation from the academic society.

There has been a number of initiatives of increasing the flexibility of labour regulations. In March 2020, the Ministry of Labour proposed to amend the Labour Code providing the government with the right to determine the notification period for upcoming layoffs or in connection with the liquidation of an organization during an epidemic. The government did not support the bill due to potential risks for employees.²⁵

As we have noted above, in May-June 2020 the Government and social partners are considering the draft of temporary regulations of labour.²⁶ This draft contains mostly the norms which were expressed during the period of quarantine in the letters and the recommendations of the Ministry of Labour and are very questionable from the point of view of their compliance with the Labour Code. For example, it decreases the notification period for changing the conditions of labour from 2 months (article 74 of the LC) to 2 weeks. The most spectacular norm of the present document is the acknowledgment of the priority of these temporary regulations of labour over other sources of labour law: “In the part not regulated by the present temporary regulations, labour legislation and other normative legal acts containing norms of labour law are applied”.

In our opinion, certain flexibility is definitely needed in the norms on changing and on the dissolution of the employment contracts in the period of pandemic. However, these norms should correspond to hierarchy of the sources of law, should be complimented with the new supportive measures for the unemployed.

Conclusions

²⁵ The Ministry of Labor proposed a new procedure for changing labor relations in the epidemic. In Russian. 24 April 2020. <<https://www.rbc.ru/economics/24/04/2020/5ea15cc29a7947041f6e20ed>> accessed 01 June 2020.

²⁶ Olga Ignatova, ‘The Ministry of Labour proposed a special procedure for remuneration and dismissals’. In Russian. (Rossiyskaya gazeta, 29 May 2020) <<https://rg.ru/2020/05/29/mintrud-predlozhit-osobyj-poriadok-oplaty-truda-i-uvolnenij.html>> accessed 01 June 2020.

International Labour Organization in its Centenary Declaration for the Future of Work called upon all Members to adopt policies and incentives that promote the creation and development of sustainable enterprises, innovation, and the transition from the informal to the formal economy.²⁷ This aspiration should also determine the policy of the states in the times of pandemic in particular though ensuring the balance of the rights of the employers and employees. The burden of the crisis should not be placed on one of the parties, but distributed between the state (through providing special measures of support to business and workers/unemployed) and the business. Workers, as the most vulnerable party, should be protected either by the means of labour law or social security law.

This is the most crucial issue in the activities of Russian authorities in the field of employment. Introducing the regime of “non-working” days they have placed the whole burden upon the employers. This measure, in our opinion, will have a deep and long lasting effect on employment market, increasing unemployment and unformal employment.

The pandemic also demonstrated that there is a need for the special mechanism of labour regulation in emergency situations. Such mechanism should be capable of responding adequately, quickly and effectively to emergencies, it should "interface" with those mechanisms that function in the normal conditions of society and with the more general socio-economic, political and legal categories.²⁸

²⁷ ILO Centenary Declaration for the Future of Work, 2019. <https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_711674.pdf> accessed 01 June 2020.

²⁸ M. V. Filippova, E. B. Khokhlov, On the decision-making mechanism in emergency situations. Yearbook of Labour Law. 2021: collection of scientific works / responsible editor E. B. Khokhlov. - Saint Petersburg : SPbSU, 2021 - Issue 11 - 2021. P. 10.