

## employment - legal changes published in January 2021

**Order of the National Agency for Employment no. 2/2021 for the approval of the Procedure for granting the amounts provided by art. 1 para. (1) of the Government Emergency Ordinance no. 220/2020 on the application of social protection measures after January 1, 2021 in the context of the spread of SARS-CoV-2 coronavirus, as well as for the amendment of some normative acts** was published in the Official Gazette, Part I no. 17 of January 7, 2021, entering into force on the same date.

The Order approved the procedure by which employers can benefit monthly, for a period of 12 months, from an amount representing 50% of the employee's salary, but not more than Lei 2,500 (for each employee in the following categories), if during the period January 1 - September 1, 2021, hire for an indefinite period, full-time: **(i)** persons over the age of 50 whose employment has ceased for reasons not attributable to them, during the state of emergency or alert, or **(ii)** persons aged between 16 and 29 registered as unemployed in the records of the employment agencies, or **(iii)** Romanian citizens, included in the same age categories, whose employment relationships ceased in 2020 with foreign employers on the territory of other states, for reasons not attributable to them, by dismissal.

In order to benefit from this support, the employers must conclude an agreement with the competent employment agencies by **September 1, 2021** (this being a mandatory time-limit to comply with for receiving the support), the template of which is provided in Annex 1 to the Order.

For concluding the agreement, the employers must submit by electronic means, following the possession of a qualified certificate (issued under the Law no. 455/2001 on electronic signature), an application (according to the template set out in Annex 2 to the Order), together with: **a)** a statement on its own responsibility, given by the legal representative, showing that the company is not in one of the situations in which the support cannot be granted, according to the template provided in Annex 3 to the Order; **b)** the identity documents of the persons employed in the categories provided above, in copy (certified for conformity with the original); **c)** the documents based on which the persons from the categories provided above were employed, in copy (certified with the original).

According to the Procedure, the amounts are granted to the employers on a monthly basis, from the date of concluding the agreement, in proportion to the actual time worked in that month by the persons employed under the conditions provided above. These amounts are also granted for the rest leave period. However, during the period in which the employment relationships of the persons covered by the convention are suspended, the amounts shall not be granted.

For the verification and settlement of the monthly amounts, the employers must submit by the 25<sup>th</sup> of the month following the month for which they request these amounts, by electronic means, to the employment agencies, a nominal table prepared according to the template provided in Annex 4 to the Order, together with the timesheet and payroll for that month signed by the employees, provided in certified copy by the employer (for conformity with the original) or, if the payment of the salary is made by transfer to a bank account, together with the timesheet and payroll for that month, as well as the salary payment orders and the related account statements, in certified copy by the employer for compliance with the original.

**Government Decision no. 3/2021 regarding the extension of the state of alert on the Romanian territory starting with January 13, 2021, as well as the establishment of the measures applied during it to prevent and combat the effects of the COVID-19 pandemic** was published in the Official Gazette, Part I no. 36 of January 12, 2021, entering into force on the same date.

According to the Decision, it was established that starting with January 13, 2021, the state of alert will be extended for another 30 days on the entire territory of the country.

The Decision maintains the obligation to wear a protective mask in public spaces, commercial spaces, means of public transport and at the workplace.

Also, for all public or private institutions and economic operators, the obligation to decide the organization of work to working from home or teleworking regime is maintained, where the specificity of the activity allows, under the conditions of art. 108-110 of the Labour Code, as well as those established by the Law no. 81/2018 on teleworking activity.

In the situation where the employee cannot work in teleworking or work from home regime, in case there are more than 50 employees, the employers have the obligation to organize the work schedule so that the staff is divided into groups to start or end the activity at a difference of at least one hour.

**Government Decision no. 4/2021 for establishing the minimum gross basic salary per country guaranteed in payment** was published in the Official Gazette, Part I no. 40 of January 13, 2021, entering into force on the same date.

By this Decision, the minimum gross basic salary per country was increased from Lei 2,230 to Lei 2,300 per month, starting with the date of entry into force of the normative act, namely January 13, 2021. This new level of the minimum gross basic salary per country was established for a normal work schedule of an average of 169,333 hours per month, representing Lei 13,583/ hour.

For the staff hired in positions for which the level of higher education is required, with at least one year's seniority in higher education, the minimum gross basic salary in the country guaranteed in payment, excluding bonuses and other allowances, shall be set at the amount of Lei 2,350 per month, for a normal work schedule of 169,333 hours on average per month, representing Lei 13,878 lei/ hour.

**Decision of the High Court of Cassation and Justice no. 30/2020 regarding the examination of the appeal in the interest of the law formulated by the Ombudsman regarding a legal issue** was published in the Official Gazette no. 68 of January 21, 2021, being applicable starting with the same date.

The High Court of Cassation and Justice was invested with the claim formulated by the Ombudsman regarding the settlement of the appeal in the interest of the law in connection with the phrase "real and serious cause" from the provisions of art. 65 of the Labour Code in the sense of establishing, *„if a serious character of the dismissal implies that, in case of reduction of the number of identical positions within the unit, the employer must apply some criteria of preference/ selection, to justify the choice of employee/ employees to be fired from a number of employees carrying out identical or similar activities”.*

The courts have given different or contradictory solutions to the same issue of law.

Thus, a first case-law considers that:

- the employer is not obliged to indicate in the dismissal decision the economic analysis underlying the adoption of the dismissal measure, the future development strategy, nor to prove the efficiency of the organization/reorganization measures, these representing its exclusive attribute;
- the courts are not called to assess on the economic activity nor on the measures of organization and functioning of the unit led by the employer, these being matters of opportunity;
- the employer is not required to apply or indicate in the dismissal decision selection criteria between similar positions, this obligation remaining only in the case of collective dismissals;
- the courts cannot impose a certain selection criterion on the employer.

A second case-law considers that:

- the employer must indicate in the dismissal decision the selection criteria between identical/ similar positions;
- these criteria must be objective and verifiable and not conceal subjective criteria, foreign to the legal case of dismissal;
- the objective criteria must pre-exist at the moment of initiating the dismissal procedure, to be provided in internal documents of the employing unit, to be known by the employee and opposable to him/ her.

The High Court considered that the issue at the origin of the appeal in the interest of the law does not start from the insufficiency or the ambiguity of art. 65 of the Labour Code, since all the courts started logically and similarly from the premises of the legal text in question. Thus, all the courts consider the analysis of the conditions imposed by art. 65 para. (2) of the Labour Code, respectively the effectiveness of the cancellation of the position(s), as well as the real and serious cause underlying this measure.

The discrepancy arises, in fact, when determining the real and serious nature of the cause of cancellation of the job(s), a stage of argumentation in which some courts feel the need to indicate criteria for selection in the dismissal decision, and other courts consider the employer to be sovereign, therefore exempted from the obligation to apply and indicate such criteria, which also excludes the obligation of the court to examine them. However, this aspect is not related to the interpretation of art. 65 of the Labour Code, but of the way in which the condition regarding the "real and serious cause", provided in the second paragraph of this article, is and must be evaluated concretely, related to the specifics of the case, which reveals a problem of application of the legal text to the circumstances of the case, not a problem of interpretation of the legal text in question.

Also, the application of the legal provisions to the particularities of the case brought before the court is the exclusive attribute of the courts, called to apply the law to the factual situation that characterizes each case, which exceeds the rigors and purpose of the appeal mechanism in the interest of law.

**For these reasons, the High Court rejected as inadmissible the appeal in the interest of the law because, on the one hand, it tends to an interpretation that adds to the text of the law, which refers to the application of the law by establishing issues of fact, and not of law and, on the other hand, because it tends to deviate from the purpose of the mechanism of unification of the case-law represented by the appeal in the interest of the law.**