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Non-employee atypical forms of employment in Poland: sociological and legal perspectives

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Abstract

Motivation: The latest statistical data coming from the Central Statistical Office of Poland reports allows to conduct first estimative study concerning scale and structure of work undertaken in non-employee atypical forms of employment in Poland. Self-employment and work performed under private (civil-law) contracts are often associated with issue of the so-called junk contracts. In this respect, particular role should be assigned to the national legislator who can impose effective regulations designed to combat abusive practices in the field of atypical forms in employment.

Aim: The purpose of the article is to present scale and structure of work undertaken in non-employee atypical forms of employment in Poland and to characterize domestic legal frameworks defining acceptable limits of applying such forms of employment.

Results: Approximately 17% of working population in Poland is employed under non-employee atypical forms. The levels of such forms of employment have been stable in recent years. The problem arises when such forms of employment are imposed on workers against their free will. The data suggests that on the average in 7 out of 10 registered cases non-employee forms of employment were imposed by an employer. Domestic regulations establish theoretically appropriate legal measures designed to reduce apparent abuse of such forms of employment. However, the main problem lies in both the difficulty to properly classify individual cases and the effectiveness of applying particular measures in practice.

Keywords: atypical forms of employment; non-employee; self-employment; civil law contracts
JEL: J21; J41; K31

1. Introduction

Atypical forms of employment are nowadays becoming increasingly popular on global and domestic labour market. The impact of the flexicurity policy, evolution of working culture, employers' need for rapid respond to fluctuations of the business cycle and new trends in human resources policy should be regarded as the main factors driving an evolution of the classic model of employment. We should draw particular attention to the noticeable tendency towards introducing new, mostly more flexible, forms of employment that seems to be better adjusted to the needs of evolving labour market.

However, it should be borne in mind that the newest trends are not always the best ones. Not infrequently, flexibility of employment results in weakening employee's position. We can observe such dependency especially in case of the non-employee forms of employment where considerable part of the Labour Code's (1974) provision protecting employees cannot be applied. Forcing an employee to undertake work in the atypical form, characterised by unfavourable working and remuneration conditions, has nothing to do with implementation of the flexicurity policy and should be considered as the obvious abuse. Employment in non-employee atypical forms should be introduced in controlled and gradual process — especially on the domestic labour market, where new (western) tendencies blend with the specificity of post-transformational economy.

There is no reason to doubt that the issue of non-employee atypical forms of employment is a matter of enormous importance and can be a subject of interesting and valuable research. The purpose of the article is to present scale and structure of work undertaken in non-employee atypical forms of employment in Poland. Furthermore, this paper also aims to characterise actual domestic legal regulations designed to prevent abuse of non-employee forms of employment in practice.

2. Literature review

2.1. Definition of the concept of atypical forms of employment

Atypical forms of employment can be defined as all those forms of undertaking work which, due to is specificity, cannot be classified under the universal model of subordinated work (Bąk, 2009, p. 9; Chobot, 1997, p. 130). Atypical forms of employment are the product of evolution of modern labour market, which can be characterised by shifting from dictate of the inflexible classical model of employment to the new, more flexible forms of employment (Ogura, 2005, pp. 6–9).

In order to define the term 'atypical forms of employment', as its initial step, it is necessary to identify essential components of the classical employment

relationship. The classical model of employment is based on five constituent characteristics:
- employment relationship based on the contract of indefinite duration,
- full-time employment,
- performing work at a workplace indicated by an employer or at his registered office,
- work performed in rigid hours defined in advance,
- continuity of work (long-time duration) (Bąk, 2009, pp. 9–10; Berezka, 2012, p. 10; Gersdorf, 2012, pp. 45–50; Liptak, 2011 p. 4).

In the view of the above, atypical forms of employment should be sought mainly in such working relations that can be characterized by a tendency to make defined components of the classical employment relationship more flexible. In particular, the term of atypical forms of employment should be referred to those employment forms, where the primacy of both employee's subordination and rigid working hours are weakened.

2.2. The classification of atypical forms of employment

A. Bąk (2009, p. 11) suggests very relevant classification of typical and atypical forms of employment. In the case of the Polish labour market, a full-time employment based on the contract on indefinite duration should be considered as the typical form of employment and as the dominant form of undertaking working activity.

On the other hand, the atypical forms of employment are subjected to further classification and can be subdivided into:
- employee atypical forms of employment: fixed-term contracts and part-time work;
- non-employee atypical forms of employment: civil law (private) contracts and self-employment;
- mixed atypical forms of employment: temporary work, telework and outwork (Bąk, 2009, p. 11).

This article focuses only on non-employee atypical forms of employment, which includes civil contracts and self-employment. A feature common for all non-employee forms of employment is that relevant provisions of the Labour Code (1974) are not applicable to such forms of work. Moving further, among civil-law contracts, the contract of mandate and the contract for specific work should be seen as the mostly utilised forms of the atypical employment.

Self-employment should be also considered as equally popular form of non-employee employment, engaging substantial part of working population in Poland. However, it has to be emphasized here that, for the purpose of this article, self-employment should be understood only as undertaking working activity solely by self-employed individuals not employing other employees (i.e. own-account workers).

2.3. Motives and implications associated with performing work in the non-employee atypical forms of employment

The vast majority of working activities performed under an employment relationship can be exercised equally efficiently under a private contract or within self-employment. It should be noted that the use of non-employee forms of employment is commonly motivated by a desire to reduce labour costs and gain more flexible structure of employment (Bąk, 2009, pp. 70–92). Workers under civil-law contracts and own-account workers do not enjoy basic rights and protection measures guaranteed by the Labour Code (1974) and other labour regulations. The provisions concerning such issues as holiday, parental or maternity leave, working time, minimum wage, specific notice periods, trade unions' protection or protection against the mobbing cannot be applied in relation to non-employee atypical forms of employment. Such forms of employment are beneficial to employers also in terms of working costs (Bąk, 2009, p. 73). For instance, not all civil contracts are saddled with social-security contributions (e.g. specific work contracts), and in the case of self-employment such burden is shifted from an employer to a worker who is exclusively responsible for paying proper contributions.

Negative consequences of exploiting non-employee forms of employment emerge especially in those cases where a choice of such employment form has been dictated by employer's desire to circumvent labour law regulations protecting employees (Bąk, 2009, p. 73). In this particular area, non-employee atypical forms of employment must be seen not only as simple labour phenomenon, but also as a serious problem of the labour market. It should be borne in mind that non-employee forms of employment significantly weaken particular aspects of the classical employment model that usually work in favour of employees. Flexitime or lack of notice periods making given relationship more flexible, may at the same time pose a threat to workers who will not receive due payment for overtime or who may immediately lose sole source of economic support (ILO, 2015, pp. 19–33; Bąk-Grabowska, pp. 705–706).

3. Methods

In order to analyse both scale and structure of non-employee atypical forms of employment in Poland it is necessary to study relevant statistical data. The data contained in the Central Statistical Office's of Poland (CSO) reports allowed to present preliminary estimations concerning both scale and structure of work undertaken in non-employee forms in Poland in years 2012–2015. The particular importance should be assigned to the information note (GUS, 2016a), which contains information necessary for conducting critical research of the phenomenon's structure in terms of employment initiative, gender, age and education of workers and types of utilised non-employee atypical forms. Nevertheless, it should be also noted that the data contained in the above-mentioned report,

due to modular character of the CSO's research, is generally underestimated and should be used only for structural analysis of the phenomenon[1].

On the other hand, the characteristics of domestic legislative frameworks, designed to combat abuse of the non-employee atypical forms of employment, requires applying critical and comprehensive analysis of relevant sources of the labour law, jurisprudence and literature.

4. Results

4.1. Scale and structure of the analysed phenomenon

The statistical data contained in the table 1 allows to estimate the scale of work undertaken in the non-employee atypical forms in Poland. Analysis of the data leads to the first conclusion that the number of persons employed in the non-employee atypical forms has represented a considerable part of the general working population during the period analysed. The average number of self-employed individuals and workers under mandate or specific work contracts in years 2012–2015 can be estimated at 2.44 million. Such number represents about 17% of working population. Therefore, it can be assumed that during the period analysed every sixth person working in Poland performed his services under civil-law contracts or as an own-account worker.

In this context, it is also worth to highlight other noticeable tendency concerning the phenomenon. The number of persons undertaking work under the non-employee forms remained relatively stable during the period analysed, experiencing only marginal fluctuations. For instance, the biggest fluctuation could be observed in years 2013–2014, when the number of civil-law contractors declined by 0.1 million (i.e. 7% year to year). It may suggest that non-employee forms of employment have reached its optimal level and respond to factual demand of the market.

Analysing the structure of investigated phenomenon, we should firstly focus on the differences in gender structure of work undertaken in the non-employee forms (table 2). Due to underestimation of the modular research (GUS, 2016a), the statistical data does not allow to identify the most popular non-employee atypical form of employment in general terms. However, the data presented in the table 2 allows to indicate most popular forms for specific gender. Therefore, it leads to the conclusion that women more often worked under a contract of mandate, while self-employment, specific work and other civil-law contracts were more common among men.

Moving further, particularly disturbing conclusions may be drawn from analysis of the data presented in the table 3. It characterises work performed

[1] The modular research was based on a random statistical sampling method involving 12.5 thousand persons. After the survey, the results were generalized in relations to entire working population (GUS, 2016a, pp. 1–2).

in non-employee forms in terms of worker's freedom to decide about such form of employment[2]. The data seems to prove that the vast majority of people performing work in non-employee atypical forms did not choose such forms freely and had to adapt to employer's requirements in this respect (GUS, 2016a, p. 4). On average, more than 7 out of 10 individuals undertaking work in non-employee forms performed work in such forms involuntarily. In the case of all private contracts and mandate contracts, the percentage of those working involuntarily in such forms was as high as 80.2% and 84.3% respectively. Taking into account the gender structure of the phenomenon, the data also leads to other conclusion that civil-law contracts were more often imposed on women (81.4% versus 79.1% in case of men). However, in case of the same contract of mandate, it was mostly man who were not free to decide about such form of working activity (86.3% versus 82.8%). Only in the case of self-employment the proportion of workers choosing such form voluntarily or involuntarily was spread quite evenly.

Moving to other characteristics of the studied phenomenon, which are not presented in the tables 1–3, it should be also highlighted that work in non-employee atypical forms is mostly undertaken by:

– people aged between 15 and 24 years or 60 years and over (13.1% and 7.0% of working population within indicated age-range);
– people with secondary education (6.7% of working population with such education worked in the non-employee forms) (GUS, 2016a, pp. 7–8).

Such regularities may prove that imposing non-employee atypical working model mainly affects those entering labour market (youth) or those considered as not-skilled or ineffective workers (lower educated and elderly).

4.2. Domestic legal frameworks: fundamental issues

4.2.1. The catalogue of sanctions and prohibitions

As a preliminary, it should be clearly emphasized that the national legislator does not prohibit the use of non-employee atypical forms of employment. Regulations limiting the use of such forms may be applied only in order to combat the circumvention of labour law. The Labour Code (1974) introduces simple set of legal measures aimed at combating unfair practices, which we may find especially in the Articles 22 and 281.

In the first place, the Article 22 §1 of the Labour Code (1974) defines the structure of employment relationship through indicating its constituent elements as:

– obligation of an employee to perform predetermined working activities,

[2] The respondents were asked whether work performed in such forms was the result of their free and independent decision or whether it was imposed by an employer (GUS, 2016a, p. 4).

– managerial authority of an employer and subordination of an employee,
– performing working activates in predefined time and place,
– chargeability of the relationship in form of remuneration.

Subsequently, the Article 22 §1(1) of the Labour Code (1974) constitutes direct requirement to consider all legal relations including the abovementioned elements as an employment relationship, regardless of a name of concluded contract. Therefore, each and every case of self-employment or private contract, whose content corresponds with the elements defined in the Article 22 §1 of the Labour Code (1974), should be classified as an employment relationship falling directly under labour law (See: Judgements of the Supreme Court of 7 April 1999 (I PKN 642/98)).

Consequently, the Labour Code (1974) in form of the Article 22 §1(2) expressly prohibits replacing any employment contract by other civil-law contract under conditions specific to an employment relationship. In simple terms, it is illegal to conclude any civil-law contract in conditions typical for an employment relationship. The indicated ban shall also be applied to self-employment (Jaśkowski & Maniewska, 2016). The national lawmaker directly restricts employers' freedom in this area in order to avoid circumvention of labour law through misuse of private contracts in conditions typical for the employment contract. It seems that this is the only provision of the Labour Code (1974) that can be regarded as indirect prohibition on employers from forcing current employees to switch to non-employee forms of employment or on imposing such forms on job candidates against their will. However, we should remember that in order to obtain effective protection against such abuse it is necessary to clearly establish that in given case work is performed under conditions specific for the employment relationship.

Finally, the lawmaker introduced penalty for infringing the above-indicated prohibition. Such conduct is considered as an offence against the rights of an employee. Under the Article 281 point 1 of the Labour Code (1974), an employer or persons acting on his behalf, concluding a civil-law contract with the constituent elements defined in the Article 22 § 1 shall be liable to a fine of between 1 and 30 thousands PLN.

At the end, it should be also emphasized that the above-mentioned directives cannot be applied automatically. Each employed person, considering his work in atypical non-employee form as an example of the circumvention of the Article 22 of the Labour Code (1974), should file a specific legal claim under provisions of the Civil Procedure Code (1964), in order to establish existence of the employment relationship. We should remember that determining employer's liability is a final product of multistage proceedings that can be launched only by competent entity. Such action can be brought only by an abused employee (Civil Procedure Code, 1964, Article 198) or by the labour inspectors (Civil Procedure Code, 1964, Article 63^{1}). Therefore, application of possible legal sanctions depends solely on employee's courage and awareness of his rights or on proper knowledge and professionalism of the competent authorities.

4.2.2. The difficulty to differentiate the typical and atypical forms of employment

In theory, the characterised legal mechanism seems to be reasonable and complete. The national legislator directly defines the term of employment relationship, designates its constituent elements, implements reasonable presumptions and bans the circumvention of law. We may also find severe legal sanctions designed to discourage dishonest employers form illegal practices. Nevertheless, in practice, application of legal instruments is relatively complicated. This is because the boundary between the typical (employee) and the atypical (non-employee) forms of employment (due to similar specificity of working duties) is often blurred and makes it practically impossible to formulate universal and general classifying premises.

This is the field where specific role should be assigned to labour courts, which repeatedly instructed how to distinguish between labour contracts, self-employment and private contracts. According to the judicature, the nature (typical or atypical) of given working relation should be primarily determined by its predominant element (See: Judgements of the Supreme Court of 14 September 1998 and 5 May 2010 (I PKN 334/98; I PK 8/10)). Concluding private contract or working in form of self-employment with dominant elements of an employment relationship should result in classifying such relation as an employment relationship.

In addition, we should also take into account disqualifying conditions. For instance, worker's power to designate replacement or lack of requirement of personal service deprive such contract of constituent elements of the employment relationship. Therefore, such form of legal relation make it impossible to classify it as an employment relationship (See: Judgements of the Supreme Court of 28 October and 26 November 1998 (I PKN 416/98; I PKN 458/98)).

The problem arises when it is impossible to determine the predominant element. In problematic cases we should study such aspects of given legal relation as common intention of the parties, contract's objective, its name and on that basis we may establish a true nature of given relation (See: Judgement of the Supreme Court of 18 June and 2 September 1998 (I PKN 191/98; I PKN 293/98)). It is an important recourse to the idea of the common will regarded as the basis of each private contractual relation. Consequently, labour courts should not classify any civil-law relation as an employment relationship against the common will of the parties.

Summing up, it is impossible to formulate universal rules of interpretation that would reduce the process of classification to the simple equation. In practice, the process of determining abuse of non-employee atypical forms of employment requires to undergo individual, precise and arduous analysis.

5. Conclusion

The presented study proves that work performed in non-employee atypical forms of employment is not a marginal phenomenon on the domestic labour market and concerns significant part of its working population (approx. 17%). It should be also recognized that employment in the non-employee atypical forms has currently reached its optimum level and seems to reflect realities and demand of the Polish labour market. We can also define gender structure of non-employee atypical forms of employment that can be characterized with specific popularity of particular forms. The contract of mandate was dominant among women, while other forms (self-employment, specific work contracts and other private contracts) were more popular among men.

Work performed in non-employee forms should be regarded as a problem especially in those cases when such form of working activity is imposed on a worker by an employer. The data proves that it is a common practice, concerning on average over 70% of people performing work in non-employee forms of employment. Imposing such forms against the will of an employed party is a direct violation of the fundamental principle of the contractual freedom in labour and civil law.

It is obvious that there are clear motives behind the popularity of non-employee forms of employment. Such practices are often motivated by employer's desire to cut working costs, to achieve more flexible relation or to circumvent labour law. Abuse of such forms of employment can be combated only through properly designed and applied legal measures. The national legislator has introduced series of legal instruments that theoretically limit employers' discretion when it comes to the use of non-employee forms of employment. At the same time, it should be borne in mind that combating the circumvent on labour law is not a simple task. In order to apply appropriate legal measures, appropriate initiative of abused worker or competent labour inspector is required. Lack of awareness of vested rights or lack of legitimate reaction of empowered authorities will prevent or seriously impede applying further legal mechanisms. On the other hand, the final result of specific case depends ultimately on professionalism and experience of labour courts which are facing extremely challenging issue to appropriately classify particular factual situations.

References

Bąk, E. (2009). *Nietypowe formy zatrudnienia na rynku pracy*. Warszawa: C.H. Beck.

Bąk-Grabkowska, D. (2012). *Atypical forms of work arrangements and forms of employment as a determinant of working time arrangements.* Paper presented at 13 th Management International Conference, Budapest, Hungary. Retrieved 25.01.2017 from http://www.fm-kp.si.

Berezka, A. (2012). Nietypowe formy zatrudnienia w Polsce na tle wybranych krajów Unii Europejskiej. *Studia i Prace Wydziału Nauk Ekonomicznych i Zarządzenia*, 28.

Chobot, A. (1997). *Nowe formy zatrudnienia. Kierunki rozwoju i nowelizacji*. Warszawa: PWN.

Gersdorf, M. (2012). Kodeks zatrudnienia wyzwaniem przyszłości. In M. Gersdorf (Ed.), *Zatrudnieni i zatrudniający na aktualnym rynku pracy*. Warszawa: LexisNexis.

GUS. (2014a). *Monitoring rynku pracy*. Retrieved 25.01.2017 from http://stat.gov.pl.

GUS. (2014b). *Rocznik statystyczny pracy 2012*. Retrieved 25.01.2017 from http://stat.gov.pl.

GUS. (2015a). *Wybrane zagadnienia rynku pracy. Dane za 2013 rok*. Retrieved 25.01.2017 from http://stat.gov.pl.

GUS. (2015b). *Wybrane zagadnienia rynku pracy. Dane za 2014 rok*. Retrieved 25.01.2017 from http://stat.gov.pl.

GUS. (2016a). *Pracujący w nietypowych formach zatrudnienia*. Retrieved 25.01.2017 from http://stat.gov.pl.

GUS. (2016b). *Rocznik statystyczny pracy 2015*. Retrieved 25.01.2017 from http://stat.gov.pl.

GUS. (2017). *Wybrane zagadnienia rynku pracy. Dane za 2015 rok*. Retrieved 25.01.2017 from: http://stat.gov.pl.

ILO. (2015). *Non-standard forms of employment*. Retrevied 25.01.2017 from http://www.ilo.org.

Jaśkowski, K. & Maniewska, E. (2016). *Komentarz aktualizowany do ustawy z dnia 26 czerwca 1974 r. Kodeks pracy. Ustawy towarzyszące z orzecznictwem. Europejskie prawo pracy z orzecznictwem*. Warszawa: LEX/el.

Judgement of the Supreme Court of 14 September 1998 (I PKN 334/98) (Poland).

Judgement of the Supreme Court of 18 June 1998 (I PKN 191/98) (Poland).

Judgement of the Supreme Court of 2 September 1998 (I PKN 293/98) (Poland).

Judgement of the Supreme Court of 26 November 1998 (I PKN 458/98) (Poland).

Judgement of the Supreme Court of 28 October 1998 (I PKN 416/98) (Poland).

Judgement of the Supreme Court of 5 May 2010 (I PK 8/10) (Poland).

Judgement of the Supreme Court of 7 April 1999 (I PKN 642/98) (Poland).

Liptak, K. (2011). Is atypical typical? Atypical employment in Central Eastern European countries. *Employment and Economy in Central and Eastern Europe*, 1.

Ogura, K. (2005). International comparison of atypical employment: differing concepts and realities in industrialized countries. *Japan Labor Review*, 2.

Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego [Civil Procedure Code of 17 November 1964] (Dz.U. 2016 poz. 1822) (Poland).

Ustawa z dnia 26 czerwca 1974 r. Kodeks pracy [Labour Code of June 26, 1974] (Dz.U. 2016 nr 0 poz. 1666) (Poland).

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Appendix

Table 1.
The number of employed, self-employed persons and specific civil-law contractors in years 2012–2015 in Poland (in millions)

Specification	2012	2013	2014	2015	Average
Employed persons (total)	14.20	14.20	14.60	14.80	14.45
Self-employed persons*	1.10	1.10	1.10	1.10	1.10
Mandate and specific work contractors	1.35	1.40	1.30	1.30	1.34

Note:

* self-employed persons without employees (own-account workers).

Source: Own preparation based on GUS (2014a; 2014b; 2015a; 2015b; 2016b; 2017).

Table 2.
The percentage of persons performing work in the non-employee atypical forms of employment by type of contract and sex (in %)

Specification	Male	Female
Contract of mandate	56.7	75.9
Self-employment*	18.8	13.4
Specific work contract	14.2	4.9
Other civil-law contracts	10.2	5.8

Note:

* self-employed persons without employees (own-account workers).

Source: Own preparation based on GUS (2016a, p. 5).

Table 3.
The percentage of persons voluntarily or involuntarily performing work in the non-employee atypical forms of employment by type of contract and sex (in %)

Specification	Voluntary			Involuntary		
	Total	Male	Female	Total	Male	Female
All civil-law contracts	19.8	20.9	18.6	80.2	79.1	81.4
Contract of mandate	15.7	13.7	17.2	84.3	86.3	82.8
Self-employment*	48.7	52.9	41.9	51.3	47.1	58.1
Average value	28.1	29.2	25.9	71.9	70.8	74.1

Note:

* self-employed persons without employees (own-account workers).

Source: Own preparation based on GUS (2016a, p. 6).