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LABOR COMPLIANCE AS AN INSTRUMENT OF LABOR RELATIONS CONTROL

Elena Kiselyova ¹

¹ Educational-scientific Institute of Law of Sumy State University, Sumy, Ukraine

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Abstract

The article deals with the peculiarities of introduction of a labor compliance system as a system of measures for ensuring employer's and other subjects' of labor law compliance with current labor legislation and other labor regulations. Labor compliance serves as a means of preventing labor rights violations. The labor compliance system, researched in this article, includes mechanisms of internal labor control (compulsory and voluntary). The article indicates the necessity of adopting a Law of Ukraine on labor compliance, which would provide the definition of labor compliance, state the purpose of introducing compliance control in a business organization, main tasks and the principles of functioning, the structure and composition of a compliance service at an external and internal level, the rights and obligations of compliance professionals, guarantees of their activities and the responsibility attached to their position. Expediency of introducing a compliance control department in organizations, enterprises and institutions is emphasized, with such department controlling the subject at all levels, and also creating a position of a compliance specialist as a person acting in accordance with an established Compliance Program. Such measure will not only simplify the existence of organizations and enterprises, but will also significantly improve the quality of labor law. Therefore, it is believed that the theme of introducing labor compliance at enterprises and institutions is very relevant.

Key words: *compliance control, labor relations, labor control, principles, integration*

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Introduction

Studies show that the number of labor law violations increases every year. According to the results of 2018 inspections the State Labor Service of Ukraine discovered 33,900 violations in the area of labor legislation observance, employment and compulsory state insurance (Public Report of the Head of the State Service of Ukraine for Labor, 2019). At the same time, these indicators are increasing each year, which leads to a significant deterioration of the rights of both workers and employers on the labor market.

A US survey on labor compliance at the enterprises has shown that 80% of the respondents are trying to comply with labor legislation, 73% have problems with complying with labor legislation and changes introduced, and only 66% of respondents are taking measures to effectively implement changes in legislation (Labor compliance and time tracking a survey of HR and finance professionals, 2013). Similar surveys have not been conducted in Ukraine but the analysis of information sources makes it possible to say that there is a problem with compliance with labor legislation at enterprises, organizations and institutions. In order to solve this problem it is necessary to introduce the concept of labor compliance which regulates labor relations and controls their conformity with established rules and regulations. This measure will not only simplify the existence of organizations and enterprises, but will also significantly improve the quality of labor law. Therefore, the purpose of this study is to define the labor compliance and its components and to compare foreign law in this area with the current legislation of Ukraine.

In accordance with the purpose of the study, the following main tasks have been identified:

- 1) to determine and explain the essence of a *compliance* term and its role in labor relations;
- 2) to determine the personnel basis for compliance implementation;
- 3) to analyze the legislation of foreign countries in the field of compliance control implementation;
- 4) to define the European standards of labor regulations observance;
- 5) to compare current Ukrainian legislation with European standards in the field of labor compliance.

Material and methods

International regulations, regulations of Ukraine and the European Union served as theoretical and methodological basis for the scientific work. The following methods were used within the course of this scientific work: 1) analytical and logical methods enabled the selection and analysis of information on the subject of research; 2) formal legal method has made it possible to determine the place of labor compliance in Ukraine, the European Union and other countries; 3) the use of historical legal method enabled studying the regulations introduced in both the European Union and worldwide; 4) comparative legal method made it possible to compare the legislation of Ukraine and other countries. For a detailed study of the subject, the author used a variety of general scientific and special methods of cognition, the choice of which is due to the peculiarities of the object, subject, purpose and objectives of the study.

Theoretical background

Within today's general trend for European integration Ukraine is trying to meet the foreign legal standards in all the areas. The Labor law is no exception. The compliance presents a completely new concept for the labor law of Ukraine, however, the legal development of the state, integration into the EU requires such institute to come into existence here and now. Compliance is considered to be a system for ensuring and controlling conformity with the law, therefore, labor compliance provides for such control wherever labor relations are present. Labor compliance is pretty popular abroad: in the United States and the United Kingdom there is a requirement for compliance programs to be implemented in institutions, enterprises and

organizations, as it is claimed to be one of the indicators of reliability of the relevant entity on the labor market.

Looking at the origins of this term, it was initially understood as a risk of legal sanctions or public authority sanctions to be imposed and as bankruptcy protection in order to demonstrate that the organization is a law-abiding partner for both other organizations and the state.

Deterrence theory predicts that the likelihood of an investigation together with the cost of penalties for violations affect an employer's assessment of the 'benefits and costs' of complying with a law. The higher the expected penalty relative to the benefits of not complying, the more likely a rational employer will be to comply with the law (Weil, 2011).

Private compliance initiatives can be considered practical applications of the theoretical paradigm of "decentred" regulation. Decentred regulation is "distinct from (or perhaps rather subsumes within it) the 'regulatory state'". Kolben explains that a decentred analysis is premised on: a shift away from command-and-control regulation towards forms that are more decentralized, dynamic, interactive and responsive. In this notion, sovereignty and rulemaking authority are layered and complex, allowing a more pluralistic range of legal orders to exist that are equal, or equivalent to that of the state (Kolben, 2007).

Traditional enforcement strategies assume that enforcement efforts should focus at the level where workplace violations are occurring (Weil, 2011). There are a number of reasons why reducing noncompliance matters. First, the majority of workers whose labor rights are not recognized are poor. Second, lack of compliance can produce workplace accidents and distort the allocation of resources. Third, noncompliance directly affects the notion that the law applies equally to all. Fourth, since it usually implies payroll tax evasion, noncompliance affects the fairness of fiscal policy and the state capacity to redistribute (Ronconi, 2010).

In 2018 a survey was conducted among the CIS countries (Ukraine, Russia, Kazakhstan, Azerbaijan, Belarus, Georgia) in order to analyze the peculiarities of organizing compliance within companies, its role and tasks. In the course of this survey it was found that 88% of respondents take into account competition compliance in their activities, 43% annually evaluate compliance risks, 21% of which evaluate them on a quarterly basis, and 37% of respondents name competition compliance and compliance in the field of industrial safety as their priorities (Compliance in the CIS, 2018).

In 2013 the United States also conducted a similar research on compliance with labor requirements during the process of work. When respondents were asked about the problems they encountered during their work the most commonly reported problem was the interpretation of laws and regulations for the organization (44%) and the lack of control over their implementation (23%) (Labor compliance and time tracking a survey of HR and finance professionals, 2013).

Therefore, the importance of such an introduction is very simple and clear: compliance with labor legislation is a means of protecting both the worker and the employer. Regulations stipulate labor standards and requirements that can protect those who follow them. It is very important for the employers to be aware of changes in law and of new labor standards as it is the basis for their work, and the compliance program analyzes and actually brings the organization to new standards.

Compliance control should minimize the risks of an entity in respect of those events that may lead not only to financial losses but also to the loss of trust from the supervisory and controlling authorities, shareholders, investors, customers etc. Modern economic development assumes that apart from financial losses, legal and reputational consequences, which influence further activity of the enterprise and its sustainable development, become of great importance (Ovsyuk, 2018).

As businesses have increasingly utilized subcontracting as a business model they have realized that there are significant risks, particularly reputational risks, associated with that model when their subcontractors fail to comply with minimum labour standards including child labour, forced labour, wages and hours, freedom of association, and occupational safety and health. Consequently, they have developed various strategies to respond to these risks including engagement of third parties to monitor, assess, and assist their subcontractors to improve their compliance with labour standards. Businesses have further recognized that risks of noncompliance with labour standards are significantly greater in producing countries where laws and regulations, labour inspectorates, judicial systems, labour unions, and capacity building assistance for their contractors are weak or non-existent, resulting in a growing interest to find ways to support improvement in those conditions (Dupper, Ocrert, Frenwick, Colin Hardy, Tess, 2016).

In general, compliance monitoring approaches are driven by two factors: (1) the compliance rule language that is used to specify the compliance requirements and (2) the event format the compliance checks are based on. Due to the possible heterogeneity of the data sources employed, an integrated target event format is desirable (Ly, Maggi, Montali, Rinderle-Ma, Wil, 2015).

Scientists distinguish two levels of compliance: internal and external. At the internal level, it is important to comply with internal control systems that are used to achieve compliance with external rules (collective agreements, internal code of labor conduct, provisions for payment of remuneration on the basis of annual work results). The external implies compliance with external rules that apply to an organization as a whole (codes, laws, regulations).

In order for such compliance relationships to exist it is necessary to establish the parties. So, the participants in labor compliance are:

- an employer;
- an employee;
- a compliance department.

Each party should understand the essence of the compliance and its significance for the organization, since it presents an instrument of internal control and protection for all participants of labor relations. One of the most important functions of labor compliance is a protective one, which is expressed in:

- protection of the employee which provides for additional control over the actions of the employer, fair compensation, equal opportunities for recruitment and protection against abuse of office and discrimination;

- protection of the employer which consists of employer's right to hire qualified employees and to require that employees arrive on time in order to work and carry out their duties with due diligence.

For this, implementation of such labor control should be based on established principles:

- the program of labor control is independent in its manifestation, that is, the participants of this program shall not be accountable to any other state or local authorities, and only to their own organization's structural authorities, shall interact with other divisions of the organization and have access to all information, including information on state secret and budget;
- regulatory consolidation, namely, adoption of a regulatory act at an enterprise level in which the status of such compliance organization, including an exclusive list of powers, tasks and purpose of activity, would be stipulated;
- obligatory responding to violations of labor law and ongoing control over compliance with the same;
- transparency of activities and interaction with other supervisory bodies and employees.

Results and discussion

The main document which guides labor compliance functioning is the compliance program. Its content should be determined by the current and strategic objectives of the enterprise, by level of existence or absence of various types of compliance risks (Romanchik, 2017). It should be a program that includes all areas of law that are, even if only slightly, related to the labor activities: main and additional. It is clear that while implementing control over the observance of legislation financial, corporate, tax issues, as well as peculiarities of disciplinary and financial liability should be analyzed. It is also important to observe additional processes, such as environmental law, securities, currency control or international relations.

Therefore, the control program faces the following tasks:

- monitoring and assessment of compliance risks;
- informing both employees and employers about their rights and obligations;
- advising the employer on further development of the organization;
- drawing up reports on compliance control implementation;
- control over activities of labor relations participants;
- analysis of budgetary funds and financial position of the organization;
- overcoming possible and existing conflicts between the parties;
- internal control and prevention of punishment in case of legislation violations.

Thus, compliance is a preventive measure that protects an organization both on the internal and on the external level. Compliance function should not be carried out upon unlawful actions being committed but should rather be directed at prevention of these in the future.

Compliance control standards are introduced by the acts adopted at the European Union level as well as those introduced by the individual member states. First of all, the European Commission as a supreme body of executive power in the EU establishes the basic methods assisting companies in meeting EU competition requirements in relation to:

- identifying specific risks of a particular company;
- providing a compliance strategy;
- implementing appropriate mechanisms of control and audit;
- building an effective system of violations notifications;
- regularly updating the strategy (Informational brochure on Compliance, 2012).

The International Organization for Standardization (ISO) in 2014 introduced the ISO 19600 Compliance Management System – Guidelines, standard that acts as one of the main international standards for organizations on how to comply with legislative requirements. ISO 19600:2014 provides guidance on design, development, implementation, evaluation, support and improvement of effective compliance work applicable to all types of organizations. The degree of application of these recommendations depends on the size, structure, nature and complexity of the organization. The international standard is based on the principles of good governance, proportionality, transparency and stability.

An international standard such as ISO / IEC 27002:2013 Information Technology - Security Techniques - Code of practice for information security controls was also developed and provides guidance on organizational standards of informational security and information security management methods, including implementation and management of control tools taking into account the risks environment of the informational security of the organization.

The issue of compliance is enshrined in the EU Financial Instruments Markets Directive (MIFID and MIFID II) which states that investment companies must establish and maintain a compliance function, namely must implement appropriate methods for controlling the activities of the investment forms (Directive 2014/65/EU of the European Parliament and the Council of 15 May 2014). With the adoption of the directive, the interaction of market participants has become more transparent, moreover, they now have the necessary level of legal protection. The principle of MIFID is to seek and attract investors to a strong market, which is only possible under conditions of full transparency of transactions on the stock exchange.

The International Organization of Securities Commissions (IOSCO) report issued in March 2006 regulates the establishment of a compliance function in investment companies (IOSCO Report on Compliance Function at Market Intermediaries) (A report of the Technical Committee of the International Organization of Securities Commissions). The purpose of this document was to review the existing IOSCO principles and to establish additional standards in the area of compliance.

According to recommendations of the Basel Committee on Banking Supervision of April 2005 on Compliance and Compliance Function in Banks (Basel Recommendations), compliance risk is defined as the risk of applying legal sanctions or regulators' sanctions, of a substantial financial loss or loss of reputation by the bank as a result of non-compliance with laws, instructions, rules standards (The official website of the Basel Committee). This document establishes the board's of directors responsibility for overall control over compliance program management, namely: the board of directors must establish a bank policy with regards to compliance control and executive responsibility for the effective management of the compliance program, including adoption of a compliance policy and informing the bank's employees of its essence, ensuring its observance and reporting to the board of directors.

The UK legal framework requires that all companies provide full information about their financial position, including balance sheet, profit and loss account, statement of changes in equity and also cash flow. Thus, in their activities the organizations are guided by the instructions of the Financial Regulatory and Supervisory Authority (FSA), which establishes the basic principles of regulation and the system of internal control. Another document is the UK Corporate Governance Code (formerly, the Combined Code), which enshrines a very unconventional principle – *comply or explain* – allowing British companies to apply the code of law at their discretion, that is, to comply with established requirements but at the same time to take into account specific circumstances if the implementation of the provisions is not possible.

In some countries, the introduction of a compliance program in an organization can be a mitigating circumstance as a measure to correct an offense. English companies, Hasbro U.K. Ltd, Agros Ltd and Littlewoods Ltd., having violated financial legislation by concluding a price fixing agreement which affected the trade of certain toys and games within the UK, did manage to reduce their own punishment as a result of mitigating circumstances, including a review and improvement of the compliance program as well as conducting trainings among the companies' management.

Another example of such practice is Art. L464-2 of the Commercial Code of France, which states that if a compliance program has detected and eliminated a violation, then this may be considered a mitigating circumstance. A mitigating circumstance will also occur in a situation where a company takes an obligation to implement the compliance program after having detected a violation (Molchanov, 2017).

In Germany, the Institute of German Auditors (IDW) adopted the Principles of Proper Audit of Compliance Management Systems (IDW PS 980) (Der IDW PS 980 Standard zur Prüfung von Compliance Management-Systemen). Its standards contain provisions and internal recommendation on policies and possible measures that can be taken by companies to enforce established rules. The principles are based on three blocks: preparation of the compliance program concept, its testing and performance evaluation. This way it will become clear which program measures work well and which have to be changed.

Analysis of the situation in Ukraine with regards to compliance at enterprises, organizations and institutions allows to state that such a mechanism is absent here and is required to be created. At the national level, the laws of Ukraine on Prevention of Corruption, on Ratification of the Convention on Transnational Corporations, on Securities and the Stock Market, on Accounting and Financial Reporting in Ukraine, on Banks and Banking and on Sanctions have been adopted. However, each of these laws regulate the company activities within the certain area of law without taking into account other areas.

As has already been mentioned, the main objective of compliance control is to minimize the risks of an entity in respect of events that may lead not only to financial losses but also to the loss of trust by the supervisory and control authorities, shareholders, investors, customers etc. Modern economic development, apart from financial losses, recognizes the importance also of legal and reputational consequences, which influence further activity of an enterprise and its sustainable development. Compliance forms foundation for control in any organization which always functions in accordance with certain rules, acts as a mandatory component of the management system, one of the important components of which is the system of internal economic control (Ovsyuk, 2018).

The first steps of introducing compliance programs have been noticed only in banking sector. In particular, JSCB Forum, a member of the financial COMMERZBANK Group has implemented its own system of risk management compliance, which ensures control over compliance with the bank legislation of Ukraine. Among the main tasks, the bank sets the following:

- prevention and combatting legalization (laundering) of proceeds from crime,
- effective resolution of conflicts of interest;
- control over the banks' employees' compliance with the requirements of professional ethics while conducting business (Pravdyva, 2011).

OJSC KREDOBANK has also introduced a system of compliance risk management. The Bank, thus, tries to determine the risk of imposing sanctions, the occurrence of financial costs or the loss of reputation or trust to the bank representatives acting on its behalf, in accordance with applicable law, internal regulations, acceptable actions and ethical principles (Public Joint Stock Company KREDOBANK).

Great importance belongs to the introduction of an effective compliance system in an organization where each department and division would really fulfil its functions. The organizational structure of the division that carries out compliance control at PJSC INDEX-BANK consists of the following: the head of the division, the department of financial monitoring, the department of deontology and financial monitoring departments at the branches of the bank.

The tasks of the Department of Financial Monitoring at PJSC INDEX-BANK include:

- implementation of financial monitoring in accordance with Ukrainian legislation corporate requirements;
- submission of reporting information to public authorities;
- implementation of activities aimed at counteraction against legalization and laundering of proceeds from crime and terrorism financing;
- control over the bank's business reputation and image risks;
- development and implementation of the Know Your Customer policy;
- control over the completeness of customer identification coverage;
- evaluation of new products and procedures for their sale (Public Joint Stock Company INDUSTRIAL EXPORT BANK).

The scope of compliance control in Ukraine is very slowly reaching the level when organizations are beginning to participate in the process of developing competition and preventing offenses. Worldwide practice shows that the most effective way of such participating is an introduction of an effective system of internal prevention of legislation violations.

It would be appropriate to record standard compliance processes that do not depend on the organization's area of business. These include the following: counteraction to laundering of proceeds from crime and terrorism financing; regulation of the process of accepting and donating gifts; invitations to events; reporting violations of ethical standards; conflicts of interests regulation; control over purchases of securities by employees; counteraction to the use of insider information and market manipulation; interaction with regulators; confidentiality of information and other processes (Federal Law of 6 Dec. 2011 No 402-FL).

Thus, actions that violate current legislation include: illegal activity and terrorism financing, money laundering through transactions involving securities, laundering of proceeds from crime for the purposes of their introduction into financial turnover, prohibited business practices (Regulation on Financial monitoring implemented by banks, approved by the Resolution of the National Bank of Ukraine Board No 189 of 14.05.2003). According to the Letter on NBU Recommendations on money laundering risks during cash-currency-exchange transactions, there may be cases involving tax evasion, fraudulent activities or legalization of proceeds from crime (Recommendations of the NBU regarding the clients' money laundering risks, sent by letter No 48-012/577- 4007 dated 19.03.2009).

It is clear that the greatest discrepancy with current legislation takes place in the area of finances, however, we shall not forget about control over the employee's and the employer's status, their rights, obligations and reputation. Employers should also consider developing appropriate policies to regulate the workplace use of the latest technologies—location-based tracking, real-time communications monitoring, instant messaging, and video and camera phones, to name a few. Additionally, drug and alcohol testing policies and employee assistance agreements should respect the employee privacy rights.

There are several factors that can influence an organization's decisions about information privacy. The internal nature of the firm itself (its structure, dynamics, and ethics) will impact its decisions about privacy. How it manages information may impact or being impacted by these decisions. Through its privacy decisions, management and policies, it can establish an overarching view of privacy that will guide future decisions about privacy and information management (Pelteret, Ophoff, 2016).

Because privacy compliance is an ongoing concern, companies benefit from implementing a strategic approach to privacy that considers privacy along with corporate growth and objectives rather than from a responsive posture. To embed privacy in the strategic objectives, the company should develop mechanisms by which the privacy team provides information regarding current and future risks and obligations to: senior executives, security and information technology teams, business unit leaders. Planning is crucial, but both the privacy team and other senior leaders must understand the need for flexibility given how rapidly corporate objectives, technology, and privacy laws change.

More recently, in Ukraine, few people thought about the need to introduce compliance in Ukrainian companies. Even fewer were willing to understand all its subtleties and develop compliance programs that would really work in Ukraine. For this, the specifics of Ukrainian legislation and law enforcement practice, as well as the features of historically developed relations in this country in the labor and business sphere, should be taken into account. The

“youth” of this trend in Ukraine has not yet allowed the formation and consolidation of goals and objectives of compliance in the Labor Code of Ukraine, but it is clear that it will be actively introduced into the activities of employers.

The Article 259 of the Labor Code of Ukraine «Supervision and control of compliance with law about work» is defined that «the state supervision and control of compliance with law about work by legal entities irrespective of pattern of ownership, type of activity and managing, physical persons - the entrepreneurs using wage labor performs the central executive body realizing state policy concerning supervision and control of compliance with law about the work, according to the procedure, determined by the Cabinet of Ministers of Ukraine». So, it can be concluded that the company has the necessary external state control, but not the internal one.

Conclusion

Today Ukrainian legislation already has all the necessary basis for encouraging business entities to implement compliance programs. This is evidenced, in particular, by a regulatory framework, although broadened, still regulates financial and legal status of the organization. At the same time, it is still necessary to enshrine the notion of compliance in labor relations.

Thus, it will be appropriate to create a law of Ukraine that would include:

- definition of the labor compliance concept;
- the purpose of introducing compliance control at the enterprise;
- the main tasks and principles of functioning;
- the structure and composition of the compliance service at the external and internal levels;
- rights and obligations of compliance specialists;
- guarantees of their activities;
- responsibility of compliance specialists.

In order to develop and achieve the identity of terms, it is necessary to include the concept of compliance and its tasks in an organization's functioning into the following laws of Ukraine: Law on Corruption Prevention, Law on Ratification of the Convention on Transnational Corporations, Law on Securities and the Stock Market, Law on Accounting and Financial Reporting in Ukraine and Law on Banks and Banking.

Following the example of France, Art. 67 of the Criminal Code of Ukraine, among the circumstances mitigating punishment, in addition to appearing with confession, true repentance or active assistance in investigating a crime, voluntary compensation of the damage or elimination of the damage, committing a crime under the threat of coercion or through financial, subordination or other dependence, it is also necessary to introduce mitigation of punishment in case of introducing compliance control in an organization, enterprise or institution.

In addition to these changes at legislative level, it is also necessary to introduce acts of recommendatory nature, such as methodological recommendations, which will provide organizations with an example of how to build a labor compliance mechanism. It is also necessary to introduce the right to comply or explain so that the work of a compliance program could be carried out not only on commonly established standards, but also have an individual approach to each entity.

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Author contact:

assoc. prof. Dr. of Legal Science Kiselyova Elena I., Sumy State University, Educational-scientific Institute of Law, Department of Administrative, Economic Law and Financial and Economic Security, Sumy, 59, Petropavlivska str., 3, Ukraine. e-mail: lenakiseleva2008@gmail.com

ORCID: <https://orcid.org/0000-0002-5625-0952>