

# **NJORD Estonia: Legislative amendment: employees in the construction sector receive additional protection and the responsibility of the main contractor increases**

On 15.10.2022, an amendment to the Employment Contracts Act entered into force, which gives employees of the construction sector the right to demand salary not only from their employer but also from the person who ordered subcontracting from the employer. The amendment transposes Directive (EU) 2019/1152 of the European Parliament and the Council on transparent and predictable working conditions in the European Union. The added regulation provides additional protection for employees in the construction sector and increases the liability of companies acting in the role of main contractors.



## **Employees of subcontractors can claim unpaid salary directly from the main contractor**

The Employment Contracts Act now allows employees in the field of construction to claim salary from the person subcontracting their employer (the so-called main contractor) if the employer (subcontractor) does not pay them. The amendment provides that the person who ordered the subcontracting is responsible for the employer's obligation to pay salary as a surety. A surety is a security by which the surety assumes the obligation to be held liable for an obligation of the debtor. Under normal circumstances, a surety arises on the basis of a voluntary agreement between the surety and the creditor. However, in the present case, the sub-contracting party assumes the employer's role as surety by law, without entering into any agreements with the subcontractors' employees.

## **Who is the person subcontracting the employer?**

The Employment Contracts Act treats a subcontracting person as a person who orders construction work from another person in areas such as construction, repair, maintenance, alteration, or demolition of buildings. According to the explanatory memorandum to the draft Act amending the Employment Contracts Act, the list referred to is not exhaustive but illustrative.

The client who orders construction works (e.g., real estate developer, owner of immovable property) is not considered a subcontracting entity within this amendment, because the client does not carry out construction work but orders the completion of an object or construction work.

### **There are several prerequisites and limitations for filing a claim for salary**

However, the liability of the subcontracting person is limited to several conditions. A diligent main contractor may also be relieved of liability to the subcontractor's employees.

#### Salary can be claimed by the employee performing the construction work

An employee working in the field of construction can demand salary from a person who has ordered subcontracting. In addition, the obligations of both the person who ordered the subcontracting, and the employer (subcontractor) must be related to the performance of the construction work. Thus, the amendment to the law does not bring additional rights and obligations to employees and employers of other sectors of the economy.

#### Salary can be claimed in the amount of the minimum rate

The employee can claim the full amount of the agreed salary from the employer (subcontractor). However, the liability of the person subcontracting from the employer to the employee is limited by the minimum monthly salary per calendar month established by law (in 2022, the minimum monthly salary is 654 euros). For example, if an employee has failed to receive salary from their employer for three months, they can claim  $3 \text{ months} \times \text{EUR } 654 = \text{EUR } 1962$  from the person who subcontracted the employer.

#### The right to claim salary arises when the enforcement agent fails to recover the salary

An employee has the right to claim salary from the person subcontracting the employer not immediately after the debt has arisen, but only if it has not been possible to collect the salary from the employer within four months from the start of the enforcement proceedings.

Thus, the employee must first claim the salary from their employer and obtain the decision of the body resolving the labour dispute, i.e., an enforcement order. To enforce a decision of a labour dispute committee or a court, the employee can turn to an enforcement agent. In order to save time and effort, the employee can turn to the labour dispute committee or the court with an alternative claim and claim salary from both the employer and the person subcontracting the employer, if the employer does not pay it. In this case, the employee does not have to turn to the body resolving the labour dispute several times and can, based on a single decision, initiate enforcement proceedings against the employer and the person subcontracting the employer if the salary claim has not been recovered from the employer after four months.

#### Observance of the due diligence of a proper entrepreneur exempts from the obligation to pay salary

The Employment Contracts Act allows the main contractor to free themselves of the liability of the surety and the payment of salary to the employee of the subcontractor if they have exercised due diligence of a proper entrepreneur in their daily economic activity in relation to the subcontractor. The duty of due diligence is a common legal concept arising from corporate law according to which the activities of a member of a company's management board are primarily assessed. The essence of the due diligence of a proper entrepreneur has been set out in several judgements. In summary, it means the obligation to always act in accordance with the law, in the most economically expedient way for the company, to be sufficiently informed in the adoption of decisions and to avoid taking unreasonable risks to a legal entity.

The duty of due diligence applies to the main contractor in such a way that they must check the background of the subcontractors before entering into agreements with them. Thus, the explanatory notes of the Act amending the Employment Contracts Act provide an example that compliance with the due diligence of a proper entrepreneur may be achieved if the person ordering the subcontracting





- asks the party to the transaction to provide documents on the financial situation or a certificate of tax data,
- makes an inquiry in public registers (commercial register, Official Announcements, e-MTA, etc.),

- checks the absence of payment defaults, the payment of social security contribution in respect of employees, the absence of suspicions of tax evasion, hidden transactions, etc., which creates credibility that the employee is expected to receive remuneration,
- if necessary, involves experts to make a decision and prevent risk, consults with experts in the respective field.
- This example of the actions required to perform due diligence is not exhaustive and a more in-depth inspection can be carried out. Similarly, carrying out an inspection of subcontractors before ordering the work from them may not be a sufficient measure, and following due diligence may mean checking the party to the transaction even during the performance of the work.

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**What do the main contractors need to consider in practice?**

The main contractor needs to bear in mind that in the event of a dispute, they must prove that they have acted with due diligence. In this context, it may be necessary to provide evidence of background checks on subcontractors by means of inquiries made, and data collected from registers and correspondence. The final assessment of the performance of due diligence shall be made by the labour dispute committee or the court. Ultimately, in the light of this legislative amendment, in order to reduce their risks, the main contractors will have to review the processes for selecting and contracting subcontractors, establish additional routines to perform due diligence, and also review contracts with subcontractor

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