

The Correlation Between The Right To Medical Secrecy And The Employer's Right To Receive Information On The Employee's Health State

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Summary

The article analyzes the theoretical aspects of the relationship between the right to medical secrecy and the employer's right to receive information on the employee's state of health, resulting in a more complete description of the implementation of the right to medical secrecy and the employer's right to information on the employee's health state and the possibilities of protecting violated rights. The limits of permissible restrictions on the right to secrecy of health in terms of ensuring the person's performance of their job function have been clarified.

Key words: *medical secrecy, information, legal status, information on health state.*

1. Introduction

One of the important guarantees of the legal status of a person, which in turn corresponds to the natural human right to honor and dignity, is the right to protection of confidential information, including the right to protection of information on the health state. Therefore, it is important to have state guarantees, the right to protection of information on health state, which in turn are reflected in a certain list of regulations.

2. Theoretical Consideration

The right not to disclose confidential information about a person is guaranteed by Part 2 of Art. 32, part 3 of Art. 34 of the Constitution of Ukraine. Also, the direct right to medical secrecy is enshrined in a number of articles of the Fundamentals of the legislation of Ukraine on health care, namely in Part 2, 5 of Art. 39, Art. 39-1, Art. 40, part 1 of Art. 43 [1]. Certain rules of law governing legal relations

regarding the provision of information on one's health are defined in Art. 30 of the Family Code of Ukraine [2], and parts 2, 4 of Art. 285, Art. 286 of the Civil Code of Ukraine [3], in Art. 132, 145 of the Criminal Code of Ukraine, Part 2 of Art. 21 of the Law of Ukraine "On Information" [4], Art. 15 of the Law of Ukraine "On Counteracting the Spread of Diseases Caused by Human Immunodeficiency Virus (HIV) and Legal and Social Protection of People Living with HIV" [5], etc.

According to Art. 64 of the Constitution of Ukraine, the constitutional rights and freedoms of man and citizen may not be restricted, except as provided by the Constitution of Ukraine. In turn, if we look at it from another angle, Art. 32 of the Constitution of Ukraine stipulates that it is not allowed to collect, store, use, and disseminate confidential information about a person without their consent, except in cases specified by law, and only in the interests of national security, economic welfare, and human rights.

There are various options for the interaction of health and labor rights of the individual for reasons of national security, as well as to ensure human rights legislation:

- 1) Obligation of the employer to ensure the functioning of the labor protection system directly;
- 2) Provision of compulsory medical examinations of certain categories of persons (an example is the provision of compulsory medical examinations of minors), or, accordingly, the list of employees who must be provided with a compulsory medical examination in connection with a certain nature of work performed (for example, mandatory medical examination for workers working in difficult or harmful working conditions);
- 3) Obligation of the employer to provide appropriate working conditions in accordance with the medical report

- (rehabilitation program) (for example, appropriate working conditions provided for persons with disabilities);
- 4) Provision of social guarantees in case of temporary disability;
 - 5) Dismissal in connection with incompatibility with the position held due to health and others.

The right to medical secrecy in its various aspects (the right to medical secrecy, i.e. to information that may become known to special entities – health professionals and other persons to whom it became known in connection with the performance of professional or official duties; the right to secrecy on health state, i.e. the patient's right to protection of information on the diagnosis, methods of treatment, and even the very fact of seeking medical care) has undergone research in the works of A. Marushchak, I. Shatkovskaya, N. Khodeeva, S. Stetsenko, etc. Criminal law aspects of protection of information on health state have been studied by such home scientists as L. Karpenko, O. Aliyeva, G. Chebotaryova, etc. Scientific developments on ensuring the rights of employees to health care, the possibility of termination of employment due to the employee's health state, etc. were carried out by N. Lukashева, Y. Shershen, I. Kravchenko, etc.

But still, the question of determining the balance of interests between employer and employee remains relevant; providing, on the one hand, sufficient conditions for the preservation of life and health that are related both to the employee and certain persons whom they could potentially harm as a result of their own illness (for example, in the food industry, in the management of high-risk facilities, in connection with the need to comply with working conditions during quarantine and adaptive quarantine (COVID-19), etc.), and on the other hand, to protect the right to secrecy on their employee's health state.

Formally, the right to information on the health state, in addition to the authorized person (the person to whom this information belongs), belongs to other participants in public and private law, in particular, when the health state is a condition for performing duties, exercising the right to engage in activities where excellent health is a condition for exercising such a right [6, p. 50].

Certain ministries and services have the right to information on the state of human health, and indirectly it belongs to those informed about such a state. The service of individuals in these units is possible only when determining the degree of fitness (absence of disease and physical defects), which is checked by certain medical commissions, on which a decision is made on the suitability or unsuitability for service. That is, ministries and services receive complete information on the health state of individuals who have passed certain commissions. Such subjects of public law include the Ministry of Internal Affairs of Ukraine, the Ministry of Defense of Ukraine, the State Penitentiary Service of Ukraine, the State Border Guard Service of Ukraine, the

State Fiscal Service of Ukraine, the Security Service of Ukraine, and the State Aviation Service of Ukraine. Passage of medical commissions is carried out on the basis of certain procedures of medical examination established by the legislation of Ukraine.

Thus, a medical examination is conducted to identify suitability for military service of draftees, conscripts, and indicators for their proper distribution by type of the Armed Forces of Ukraine, types of troops, and military specialty according to health state and physical development; suitability for military service in the military specialty of servicemen; suitability of candidates for admission to military educational institutions; suitability of servicemen, conscripts, employees of the Armed Forces to work with radioactive sources and other sources of ionizing radiation, rocket fuel components and other highly toxic substances, radio equipment that generate electromagnetic fields; opportunities for military service by officers, ensigns, midshipmen, female servicemen abroad and residence of their family members, as well as the need for long-term specialized treatment and medical examination of their family members, their transportability due to their health state [7].

In order to comply with Art. 21 of the Law of Ukraine "On Protection of the Population from Infectious Diseases", the Cabinet of Ministers of Ukraine approved a list of professions, industries, and organizations whose employees are subject to mandatory preventive medical examinations, and the procedure for mandatory preventive medical examinations and issuance of personal medical books. According to the list of professions, industries, and organizations whose employees are subject to mandatory preventive medical examinations, there are 28 industries and organizations whose employees are subject to mandatory preventive medical examinations: food and processing industry (except for employees of enterprises – manufacturers of certain goods), food trade enterprises, maternity hospitals, children's hospitals, laundries, baths, sports and health complexes, educational institutions, cultural institutions, the subway, private services at home, etc. [8]. Therefore, these industries and organizations are also in the process of labor relations, receiving information on the health state of individuals – employees, are the subject of the right to information on their health.

In order to clarify the limits of the permissible restriction of the right and secrecy of health state in terms of ensuring the performance of a person's job function, it can be noted that the first point that affects the right to protection of health state information is primarily mandatory prior medical examination (hereinafter – periodic medical examinations). According to the current legislation (Article 139 of the Labor Code of Ukraine, Article 17 of the Law "On labor protection"), the employer is obliged to organize at their own expense preliminary (when hiring an employee) and periodic (during employment) medical examinations of employees who engaged in heavy work, work with harmful or dangerous

working conditions or those where there is a need for professional selection, annual mandatory medical examination of persons under 21 years of age.

In turn, the employer is also obliged to provide at their own expense an extraordinary medical examination of employees in the following cases:

- at the request of the employee, if they believe that the deterioration of their health is related to working conditions;
- on their own initiative, if the employee's health state does not allow them to perform their duties.

If there is a need to provide an emergency medical examination at the request of the employee, the problem arises only in the possibility of abuse of this right by the employee, the need for an emergency medical examination by the employer on their own initiative may raise a number of questions.

Thus, the Employer has the right to send the employee for an extraordinary medical examination, despite the very desire of the employee themselves. In fact, such a referral should be directly based on the assumptions of an authorized person (medical worker or occupational safety engineer), which may not be confirmed. Further, based on the conclusion of the chief physician of the medical unit on the need and duration of transfer to another easier job and the consent of the employee, the employer issues an order to change significant working conditions or transfer the employee to another easier job or for a fixed period or on a permanent basis.

After the expiration of the established period of transfer of the employee to another easier job, they have the right to return to the previous place of work. If the employee is found fit to perform the specified work, they may also return to their duties under the previous employment contract. However, this whole situation can lead to litigation if the employee believes that they have been unjustifiably suspended from work for a medical examination. Given this circumstance, as well as the occurrence of additional costs that the employer will have to incur, this right is quite difficult for practical implementation. In addition, as mentioned above, for some types of employment (categories of workers) a health book is required, which contains even more detailed information on the employee's health state. It is impossible to avoid the employer receiving such information because it is the owner (manager) of the legal entity that provides the production of certain products or services who is responsible for respecting consumer rights.

Thus, we are faced with a comparison of public and private interests, but the advantage will belong to the public interest. Therefore, a person is not deprived of the right not to disclose information on their health state, but to refuse to start work in the case of a preliminary medical examination, or to resign on other grounds at their own request or by agreement of the parties.

The situation is more difficult for the employer. Thus, Art. 40 of the Labor Code of Ukraine provides for the possibility

of termination of the employment contract at the initiative of the owner or their authorized body in case of incompatibility of the employee to the position or work performed due to health, which prevents the continuation of the work in question (according to Para 2 of Art. 40 of the Labor Code of Ukraine) [9]. In this way, the owner or, in turn, the manager has the opportunity to fulfill their obligation to ensure proper working conditions safe for the health of the employee, as well as to manufacture quality, safe products (services). However, the labor legislation of Ukraine is, above all, guarding the labor rights of the employee. In general, this is a positive trend as long as it does not harm the public interest. According to Art. 43 of the Labor Code of Ukraine, the dismissal of an employee on the aforementioned grounds may be carried out only with the prior consent of the elected body (trade union representative), the primary trade union organization if the employee is its member. Therefore, there is a threat of such restrictions in certain circumstances, namely:

- 1) Delaying time, even with such consent, because the employer does not always have the opportunity to expand the staff in order to entrust the duties of a person suspended from work due to health problems to another person;
- 2) The employee can be potentially dangerous to the life and health of others, so even transferring them to a lighter job may not solve the problem of ensuring healthy and safe working conditions.

At present, the legislation of Ukraine provides primarily for the support of socially vulnerable groups (for example, single mothers). In fact, today it is impossible to dismiss a woman with the status of a single mother with a child under the age of 14 or a disabled child under the age of 18 at the initiative of the employer (regardless of the grounds for dismissal). According to Art. 184 of the Labor Code of Ukraine, only the possibility of dismissal in the event of complete liquidation of the enterprise, institution, organization is provided when dismissal with compulsory employment is allowed. However, it is impossible to allow the health of a disabled worker to deteriorate due to the lack of appropriate working conditions (which would correspond to the conclusion of the MSEC (medical and social expert commission) and the individual rehabilitation program for a person with a disability), because, according to Art. 172 of the Labor Code of Ukraine, the employer is obliged to employ a person with a disability in accordance with medical recommendations.

So, in fact, under certain conditions, when the employer is not able to offer such a person another job, namely with easier working conditions, they become hostage to the situation. The only solution to this problem is to remove such an employee from their job, but in this case, there are no legal grounds (and, frankly speaking, the interest of the employer) to keep their average earnings, neither in part nor in full. That is, the current legislation creates conditions for the transfer of the social function of the state to the employer, and not so much to real measures to protect the socially vulnerable, and forces

the employer to either agree on dismissal with the employee on mutually beneficial terms or to provide them with the most uncomfortable situation, as a result of which they will eventually decide to resign on their own. To address this situation, a clear mechanism could be used with the participation of the state in the person authorized by the services (State Employment Service), in order to provide mechanisms for employer interaction on contractual terms at the legislative level to ensure the transfer of such an employee to another job in an organization that needs the employment of a person with a disability, and in which there is a vacancy with appropriate working conditions for such a person.

Some issues arise with regard to employees with disabilities. Thus, in order to ensure proper working conditions, the employee should provide an individual rehabilitation program to the employer, which contains very detailed information on the employee's health state. However, due to the existing gaps in the legislation, there is no right of the employer to create safe working conditions for a worker with a disability, to require a worker with a disability to present an individual rehabilitation program. Instead, the employer can only obtain a medical certificate, which does not disclose in detail all the necessary conditions for the work of a person with a disability. Moreover, Part 2 of Art. 39-1 of the Fundamentals of the legislation of Ukraine on health care provides a prohibition to require and provide at the place of work or study the information on the diagnosis and methods of treatment of the patient. Therefore, in fact, the employer may unknowingly violate the law on health care, as it does not have sufficient necessary information [1, 11].

The next issue is the existence of gaps in the current legislation on the protection of the right to privacy of the employee, namely the indication of the diagnosis in the certificates of incapacity. Nowadays, the diagnosis can be indicated only at the request of the patient in the certificates of incapacity, in this case, their right to secrecy on their health state is not violated, but the certificate of incapacity for work must contain information on their medical institution (name, location of the medical institution, stamp, and seal of the health care institution). The Social Insurance Commission, which is created directly by the employer, is obliged to check all these data for the purpose of temporary disability benefits, and in the absence of any of the aforementioned details, the benefit is not assigned. But in this case, the employee's right to secrecy on their health state, the fact of seeking medical care, diagnosis, as well as information obtained during their medical examination are subject to disclosure without the consent of the authorized person, because the medical institution where the patient received medical care, may be, for example, a psychiatric hospital, and the person may experience significant inconvenience due to the awareness of the employer and their colleagues of receiving this type of medical services. With the introduction of electronic processing and accounting of certificates of incapacity, this problem can be solved, but the issues of administration

(maintenance) of this system are questionable because there will still be a circle of people who will have access to information on the patients' health state (system administrators, individuals who check the validity of certificates of incapacity and other persons to whom this information became known in connection with the performance of their functional and official duties).

According to O. Posykalyuk, the limits, grounds, and conditions of the employer's interference with the right to privacy of the employee must meet three criteria: 1) legal grounds for the interference; 2) the legitimate purpose of the interference; 3) the proportionality of such interference to the set aim [10]. Namely, such a conclusion is made by the author on the basis of the analysis of the case-law of the European Court of Human Rights, which is quite balanced and appropriate in the context of lawmaking in Ukraine. At the same time, such an approach would be appropriate for the legislator to take into account when amending the current legislation of Ukraine.

Conclusions

Thus, there is an urgent need to replace the outdated legislation, as some of it has been in operation since Soviet times, to correspond to the needs of the present. Right now, the issue is not only to ensure the mechanism of protection of all statutory rights of the employee and the right to medical secrecy but also to create real opportunities for employers to directly perform their duties under the law. Our state, adhering to the requirements of today, performing the functions of protection and control at the expense of established state bodies, services, and institutions, should not overload individuals, including employers.

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