DELAY OF PREVENTIVE MEDICAL INSPECTIONS OF EMPLOYEES

ODLOŽENIE LEKÁRSKYCH PREVENTNÍVNYCH PREHLIADOK ZAMESTNANCOV[1]

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ABSTRACT

The present scientific paper addresses the issue of the impact of selected preventive measures to halt the spread of corona virus on the area of individual employment relationships, especially on the protection of employees' health at work during the postponement of the preventive medical examinations of employees. The authors justify the relevance and the need to carry out preventive medical examinations of employees in real time and within the set deadlines with regard to the primary protection of employees' health. The aim is to analyse the labour law consequences of the suspension and postponement of preventive medical examinations of employees and thus put forth the legal and practical arguments against the implementation of such measure in the form in which it has been adopted. The adopted measure disproportionately interferes with the right to protection of the life and health of the employee at work and causes legal uncertainty for the entities in terms of their responsibilities in employment relations.

ABSTRAKT

Predkladaný vedecký článok sa zaoberá problematikou dopadu vybraných preventívnych opatrení proti šíreniu korona vírusu na oblasť individuálnych pracovnoprávnych vzťahov, osobitne na ochranu zdravia zamestnancov pri práci pri odložení lekárskych preventívnych prehliadok zamestnancov. Autori odôvodňujú relevanciu a potrebu vykonávania lekárskych preventívnych prehliadok zamestnancov v reálnom čase a v stanovených termínoch s ohľadom na primárnu ochranu zdravia zamestnancov. Cieľom je analyzovať pracovnoprávne následky pozastavenia a odkladu lekárskych preventívnych prehliadok zamestnancov a uviesť tak právnu i praktickú argumentáciu proti realizácii takéhoto opatrenia v prijatej podobe. Prijaté opatrenie v neprimeranej miere zasahuje do práva na ochranu života a zdravia zamestnanca pri práci a spôsobuje právnu neistotu subjektov v rámci ich zodpovednostných pracovnoprávnych vzťahoch.

I. INTRODUCTION

Currently, health in society is affected by COVID-19, caused by the SARS-CoV-2 coronavirus. In order to address situations and problems that may seriously endanger public health, the Government of the Slovak Republic has taken a number of restrictive measures. On 27 March 2020, it adopted the Resolution no. 174 in response to the measures resulting from the meeting of the Central Crisis Management Team to tackle this disease in the territory of the

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Slovak Republic. In its point A.10, the cited Resolution tasked the Minister of Health, in cooperation with the Surgeon General of the Slovak Republic and the Minister of Labor, Social Affairs and Family, to adopt a measure setting conditions for limited execution of work-related preventive medical examinations under Section 30e of Act no. 355/2007 Statutes on the protection, support and development of public health as amended (hereinafter referred to as the Health Protection Act). Following the above Resolution clause and the need to implement the measures adopted therein, two laws have been passed. The Act no. 66/2020 Statutes, supplementing Act no. 311/2001 Statutes of the Labor Code, as amended, which supplements certain laws effective as of 4 April 2020 (hereinafter referred to as the amendment to the Labor Code and other legal regulations) and the Act no. 69/2020 Statutes on emergency measures in connection with the spread of a dangerous contagious human disease COVID-19 in the area of health services, as amended (hereinafter the Act on Emergency Measures), which entered into force on 6 April 2020. In order to achieve the purpose of counter-epidemiological measures to minimize the need for assembling, the execution of work-related preventive medical examinations has stopped for the period of the crisis, pursuant to the provisions of § 30e of the Health Protection Act.[4] Newly adopted prov. § 30e par. 21 (a) of the Health Protection Act stipulates that in times of a crisis, the assessment of the medical fitness of a natural person applying for a job is replaced by their affidavit in support of their fitness.[5] At the same time, according to par. 22 of the cited provision, the affidavit must be replaced by an assessment of medical fitness for work no later than 90 days following the end of the crisis. The obligation of a natural person applying for employment, the subject of which is the performance of work falling in the third or fourth category, or for such employment in which their medical fitness is required by a special regulation, to undergo an initial preventive medical examination in relation to work is, therefore, suspended. A natural person is required to undergo this type of medical examination within 90 days of the end of the crisis.

The amendment to the LC and other legal regulations meant that a new provision of *§ 39i*, entitled "*Transitional provisions for the time being of a crisis or a state of emergency, declared in connection with COVID-19", has been added to the Act no. 124/2006 Statutes on Health and Safety at Work as amended (hereinafter referred to as the "Health and Safety Act*"). The provision of § 38i of the HSA introduces the inclusion of selected deadlines, their non-expiry during the crisis and during one month after the crisis has transpired. According to § 16 par. 6 of the HAS, deadline for execution of work-related preventive medical examinations within five years from the issuance of the license, certificate and document, or within five years from the previous work-related preventive medical examination, the end of which coincides with duration of the crisis, is for the time being of the crisis considered to be as follows. If the end of this period falls within one month of the date on which the crisis is declared to be over, the statutory period shall be deemed maintained, subject to execution of the preventive medical examination no later than one month of the date on which the crisis is declared to be over. This involves the suspension and postponement of preventive medical examinations, which are necessary to maintain the validity of licenses, documents, certificates, such as, for example, the certificates of revision technicians, certificates authorizing the bearer to repair reserved technical equipment, certificates authorizing the bearer to operate technical equipment, etc.

We believe that the intended positive objective of the measures adopted above is lacking in effect and may have significant negative consequences in the area of industrial relations, while many other contexts cannot be even envisaged by the law at this time. The protection of the

[4] An exception is the assessment of medical fitness for work of the health professionals who provide health care under direct danger to life and health during a pandemic due to the spread of a highly dangerous infection. The medical fitness assessment of workers in this category is also performed in crisis.

[5] By analogy, according to § 30e par. 21 (b) of the Health Protection Act, the affidavit replaces the certificate of health fitness of a natural person to perform epidemiologically serious activities in the production, handling and placing the food and meals on the market. Specimens of both affidavits are given in the annexes to the Public Health Protection Act.

employee's health is a basic pillar of the legal regulation of economically dependent work.[6] We agree that, in times of crisis, society-wide preventive measures take precedence over health surveillance in the workplace, and that employers can be exempted from certain occupational health obligations (e.g. administrative, notification obligations). The employer's obligations of protecting the health at work are set out in § 30 of the Public Health Protection Act. The Act on Extraordinary Measures suspended fulfillment of all obligations of the employer, which the latter is obliged to honor in cooperation with the occupational health service, as well as the obligations in which the employer cooperates voluntarily with the occupational health service.[7] However, the employer is obliged to honor all these obligations touching the protection of health at work immediately after the crisis has transpired. The activity of the occupational health service is also suspended. In times of crisis, the occupational health service does not supervise working conditions or assess the employees' fitness for work through the performance of work-related preventive medical examinations. However, it may provide advice aimed at protecting health at work and preventing occupational and work-related diseases, but from a distance, not at the employer's workplace. The activity of the occupational health service is resumed immediately after the end of the crisis. However, we believe that the consequences of postponing the execution of preventive medical examinations of employees have been taken lightly and there is a clear disproportion between the protection of public health and the right to protection of employee health at work. In the present scientific paper, we clarify the essence of preventive medical examinations of employees, the intended purpose of which can be realized subject to their execution in real time, and we analyze the consequences that postponement of preventive medical examinations may cause in the light of the labor law.

II. THE ESSENCE OF EXECUTING THE EMPLOYEES' MEDICAL EXAMINATIONS

Preventive medical examinations of employees are of crucial importance in labor law. Their execution is a necessary substantive condition enabling an employee to perform economically dependent work. The fact that this condition has been satisfied must be demonstrated in certain cases, if required by a special legal regulation, in the process of the so-called pre-contractual relations already. According to prov. § 41 par. 2 of Act no. 311/2001 Statutes as amended (hereinafter referred to as the "LC"), the employer may enter into an employment contract only with a person health wise or mentally fit for the type of work involved. Furthermore, the condition of medical fitness for the performance of work is transformed into the content of the employment relationship itself in the form of general obligations of the employer in the field of labor protection under § 146 para. 1 LC in conjunction with the provision of § 6 par. 1 (o) of the Health and Safety Act. Pursuant to § 6 para. 1 (o) of the HSA, in order to ensure the safety and health protection of employees, the employer is obliged to classify employees according to their eligibility for the type of work with regard to **their health, based especially on the result of an assessment of their medical fitness for work**, their abilities, age, qualifications and professional competence in accordance with legislation and other regulations, to ensure safety and health protection at work[8] **and not let them perform work which does not correspond**

[6] See also: HORECKÝ, J., HALÍŘ, J., SMEJKAL, M., STRÁNSKÝ, J., HAVLOVÁ, J., KADLUBIEC, V., GALVAS, M.,MACHÁLEK P. *Zdraví a práce*. 1. vyd. Brno: Masarykova univerzita, 2018.s. 68-84. KUNDRÁT, I. Pracovný čas a ochrana zdravia pri výkone brigádnickej práce študentov. In: *Vedecká konferencia doktorandov na Akadémií Policajného zboru v Bratislave*, 2. ročník Bratislava: Akadémia Policajného zboru v Bratislave, 2019, s. 201-208.; 9. RAMESH, N., SIDDAIAH, A, JOSEPH, B. Tackling corona virus disease 2019 (COVID 19) in workplaces. In: *Indian journal of occupational and environmental medicine*, 24(1), pp. 16-18.

[7] Prov. of § 30 par. 10 of the Act on Extraordinary Measures: In times of a crisis, the employer is not bound by their obligations in the protection of health at work under paragraph 1 (b) to (o) and paragraphs 2, 3, 6 and 9.

[8] With respect to which legislation can be considered legislation and other regulations to ensure safety and health at work, see: ŽUĽOVÁ, J. *Rešerš právnych predpisov na zaistenie BOZP.* [online] [cit. 2020-05-01]. Available:

to their state of health, in particular in view of the result of an assessment of their medical fitness for work, to their abilities subject to certain age, qualifications and evidence of professional competences under legislation and other regulations aiming to ensure safety and health at work.[9] In order to ensure safety and health protection at work, the employer is obliged to carry out surveillance[10], including work-related preventive medical examinations[11] at regular intervals, taking into account the nature of work and working conditions at the workplace, and also upon request of the employee (prov. of § 6 par. 1 (q) of the Health and Safety Act).[12]

Health surveillance includes the supervision of working conditions and the assessment of medical fitness for work through execution of work-related preventive medical examinations. The assessment of occupational fitness is carried out on the basis of the health risk evaluation from exposure to occupational factors and the working environment. Depending on the purpose the examination is carried out for, several types of preventive medical examinations of employees are recognized. Work-related initial preventive medical examinations of job seekers are conducted before the job seekers start work. These examinations focus on detection of diseases and symptoms of diseases that are not clinically manifested yet that are detectable and could be a health contraindication in the performance of a particular job. In the case of employees performing work for which medical fitness is required under special regulations, the purpose of a work-related preventive medical examination is to assess all possible effects of the work performed on the health of a particular employee, which could result in damage to employee health later on and cause an occupational disease, or to reveal an acute health problem of an employee that could make them ill-disposed for work and become one of the causes of an accident at work. Periodic preventive medical examinations are used for regular and continuous monitoring and evaluation of the employee's health, as well as for detecting changes in their health in connection with the level of intensity of the work performed making demands on the employee's health. In case of employees performing the type of work falling into the third category, the examination is conducted once every two years. In case of employees performing the type of work falling into the fourth category, the examination is conducted once a year or at the frequency specified in a special regulation or before any change in the job classification (e.g. concerning a worker exposed to category A sources of ionizing radiation). An extraordinary preventive medical examination shall be conducted if so ordered by a public health authority or proposed by the occupational health service physician. Work-related preventive checkout medical examinations are carried out at the end of the employment or a relationship similar to employment for health reasons.[13] They are conducted to determine the condition of the target organs according to the specific factor of the work environment to which the employee had been exposed at work.[14] Finally, after the termination of employment or a relationship similar to employment, if the employee so requests, a former employer for whom

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https://dusevnezdravie. upjs.sk/wp-content/uploads/2019/09/Zulova_Jana_Re%C5%A1er%C5%A1-pr%C3%A1vnych-prepisov BOZP_elektronicky_dokument_APVV.pdf.

[9] See also : HORECKÝ, J. BOZP - Tvrdé jádro pracovního práva. In: Jaroslav Stránský et al. (eds.) *Pracovní právo 2018 náhrada nemajetkové újmy v pracovním právu, ochrana zdraví při práci a aktuální otázky nemocenského pojištění.* Brno:Mararykova Univerzita, 2019. s. 68.

[10] Pursuant to § 30a and 30d of Act no. 355/2007 Statutes on the protection, support and development of public health as amended by Act no. 204/2014 Statutes.

[11] Pursuant to § 30e of Act no. 355/2007 Statutes on the protection, support and development of public health as amended by Act no. 204/2014 Statutes.

[12] Compare also: BĚLINA, M., DRÁPAL, L. a kol. 2015. *Zákoník práce. Velké komentáře*. 2. vydání. Praha: Nakladatelství C.H. Beck, s. 301.

[13] OLŠOVSKÁ, A. Skončenie pracovného pomeru a zdravotná nespôsobilosť. In: *Starostlivosť o zdravie zamestnancov. Recenzovaný zborník príspevkov z vedeckej konferencie.* Košice: Vydavateľstvo ŠafárikPress, 2018, s. 289-305.

[14] More details on the types of the preventive medical examinations for work: ONDREJKOVÁ, Ľ. *Pracovná zdravotná služba pre zamestnávateľov.* Bratislava: Wolters Kluwer, 2019, s.47-49.

the employee performed work involving hazard factors with late onset of consequences to health is done by a follow-up preventive medical examination.[15]

However, the essence of conducting preventive medical examinations of employees is not exhausted by the above-presented examples. Pursuant to § 16 par. 1 of the HSA, a natural person may operate a designated work equipment and perform specified work activities stipulated by legal regulations to ensure safety and health protection at work during its operation only on the basis of a valid operating license (hereinafter "license") or a valid certificate for performance of activities (hereinafter referred to as "certificate") or a certificate of completion of education and training of operator staff (hereinafter referred to as "document"). The condition for issuing a license, certificate or document is, among other conditions, medical fitness for work. It is also assessed on the basis of the result of a work-related preventive medical examination according to § 30e of the Health Protection Act and the proof thereof is a medical report not older than six months (§ 16 par. 4 of the HSA). An initial preventive medical examination is a condition for issuance of a license, certificate or document; a periodic preventive medical examination is a condition that the license, certificate or document does not expire. A natural person holding a license, certificate or document shall be required to undergo a work-related preventive medical examination assessing their medical fitness for the work required to perform the given activity, within five years of the date of issue of the license, certificate or document, or of the date of the previous work-related preventive medical examination (provision of § 16 par. 6 of the HSA). If a natural person has not undergone a work-related preventive medical examination or if the result of the work-related preventive medical examination finds them deficient of the medical fitness for work necessary to perform the activity for which a license, certificate or document has been issued, this license, certificate or document validity expires and the natural person must repeat the whole process of obtaining it.[16]

The employee medical fitness for work is, therefore, assessed in relation to all harmful factors of work and the working environment, i.e. factors that are part of the work and relate to the working conditions under which the work is performed and their purpose is to objectively assess the employee's medical fitness for the work to which they are assigned. Through work-related preventive medical examinations, it is possible to detect early changes in the health of employees related to work, and thus prevent possible onset of occupational or work-related diseases. Work-related preventive medical examinations are one of the most effective preventive measures aimed at improving the protection of employees' health, precisely because they are aimed at monitoring changes in the health of a particular employee **in real time** and examining those human body systems that may be damaged by one of the harmful factors of work and the working environment.

III. LABOR LAW CONSEQUENCES OF THE POSTPONEMENT OF PREVENTIVE MEDICAL EXAMINATIONS

The first major consequence, as a real risk stemming from the failure to conduct the initial preventive medical examination, is that the employer will employ a person who is not medically fit to perform the work. Pursuant to the measures adopted, a natural person seeking employment under which they would be performing work falling in the third or fourth category, or for such employment in which their medical fitness is required by a special regulation, is now not required to undergo an initial work-related preventive medical examination. A natural person is required to undergo this type of medical examination within 90 days of the end of the crisis. During the crisis, the assessment of the medical fitness of such a natural person is replaced by

[15] See also: SEILEROVÁ, M. Ochrana zdravia pedagogických zamestnancov a ich zdravotná spôsobilosť. In: *Sine amicitia vitam est nullam: pro memoria prof. Zdeňky Gregorovej*. Praha: Nakladatelství Leges, 2019, s. 190-211.

[16] OLŠOVSKÁ, A. *Pracovný pomer*. Bratislava: Wolters Kluwer, 2018, s. 78 a nasl.

their affidavit in proof of their fitness.[17] The employer finds themselves in an extremely precarious situation when they have to hire a person for a job falling in the third or fourth risk category with only their (unprofessional and subjective) affidavit in confirmation of their fitness to carry out such work, declared in the affidavit. Due to the fact that it is not possible to predict when the crisis will be over, the employee may be exposed to a harmful factor of the working environment with irreversible consequences to their health for an unreasonably long time. The same risk also arises for employees performing work falling in the third and especially the fourth risk category, if they do not undergo a periodic preventive medical examination. In case of the types of work falling in the third and fourth risk categories, these are the types of work in which damage to health may occur even though preventive measures are taken to reduce the risk (for example, a miner or a tunnel boring worker). This premise is also supported by the above-mentioned periodicity of preventive medical examinations, e.g. in the fourth occupational risk category, where it is an obligatory duty to undergo a preventive medical examination at least once a year. The postponement of these preventive medical examinations thus clearly runs counter to the general and immanent interest in protecting the employee's life and health at work, and failure to carry out a preventive medical examination of the third risk category, but especially of the fourth risk category, cannot be justified even by implementation of such a measure as the present counter-epidemiological one. The key paradigm for the conduct of a preventive medical examination of an employee is an objective assessment of whether the employee is medically fit for performing the work prior to its commencement or during such work and the postponement of the examination thus has a fundamental impact on the protection of the employee's life and health.

The postponement of preventive medical examinations (i.e. maintaining the statutory period for an indefinite duration of the crisis and one month subsequent to its end) will be particularly reflected in cases where the examinations are necessary to obtain or renew authorizations (certificates of professional competence), e.g. for employees operating motor (forklift) trucks, and thus performing activities for which medical fitness for work is required on the basis of a special license, certificate or document pursuant to § 16 and Annex no. 1a of the Health and Safety Act. Preventive medical examinations for the assessment of medical fitness are conducted on these employees in accordance with the Bulletin of the Ministry of Health - Professional Guidelines of the Ministry of Health of the Slovak Republic on the content of the work-related preventive medical examinations, issued on 29 September 2016. A preventive medical examination includes an overall assessment of the employee's work-related medical fitness, including the employee's detailed work history and data on vertigo and other types of seizure, as well as a complete physical examination, including orientation examination of sensory function, orientation neurological and psychological examination and eye examination. A possible postponement of a preventive medical examination may have a significant impact on the area of employment liability relations, where such an employee is exposed to the risk of causing damage to their own health or the health of other employees, or damage to the employer's property. In this category of employees, it is necessary to consider another fundamental dimension, and that is giving them the option to maintain a valid license, certificate or document to perform the activity, which entitles them to operate the designated work equipment and carry out specified work activities provided by legislation to ensure safety and health protection at work during its operation in accordance with § 16 of the HSA (see also Part II of this paper). The mere statutory imposition of time limits under § 39i of the HSA does not address the objective state of health of an employee, who may already be medically unfit to perform the work, even though the license has not expired, as this time limit is in force. In this

[17] By analogy, according to § 30e par. 21 (b) of the Health Protection Act, the affidavit replaces the certificate of health fitness of a natural person to perform epidemiologically serious activities in the production, handling and placing the food and meals on the market. Specimens of both affidavits are given in the annexes to the Public Health Protection Act.

sense, however, the employer cannot assign an employee a job for which the latter is not medically fit or does not have the necessary certificate, license, document that proves their professional competence to perform this job. However, the postponement of such medical examinations may lead to a situation where the employees' certificates, licenses, documents do not expire, but preventive medical examinations as an objective parameter of assessing the employee's health status are postponed but had that not been the case, and the medical fitness of the employees had been duly assessed, the employer would be required to immediately reassign the employees based on their current medical fitness to perform work where competence subject to the licenses above is not required.

In addition to the fact that the postponement of preventive medical examinations endangers the health of employees, another dimension of the measures in place can be identified, which is probably the most fundamental from the labor law point of view. For example, if the employee's preventive medical examination fails to be conducted in an additional period, e.g. 6 months after the moment when the employee was supposed to undergo it under the original legislation and the employee is diagnosed with a health damaging condition satisfying the definition of an occupational disease, who will be responsible for this damage to the employee's health? Pursuant to § 196 par. 4 LC the liability for damage caused to an employee in the form of an occupational disease lies with the employer with whom the employee last worked before having been diagnosed with such disease in an employment under the conditions that give rise to an occupational disease which has affected him. Since in this case the nature of the employer's liability is objective, the employer is liable for this damage even if he had complied with the obligations arising from special regulations and other regulations to ensure safety and health protection at work, provided the employer has not relieved themselves of their liability for reasons contained in § 196 LC.[18] Although the employer may justify the legal option the law gave them to postpone a medical examination in accordance with a special legal regulation, this does not change the employer's respective liability in any way. However, identifying the culprits and the victims is complicated. We must take into account the presumption that, had an employee undergone a medical examination at a time when, under the original legislation, the employee was required to undergo a medical examination, damage to their health could be detected at a stage which would only pose a risk of an occupational disease. Discontinuing work in the working conditions that cause the occupational disease and reassignment of the employee to perform other work without a risk factor in the work environment, together with correctly applied medical therapy, could result in a preventive effect in the sense that the employee would not develop the occupational disease. However, the newly adopted legislation seems to have "imposed" the strict liability for damage to the employee's health onto the employer and, at the same time, forced the employee to harm their own health. This risk is particularly high in cases where the work falls into the third or fourth risk category, where the damage to health can be fatal with a significant impact on the employee's continued social inclusion. Why should the employer bear the strict liability and the employee should have impaired health in such case? Shouldn't it be the legislator who should be liable for the unprofessional nature of the legislation adopted? Even in accordance with § 196 of the LC, the employer cannot waive their liability for the onset of an occupational disease, as the said reason does not meet the definition of the subjective action of the employee as a reason to vacate the employer of the liability, as set forth in the provision of § 196 par. (1) and the par. 2 LC, not even in part. The most common damage to an employee's health in a conventional manufacturing process in the form of assembly work is long-term unilateral overloading of certain body parts, which could be prevented by reassigning the employee or increasing their rotation if a medical examination reveals a risk of an occupational disease. The postponement of preventive medical examinations delays such

[18] BARANCOVÁ, H. *Zákonník práce. Komentár*. Bratislava: C. H. Beck, 2017, s. 1059 a nasl.

finding. It is subject to debate whether the preventive purpose of the adopted anti-epidemiological measure in comparison with the protection of individual health of employees is as high a priority as declared in the explanatory memorandum to the Act on Extraordinary Measures.

Other controversial aspects of the measures taken can also be considered, especially in the area of liability relations. If we return e.g. to the driver of the forklift truck, one of the examinations in assessing his medical fitness is also devoted to examining his sight and motor functions. If damage to the health of another employee or the employer's property occurs, does the liability lie with this particular employee, whose employer had not sent him to a preventive medical examination, because the employer was unable to do so due to such examinations having been postponed? Can such employee successfully defend themselves with an argument that they did not know that they were no longer fit for the job and that the damage caused was to be borne by the employer? The legal opinion will probably depend on the specific side of the employment relationship, where the employer will claim that they had not violated any legislation and the employee that they could not (was unable to) prove the deterioration of their health because they had not been subjected to a preventive medical examination. In this context, however, other controversial areas will continue to arise (and in practice, their emergence has already been showing), e.g. in the area of observance of work discipline or in the application of § 47 par. 3 (a) or (b) of the LC.[19] If the employee or the employer is convinced of the employee's medical incapacity, what should be the procedure if, in the current situation, we cannot objectively assess the employee's medical fitness for work through a preventive medical examination? The subjective belief of the employee about their own lack of fitness will probably lead to a refusal to follow the work instruction in accordance with § 47 par. 3 (b) of the LC. The employer's belief in the employee's incapacity will lead to the latter's reassignment to another job, but it is questionable whether such reassignment will be in accordance with the law, as reassignment of an employee to another job for health reasons is under § 55 of the LC subject to a medical report resulting from a preventive medical examination. Legally more certain, although probably economically more discriminating, might be for the employer to apply the provision of an obstacle to work on the part of the employer to dealing with such employees according to § 142 par. 3 of the LC.[20]

However, the postponement of medical examinations has already created another unsolvable labor law problem, which fundamentally reduces the employment protection of employees. The impossibility of conducting preventive medical examinations does not allow the employer to terminate the employment pursuant to § 63 para. 1 (c) of the LC in the existence of a long-term loss of medical fitness of an employee to perform work, as it is not objectively possible to obtain a medical report stating such a long-term medical incapacity. In case of employees who, for example, return to work after their temporary incapacity for work, during which they were provided with health care, positive or negative changes in their state of health may have occurred in the meantime and it is, therefore, necessary to reassess their state of health. Thus, although both the employer and the employee are convinced of the need to terminate the employment, the absence of an objective fact, demonstrated in the form of a medical report on the health status of the employee, causes a state of legal uncertainty as to whether it is possible to proceed under Art. § 63 par. 1. (c) of the LC, linked to the employee's possible entitlement to severance pay upon termination of employment in accordance with § 76 par. 3 of the LC, which is, of course, contested by the employer, or should the employment be terminated by

[19] Prov. of § 47 par. 3 LC: The employer may not consider a breach of duty on the part of the employee if the latter refuses to perform work or follow instructions that a) are contrary to generally binding legislation or good morals, b) directly and seriously endanger the life or health of the employee or other persons.

[20] Prov. of § 142 par. 3 LC: If the employee was unable to perform the work due to obstacles on the part of the employer as mentioned in paragraphs 1 and 2, the employer shall provide them with compensation of wages amounting to their average earnings.

agreement under Art. § 60 of the LC without the obligatory emergence of the right to severance pay in accordance with the cited provision. § 76 of the LC. The employer thus tries to minimize the risk of increased ancillary costs of the employee, in which the employer is greatly helped by the postponement of the medical examination, the employee is unable to use the appropriate legal ground for employment termination linked to the employee's right to severance pay. However, the decision to postpone the termination of employment until the time of the medical assessment of the employee's state of health for the purposes of termination of employment also creates, secondarily, another problem consisting in the legal qualification of the time until the medical examination is conducted. In theory, the employer has only two options to assess this situation, namely, they can either apply the clause of an obstacle to work on the part of the employer according to Art. § 142 par. 3 of the LC with compensation of wages amounting to average earnings, if the employer believes that the employee is not fit to perform work due to their health condition or they can assign work to the employee, risking deterioration of the employee's health condition thereby, as the employer does not have a medical report on the employee's lack of fitness. In both cases, the employer is thus exposed either to the risk of deterioration of the employee's health or to increased labor costs, if, for example it is later shown that the employee was qualified to perform the work or in terms of the postponement of the entire process of the employment termination by the period during which the obstacles at work on the part of the employer applied. The only solution to this situation is, in principle, to terminate the employment by agreement, which neither party would wish to accept, as it is not be in the employer's interest to provide the employee with the full amount of severance pay, to which the latter would become entitled if the substantive conditions were subsequently demonstrated to have been satisfied under Art. § 76 par. 3 of the LC. The decision in any specific case will, of course, be up to the employer, or up to the employee, however, it can be stated in principle that through no fault of their own and through the inconsistency of the legislator, they could be exposed to a situation causing harm to one or the other.

We perceive the postponement in execution of preventive medical examinations to be an inappropriate measure for other reasons as well. Based on the decision of the Public Health Office of the Slovak Republic, specific businesses were closed and the number of employees, who should undergo a preventive medical examination, has thus decreased. However, we must realize that the decision does not concern the closure of all establishments, and for many employees, a flat postponement of preventive medical examinations is irrelevant, resulting in more harm than good. In times of crisis, some of the employees are working at an even higher pace and productivity,[21] with a negative impact on their lives and health.[22] The negative effects of suspension and postponement of periodic preventive medical examinations can thus become much more intense. If the measures taken are intended to minimize the need for assemble, these measures not only have no effect but no grounds for their existence either. On the one hand, it seems not to matter that employees meet on the job, on the other hand, the most important element of their employment protection in the form of regular assessment of their health is postponed and is not implemented without taking into account the negative impact on occupational health. The practical dimension of carrying out preventive medical examinations has not taken into account either, especially for work falling in the third and fourth risk categories. In these cases, employers have contracted their own occupational health services, who conduct preventive medical examinations in their own medical facilities, controlling the movement of all persons and excluding the general public.[23] Preventive medical examinations

[21] E.g. food industry, production of consumer goods, hygienic products, etc.

[22] See also: MARI-ISABELLA STAN, RUS, M., & TASENTE, T. Young people’s perception of the measures taken by the authorities in the context of the Covid-19 pandemic. In: *Technium Social Sciences Journal*, 7(1)/2020, pp.18-27. [online] cit. 2020-05-05]. Available: https://techniumscience.com/index.php/socialsciences/article/view/516.

[23] SPINAZZÈ, A., CATTANEO, A., CAVALLO, D.M. COVID-19 Outbreak in Italy: Protecting Worker Health and the Response of the Italian Industrial Hygienists Association. In: *Annals of work exposures and health.* Volume 64, Issue

are carried out at scheduled times, so there is basically no waiting at the doctors' and employees do not gather in larger groups. Thus, the employer clearly has the possibility to comply with strict epidemiological measures and, at the same time, to ensure, in accordance with the above-mentioned legal regulations, an assessment of the employee's state of health within the time limits prescribed.

We believe that the arguments put forward indicate that the postponement of preventive medical examinations of employees is disproportionate, especially for employees in the fourth risk category, and that the measures taken should be invalidated as soon as possible.

IV. CONCLUSION

The purpose of a preventive medical examination is the detection and initial diagnosis of a disease that would prevent or restrict an employee from performing their work at an early stage. The subsequent immediate reaction of the employer, consisting in the appropriate adjustment of working conditions or reassignment of the employee to another job, has preventive effects in the event of further damage to the employee's health. The postponement of the preventive medical examination of the employee by the amendment to the LC and other legal regulations, and by the Act on Extraordinary Measures, has voided the meaning of the preventive medical examination as it, de facto, postponed the examination indefinitely. In our opinion, the adopted measure disproportionately interferes with the right to protection of the employee's health at work. Postponing the preventive medical examination may cause an occupational disease instead of a situation with the employee being exposed to only a milder consequence in form of a danger of developing such a disease had the preventive medical examination been carried out in real time. It is legally uncertain to assess whether the liability requirements for an accident at work or an occupational disease, if such occurred in an incapacitated employee whose medical fitness could not have been assessed due to the postponement of preventive medical examinations, have been satisfied.[24] The legality of the procedure of reassignment of the employee to another job is questionable, if their state of health has not been objectively assessed by a medical opinion resulting from a preventive medical examination. The temporary nature of the measure adopted (for the time being of the crisis) does not justify its disproportionality, and the shortcomings pointed out should be a memento so that they not to recur in any crisis in the future.

KEY WORDS

preventive medical examination, employee, employer, health and safety protection at work, COVID-19, coronavirus

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preventívne lekárske vyšetrenie, zamestnanec, zamestnávateľ, ochrana zdravia a bezpečnosť pri práci, COVID-19, koronavírus

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24 See also: FIĽA, M., SCHWARCZOVÁ, L., MURA, L. Citizen satisfaction survey as a tool of citizen relationship management of local government in Slovakia. In: *Serbian Journal of Management*. Vol. 10(1), 2015, pp.117-129.[online] [cit.2020-05-05]. Available: https://www.researchgate.net/publication/282241514-Citizen_satisfaction_survey_as_a_tool_of_citizen_relationship_management_of_local_government_in_Slovakia.

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