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TÍTULO: Acerca de algunas garantías proporcionadas al empleado al finalizar las relaciones laborales en relación con la liquidación del empleador de la entidad legal.

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RESUMEN: El artículo está dedicado al análisis de las normas de la legislación laboral de Rusia sobre las garantías monetarias otorgadas a un empleado al momento de su despido en relación con la liquidación de un empleador, reflejando la política estatal en relación con la terminación de las relaciones laborales. El artículo discute los problemas que surgen del incumplimiento por parte del empleador de las obligaciones para el pago de la indemnización por despido y los ingresos medios para el período de empleo. Examina la experiencia histórica de la regulación estatal de este problema. Se hacen conclusiones sobre la necesidad de cambiar el art. 178 del Código de Trabajo de la Federación Rusa y otras normas sobre garantías monetarias en caso de liquidación del empleador.

PALABRAS CLAVES: Liquidación de la organización, indemnización por despido, garantías a la liquidación de la organización.

TITLE: About some guarantees provided to the employee upon termination of employment relations in connection with the liquidation of the legal entity's employer.

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ABSTRACT: The article is devoted to the analysis of the norms of the labor legislation of Russia on monetary guarantees provided for an employee upon dismissal in connection with the liquidation of an employer, reflecting the state policy regarding termination of labor relations. The article discusses the problems arising from the performance by the employer of obligations for the payment of severance pay and average earnings for the period of employment. It examines the historical experience of state regulation of this issue. Conclusions are made about the need to change Art. 178 of the Labor Code of the Russian Federation and other rules on monetary guarantees in case of liquidation of the employer.

KEY WORDS: liquidation of the organization, severance pay, guarantees at liquidation of the organization.

INTRODUCTION.

Since the category "liquidation of an organization" refers to civil law, and termination of labor relations is one of its legal consequences, the scientific legal literature focuses on the characteristics of liquidation and its forms, the order of implementation and legal consequences for relations

governed by civil law (Gabov, 2014); that is, those issues that do not reflect the policy of the state regarding the termination of labor relations (Noda, 2005).

Scientists involved in the study of labor law, note, in general, such problems as the lack of a definition of liquidation in labor law (Gabov, 2016), exceptional circumstances that allow to identify the process as a liquidation, not reorganization (Kiselev, 2008), as well as the legislator's failure to specify the period of time employment contract for this reason (Zhilin et al., 2014). Only some authors refer in their work to the problem of maintaining average earnings for an employee (Tsyapkina, 2017), noting possible problems with the implementation of this guarantee (Zhdanova et al., 2015).

The current Labor Code of the Russian Federation, as is known, is not the first codified law regulating labor relations. The first codified law in this area was adopted in 1918, after the October Revolution, during the Civil War. A few years later, in 1922, the Soviet state terminated the Code of 1918, it was replaced by the Code, which, with changes, was valid until 1972.

The Labor Code, which was enacted on April 1, 1972, was repeatedly edited and expired on February 1, 2002, when the Labor Code of the Russian Federation, regulating labor and other relations directly related to them, entered into force in Russia.

Each of the above codes provided for the liquidation of the employer as a basis for termination of the employment relationship and certain guarantees for the employee due to dismissal due to liquidation. Such guarantees include the payment of a sum of money at and without dismissal. The size, order and duration of payment of these amounts have changed since 1918, but the state's approach to the fact that in the event of the liquidation of an employer an employee has the right to monetary support remained unchanged.

The Labor Code of 1918 enshrined the obligation of the employer to warn 2 weeks before the employee's dismissal and the local Department of Workforce Distribution. The worker was declared unemployed from the moment of the warning, continuing to fulfill his duties until the expiration of a two-week period (Articles 47-48 of the Labor Code of 1918).

After the actual abandonment of work and no later than the fourth day of unemployment, the employee was entitled to receive unemployment benefits paid not by the employer, but by a specialized organization — the local fund for the unemployed (paragraphs 15, 3 of the Rules on the Unemployed and on the issuance of benefits to them) this code).

Labor Code of the RSFSR in 1922 in Art. 88 secured the employee the right to severance pay in the amount of two-week earnings or a warning two weeks before the dismissal. In the future, a former employee could apply for unemployment benefits, which was also not paid by the employer.

In Art. 36 of the Labor Code of the RSFSR of 1971 (in the original edition), the employee retained the right to severance pay in the same amount. Subsequently, this Code was changed, the employee was recognized the right to maintain the average wage for the period of employment, but not more than three months, taking into account the monthly severance pay (art. 40.3).

The current Labor Code of the Russian Federation in Part 1 of Art. 178 of the Labor Code of the Russian Federation, despite the changes that have occurred in society and the state, the rejection of socialist ideology and economy, provides for the right of an employee to receive severance pay and payment of average earnings during a certain period, thereby maintaining some kind of commonality with the regulation enshrined in the Labor Code 1971.

For employees in the event of liquidation of an organization, the Labor Code of the Russian Federation provides for additional guarantees; this raises the question of why dismissal on other grounds does not allow an employee to apply for these guarantees.

The actual implementation of the right to preserve the average earnings of an employee for the period of employment is doubtful, since the liquidation of an organization is, according to the Civil Code of the Russian Federation, a method of terminating a legal entity. In addition, is the differentiation of guarantees during liquidation provided for by labor legislation, reasonable and consistent, taking into account the specifics of only some labor relations, namely: seasonal, temporary workers, workers engaged in labor activities in the regions of the Far North and areas that are equal to such areas.

General scientific methods of cognition were used in the article: dialectical, logical, and also special: comparative legal, system analysis, formal legal.

DEVELOPMENT.

As a general rule, contained in Part 1 of Art. 178 of the Labor Code of the Russian Federation, in case of liquidation of the organization, the employee is paid a severance pay in the amount of the average monthly wage, and it also maintains the average monthly wage for the period of employment, but not more than two months from the date of dismissal (with offset of the severance pay).

During the third month, these earnings are also saved, but this requires a decision of the employment service body, which is made in exceptional cases, if within two weeks after the dismissal the employee applied to this body and was not employed by him (part 2 of article 178 of the Labor Code of the Russian Federation).

Consequently, the minimum period of retention of average earnings is two months from the date of dismissal, provided that the employee did not find work during this period.

The general rules listed above have exceptions for an employee who is dismissed from an organization located in the regions of the Extreme North and similar localities.

In connection with the liquidation of the organization, the average monthly salary due to part 1 of art. 318 of the Labor Code of the Russian Federation is also maintained for the period of employment, but at the same time the possible period is increased by one month; that is, the average earnings can be paid within a period of not more than three months from the date of dismissal (with offset of the severance pay).

The employment service may also, by decision in exceptional cases, save the average salary for a specified employee for a longer period - during the fourth, fifth and sixth months from the date of dismissal, provided that within one month after the dismissal the employee applied to this body and was not employed (part 2 of article 318 of the Labor Code of the Russian Federation).

The regions of the Far North and equated areas occupy fully or partially the territory of 24 constituent entities of the Russian Federation and are territories with harsh natural conditions. In order to determine whether the territory belongs to such areas and localities, the Resolution of the Council of Ministers of the USSR dated January 3, 1983 No. 12 "On Amendments and Additions to the List of Districts of the Far North and Localities Equated to the Districts of the Far North", is approved. dated November 10, 1967 No. 1029" (with subsequent amendments and additions).

For an employee engaged in seasonal work, the payment of severance pay is provided in a smaller amount - in the amount of two-week average earnings (Part 3 of Art. 296 of the Labor Code of the Russian Federation), and for an employee who has entered into an employment contract for up to two months, such allowance is not provided as a general rule at all (part 3 of article 292 of the Labor Code of the Russian Federation).

Thus, the legislator in a special way approached the issue of providing guarantees upon liquidation of an organization.

The largest amount of guarantees is recognized for workers who perform their work in special climatic conditions - in the regions of the Far North and localities equivalent to them.

The smallest amount is assigned to persons who have entered into an employment contract for up to two months and to perform seasonal work as employees.

Since the above-mentioned areas and localities do not differ in favorable climatic conditions, the establishment of additional benefits for employees performing a labor function in these areas seems logical and reasonable. Due to the fact that neither seasonal nor temporary work does not presuppose the initial duration of the employment relationship, fixing a smaller amount of guarantees for such employees in case of liquidation cannot be considered discriminatory.

At the same time, it is not clear why the legislator has not provided for increased severance pay or the retention of its payment for a longer period (compared to the general rules) for pregnant women, people with family responsibilities or for underage workers for whom additional rights are enshrined in the Labor Code of the Russian Federation and guarantees in the execution and termination of the employment contract.

Results.

In itself, the preservation of average earnings for an employee for the period of employment raises certain questions. During this period, the employment relationship between the employee and the employer has already been terminated, the employee does not have a job, and therefore has the right to apply to state employment service agencies and apply for the status of unemployed, as stipulated by the RF Law of 19.04.1991 N 1032-1 "On Employment Russian Federation". In this article. 31 of this law provides that citizens who were dismissed due to the liquidation of an organization recognized in the prescribed manner as unemployed but not employed during the period during which

the average salary (including offset payment) is kept for the last place of work (service), unemployment benefit is calculated from the first day after the specified period.

In other words, the state imposed on the employer the obligation to provide funds for the existence of the former employee for the period of employment, but not more than two months, as a general rule. Such a state policy cannot be recognized as effective for several reasons.

First, by listing the relations regulated by labor legislation, the state does not mention the relationship of recognizing the unemployed and paying the corresponding allowance. From the content of art. 7.1 of the Law of the Russian Federation of April 19, 1991 No. 1032-1 “On Employment of the Population in the Russian Federation”, it does not follow that these relations relate to the relations for compulsory social insurance mentioned in the Labor Code of the Russian Federation as a subject of legal regulation of labor legislation.

Secondly, the liquidation, as already noted, ends with the termination of a legal entity, that is, the employer ceases to be a subject of law, a participant in legal relations endowed with certain duties and rights. Does this mean a loss of the employee’s right to preserve average earnings for the period of employment? If we proceed from the theory of law, then such a duty and, accordingly, the right of the employee cease. On the other hand, the Labor Code of the Russian Federation provides for the unconditional preservation of the right to preserve average earnings, and the Civil Code of the Russian Federation does not exclude the transfer of rights and obligations in the order of singular succession.

The Constitutional Court of Russia voiced the position that a termination of a legal entity should not deprive an employee of the right to preserve earnings for the period of employment, employees dismissed on this basis and acquired the right to maintain average earnings for the period of employment after it is completed, are provided by the employer or an increase in the amount of

severance pay for a dismissed employee in accordance with the procedure provided for by the fourth part of Article 178 of the Labor Code of the Russian Federation or using civil law norms, do not contradict the legislation.

This Resolution of the Constitutional Court of Russia, the competence of which has the authority to consider the issue of compliance of laws with the Constitution of Russia, testifies to the recognition of the problem of violation of the rights of workers dismissed due to liquidation. As a temporary measure, applied before making amendments to the Labor Code of the Russian Federation, it has been proposed to ensure that the employee exercises this right through the employer using one of the two proposed options.

The use of civil law mechanisms referred to in the Resolution of the Constitutional Court of Russia is not typical for labor relations regulated by labor legislation providing for specific rights, freedoms and interests of legal entities, therefore the government is unlikely to include in the Labor Code of the Russian Federation a provision on the use of these mechanisms.

CONCLUSIONS.

It appears that the labor legislation in terms of guarantees upon termination of labor relations in connection with liquidation will be changed in such a way that the employee will be recognized the right to severance pay without retaining the average earnings for the period of employment.

For the period of employment, an employee recognized as unemployed must be paid by the employment service institution. Such an approach is not new in the labor legislation, the first labor codes of the laws contained precisely this understanding of the sums paid to the employee upon liquidation of the employing organization.

Thus, the differentiation of guarantees provided for by labor legislation in case of dismissal due to liquidation depending on the category of employee is reasonable; however, such a differentiated approach should be extended to other employees, and in particular, to persons with family responsibilities.

Maintaining the average earnings for the period of employment of an employee dismissed due to the liquidation of the organization must be replaced by unemployment benefit, which is paid by the employment service institution.

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