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EMPLOYEES' ABUSE OF SICK LEAVE AND COMBATING SUCH MALPRACTICE

Abuse of absence from work due to temporary incapacity to work (abuse of sick leave) is certainly one of the most painful issues encountered by employers. That is more than understandable when we consider the consequences of such employee conduct. First, the employer suffers economic loss because an employee fakes grounds for absence from work, and during that time is not performing the job supposed to be performed under employment contract, that is to say, the employee is not contributing to employer's business activities. The employer therefore has to organize for the work to be performed by other employees in order to cover the scope of work and the tasks that need to be accomplished. Secondly, the employer suffers financial loss because the company is paying the employee compensation of salary because of temporary incapacity to work up to the 30th day of such leave, yet the sick leave is in fact fake. Of course, if it is established that such abuse of sick leave has taken place, the employee loses the right to salary compensation. Also, the employer has to make a special effort to establish that the sick leave is being abused, losing time and other resources in the process. An additional difficulty lies in the fact that, provisionally speaking, abuse of sick leave is not easy to establish, even though the new elements introduced in the Labour Law in 2014 have made a significant step in that direction.

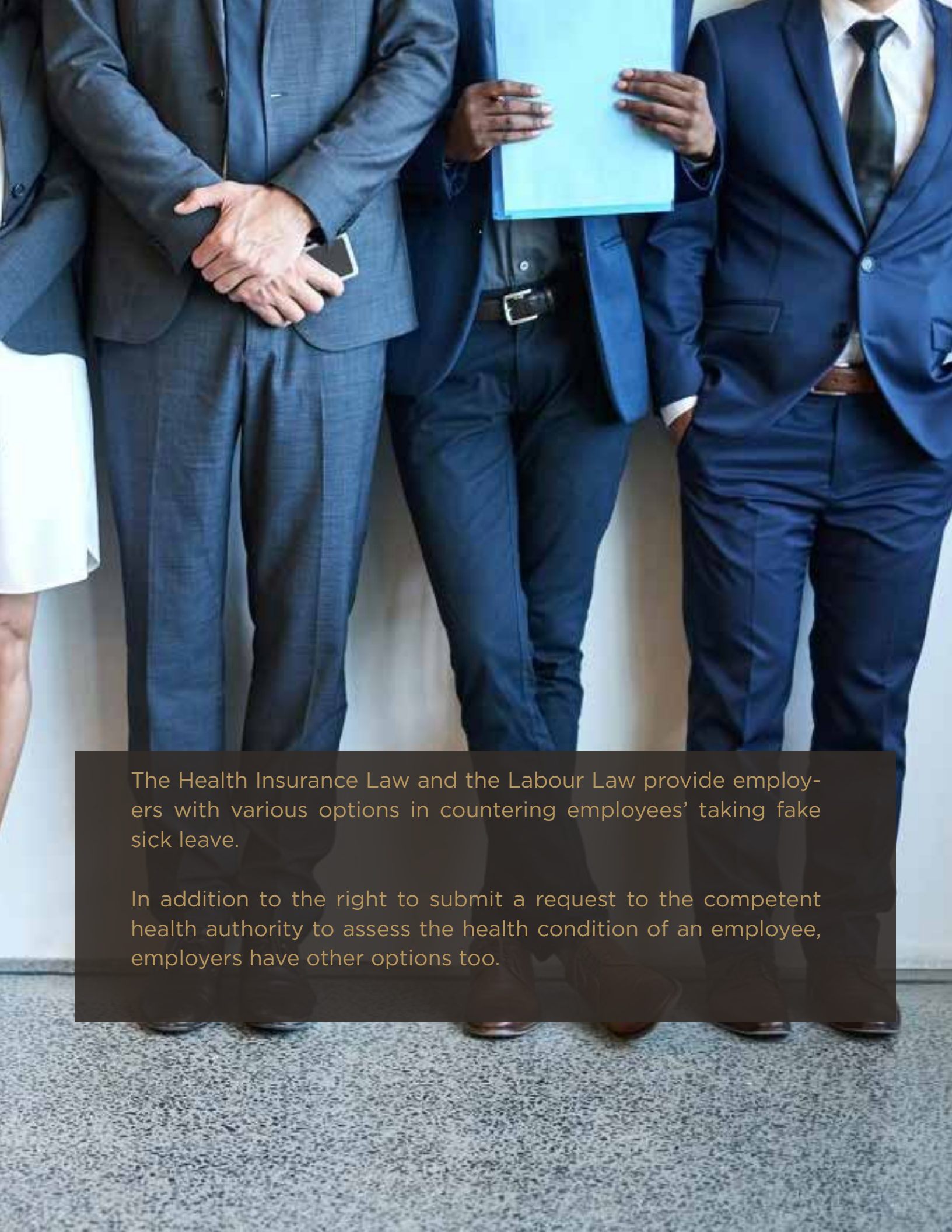
Therefore it is important to discuss the provisions on employee absence due to temporary incapacity to work and accompanying compensation of salary, as well as abuses of these rights and the means at the disposal of every employer to discover, sanction and suppress such malpractice on the part of certain employees. We shall review the relevant provisions of the Labour Law ("Official Gazette of RS" No. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014 and 13/2017 - "Labour Law"), and of the Health Insurance Law ("Official Gazette of RS" No. 107/2005, 109/2005, 57/2011, 110/2012, 119/2012, 99/2014, 123/2014, 126/2014, 106/2015 and 10/2016 - "Health Insurance Law") relating to sick leave and its abuse, as well as the current case law and opinions of the competent Ministry.

What is an abuse of sick leave?

Generally speaking, we could say that there are in essence two forms of abuse of sick leave: the first - when the employee is not sick at all, but his/her doctor "opens" sick leave, which the employee is aware of, and the second - when the employee is actually sick, but fails to follow the treatment instructions, but instead uses the sick leave in an unlawful manner (works in the "black economy" for another employer, mends the roof on his house, travels, etc. although this depends on the type of illness and on the prescribed treatment, which we will discuss in more detail later on).

When an employer has suspicion about sick leave validity

Article 103 of the Labour Law specifies that if an employer has suspicions as to whether the reasons for absence from work are justified, the employer may submit a request to the competent health authority to assess the health condition of the employee, in accordance with the Health Insurance Law. In accordance with said law, the employer may also submit a request to the healthcare facility when the work capacity was assessed by the employee's chosen doctor, or to a branch of the RFZO if the incapacity to work was assessed by a med-ical committee.



The Health Insurance Law and the Labour Law provide employers with various options in countering employees' taking fake sick leave.

In addition to the right to submit a request to the competent health authority to assess the health condition of an employee, employers have other options too.

The employee is obliged to check in with the first-instance or second-instance medical committee regarding the re-examination request, within the period of time specified by the committee. The consequence of failure to comply with this call for an examination (without justified reason) is that the employer may cease paying the employee compensation of sal-ary until the employee complies with the call. What constitutes justified and what unjustified reasons remains for the employer to decide in each specific case, considering all the facts and circumstances.

What are the possible activities of health care authorities after such a request is submitted? If the chosen doctor abuses power in the procedure for exercising the rights of insured per-sons, the branch of the RFZO terminates the contract with the chosen doctor and proposes to the competent chamber of medical professionals to revoke that doctor's license to work independently.

The first-instance medical committee, among other things, assesses and determines the du-ration of temporary incapacity to work of an employee, at the proposal of chosen doctor, for temporary incapacity to work exceeding 30 days. It also provides an assessment following an employee's or employer's objection to the chosen doctor's assessment of the temporary incapacity to work up to 30 days. The first-instance medical committee assesses temporary incapacity to work based on a direct examination of the employee, and on the medical doc-umentation.

On the other hand, the second-instance medical committee provides an assessment follow-ing an employee's or employer's objection to an assessment, that is to say, to the state of facts established by the first-instance committee, and then, upon request from the employ-ee, branch or employer, examines the correctness of the assessment given as final by the first-instance medical committee, and provides its assessment and opinion. The second-in-stance medical committee can review all rights, and conduct an expert determination re-garding all rights under compulsory social insurance decided upon by the chosen doctor or the first-instance medical committee, at the request of the insured person, employer, local RFZO branch or the RFZO.

The Health Insurance Law has introduced the institute of repeating the procedure for as-sessing incapacity to work in Article 163, which is one of the means for combatting abuse of sick leave. Therefore, the RFZO, the local branch or employer may request that the insured person (employee) whose temporary incapacity to work was assessed by the chosen doctor or first-instance medical committee be re-examined by the first-instance or second-instance medical committee, in order to reassess employee's temporary incapacity to work.
The initiative for the insured person to be re-examined can also be put forward by the cho-sen doctor, or first-instance medical committee. A re-examination can be requested within 30 days from the date of the assessment by the expert medical authority in the procedure, so it is important to heed this deadline, although exceptions are frequently made in practice.
If the insured person fails to comply with the call for an examination without justified reason, payment of the compensation of salary ceases, and the insured person is not entitled to compensation until he/she complies with the call, as we have already noted above. This can also constitute grounds for termination of employment by the employer.

The last institute of the Health Insurance Law discussed in this article as a means to combat fake sick leave is an expert determination in the procedure of exercising rights under com-pulsory health insurance (Articles 164-166). The RFZO, or the local branch, ex officio or at the request of the employer, may request an expert determination regarding the exercising of all rights of insured persons under compulsory health insurance, including an expert de-termination regarding the health condition of the insured person (employee).
Apart from the right to submit a request to the competent health care authority to assess the health condition of the employee in accordance with the Health Insurance Law, as dis-cussed above, employers also have other options at their disposal.

Labour Law amendments from 2014 have introduced new "weapons" for the employer

Namely, employers may refer an employee for the relevant testing at an authorized health-care facility selected by the employer, at the employer's expense, in order to determine abuse of the right to sick leave, or determine the existence of such circumstances in some other manner, in accordance with a general act (Article 179 paragraph 4 of the Labour Law). "Authorized healthcare facility" is generally taken to mean a private practice, including pri-vate hospitals and laboratories. It is important to note that the costs of such testing are cov-ered by the employer. What is actually meant by the term relevant testing depends on the specific case. If the doctor's note on temporary incapacity to work specifies the classifica-tion code for asthma, the relevant test in that case would be spirometry. Tachycardia would, for instance, be tested by EKG, while in the case of bacteria the relevant testing would be done by a laboratory, etc. As for mental disorders and illnesses, the employer may refer the employee to a psychiatrist.

An employee's refusal to comply with the employer's call for additional testing is considered violation of work discipline (Article 179 paragraph 4 of the Labour Law). It is necessary to note that this provision does not speak of the employee's failure to comply with the call for an examination, that is, the employee's failure to turn up for the examination, but of "refusal" of the call for testing. Therefore, mere failure of the employee to turn up for the examina-tion does not automatically constitute grounds for termination of employment, because the employee might have proper justification for not turning up. In this context it is first of all necessary for the employer to reliably notify the employee of the examination the employee is being referred to, when the doctor's appointment is scheduled for, at which healthcare fa-cility, at which address, and the type of testing the employee is referred for, and specify that, in accordance with the Law, the employer will cover the costs of the tests. Such notification can be sent in writing to the home address of an employee on sick leave, in combination with an e-mail notification as well. For their own legal certainty it is advisable for employers to have proof of delivery of such notification.

In the cited paragraph 4 of Article 179, the Labour Law gives employers the opportunity to enact a general act specifying other manners of determining the existence of abuse of sick leave. Current practice has shown that employers use this opportunity, and in their labour rules specify the employer's right to form a permanent or ad hoc committee that will make house calls to verify potential abuses of sick leave. The committee is usually made up of employees from the HR department, colleagues of the employee on sick leave and/or his immediate superior.

The committee visits the employee at his home address, talks to him and determines facts of interest, and then prepares a report. In case of suspicion that the employee is in fact else-where (e.g. working for another company), the committee may visit that location as well. It would be a flagrant abuse of sick leave if an employee were for instance diagnosed with discus hernia, for which he is on sick leave, and the committee were to find him chopping wood or lifting weights at the gym.

However, no active conduct can be expected from the employee towards the employer in that sense, as testified to by case law: "Given that the Law does not specify the employee's obligation to notify the employer of prescribed treatments, checkups, and his health condi-tion in general during the temporary incapacity to work, failure to respond to a call from the employer or any misunderstanding regarding the employee's location at the time of the call does not constitute violation of work discipline" (from the Ruling of the Supreme Court of Cassation, Rev2, 417/2015 dated 16 September, 2015).

Is the procedure before RFZO mandatory or not

Court practice is not uniform in answering the question of whether it is sufficient for the employer to determine abuse of sick leave at a private healthcare facility, or by way of a committee, in order to immediately terminate the employment contract according to the procedure specified by the Labour Law, or the employer has to also initiate a procedure be-fore the first-instance or second-instance medical committee. The viewpoint has been taken that this is not obligatory, since the Law does not indicate the conclusion that this would be an obligation. This is corroborated by the Decision of the Serbian Supreme Court, Rev II 845/2008 dated 26 June, 2008, which specifies that the entitlement of employers under Article 103 paragraph 5 of the Labour Law is not a compulsory legal action which employers must first take in order to terminate an employee's employment contract for abuse of sick leave. Unfortunately, the case law sees different decisions as well.

What is evident is that in each individual case employers have to assess the proof gathered by way of testing or through a committee. If an employer believes that the proof is suffi-cient, that is, that it does indeed prove abuse of sick leave, then the employer may lawfully terminate such employee's employment contract. If there is any doubt, we would, for legal certainty, recommend that the employer initiate the procedure before the first-instance or second-instance medical committee for final (and most credible) resolution of the situation.

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