**NEW BULGARIAN UNIVERSITY**

**MASTER'S FACULTY**

**DEPARTMENT OF LAW**

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# THE UNPAID LEAVE UNDER ART. 160, PARA. 1 OF LABOUR CODE

## SUMMARY

OF A DISSERTATION FOR OBTAINING THE SCIENTIFIC DEGREE 'DOCTOR OF SCIENCES'

Field of higher education 3. 'Social, economic and legal sciences'

Professional direction 3.6. 'Law'

Scientific specialty 'Labour Law and Social Security Law'

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## Subject, purpose and tasks of the dissertation research

**The subject matter** of the dissertation research is the current legal framework of unpaid leave under Art. 160, para. 1 of the Labour Code (LC).

**The main purpose** of the dissertation is to examine the legal nature of unpaid leave under Art. 160, para. 1 LC through scientific analysis of the legislation in force, theoretical developments and empirical material. As a consequence of this analysis, the secondary objective is to make proposals *de lege ferenda* for improving the national legislation.

In order for this objective to be achieved, the following **main tasks** are set: to examine those norms of the current labour law which regulate the unpaid leave under Art. 160, para. 1 LC; to draw up a legal characteristic of the term 'unpaid leave' and to differentiate it from the paid leave; to make an attempt at a classification of the types of unpaid leave; to examine the accessible case law with regard to various aspects of application of the legal framework of unpaid leave under Art. 160, para. 1 LC.

## Methodological, regulatory, theoretical and empirical basis of the research

**The methodological basis** of the dissertation is a complex of general scientific and special methods for conducting scientific research, such as systematic-structural, dialectical, legal, and historical ones, the methods of induction and deduction, the statistical method of observation, the method of exclusion, etc. The modes of interpretation in law, the logical means of overcoming the gaps in law, and the method of comparative legal analysis of foreign legislation are also used.

The subject matter of the research has predetermined that its content includes a discussion of certain general provisions regarding the legal nature of leave as an institute of labour law, and the division of leave into various types according to different classification criteria. The elaboration of the dissertation also required an analysis of separate provisions of the Constitution of the Republic of Bulgaria and of sectoral regulations that have certain bearing on the issues under consideration. The chronological scope of the research also includes a preceding legislative period – the Labour Code of 1951, old versions of provisions of the current Labour Code of 1986, as well as repealed subordinate legislation acts. The research takes into account the legislation, the case law and the scientific publications prior to 11 September 2016.

**The theoretical basis** of the research is built upon summing up and analyzing the scientific works in the field of labour law, and of constitutional, civil and administrative law. In view of the nature of labour relations, they are subject to interdisciplinary scientific knowledge. It is not possible to examine the relevant labour rules without seeking their basis or their regulatory impact on the economic labour relations they regulate.

In Bulgarian labour law literature there is no comprehensive independent research of unpaid leave under Art. 160, para. 1 LC. Various aspects of it are discussed in the university lecture courses of Bulgarian labour law jurists (Prof. Lyubomir Radoilski, Prof. Vassil Mrachkov, Prof. Krasimira Sredkova, Prof. Atanas Vasilev, Prof. Kruger Milovanov, etc.); in some monographic studies dealing with leave as a labour law institute (Dr. Boris Mihaylov, Prof. Nikola Yosifov); in studies and articles in the legal periodicals (Trapko Tanev, Dimitar Anchev, Bozhidar Panayotov, Stefanka Simeonova, Emilia Banova, Stoyna Serbezova, Assoc.Prof. Andrey Alexandrov, etc.). Notwithstanding the research achievements of the said authors, in Bulgarian legal science the question of the legal nature of unpaid leave under Art. 160, para. 1 LC is underdeveloped.

**The empirical basis** of the scientific research is the case law and the administrative practice of the Ministry of Labour and Social Policy in the application of various aspects of unpaid leave under Art. 160, para. 1 LC.

## Theoretical and practical significance of the dissertation research

For most of their life, people work and support themselves and their family members with the income from their work. The vast majority of working people carry out activities within the framework of an employment relationship and other relationships which have great proximity to the subject matter of the employment relationship. Therefore, all employment institutes, in particular the one of unpaid leave, greatly affect the rights, interests and dignity of the person. Because of that, the interest in the scientific research of unpaid leave remains topical.

The insufficient scientific workout, the need for systemization and the theoretical and practical significance of the institute of unpaid leave condition the choice of the subject and make the dissertation a topical one. The aim is that the theoretical points, conclusions and recommendations in the dissertation form the basis for solving problematic issues in the process of applying the labour law regulation by their addressees and by the court as a judicial authority.

**In the theoretical aspect**, an attempt is made to reveal the legal nature of unpaid leave under Art. 160, para. 1 LC; its legal characteristic and comparison with paid leave; classification of the types of unpaid leave on the basis of different classification criteria. The dissertation contains a comprehensive analysis of unpaid leave under Art. 160, para. 1 LC as a legal possibility under current labour law. On various occasions, the research also analyzes other labour law institutes, exposing the scientific views of the author. This is also an attempt to form a complex and systematic approach to merging the relevant legal norms into a logical unity.

**The practical significance** of the dissertation research is multilayered. Unpaid leave under Art. 160, para. 1 LC as a type of statutory leave is often taken by employees. Although it has had its positive legal regulation for decades, problems with its use continue to arise in practice. Over the years, a number of judicial and administrative practices have been established, and various aspects of this type of leave have been discussed. The analysis and systematization of the problems encountered regarding the lawful application of the legal framework of unpaid leave under Art. 160, para. 1 LC, incl. through proposals for amending the existing legislation, make this work topical from a practical point of view as well. The proposed scientific theses may serve as a theoretical basis for practical activities of the court and the other legal authorities applying the relevant legal framework. The proposals *de lege ferenda* may have their benefit in practical terms, as the legislature may use them in the future improvements of labour legislation.

## Volume and structure of the dissertation

The dissertation has a volume of 338 pages. The equalization to standard typescript pages (1,800 characters per page) gives 426 pages. In autumn 2016, the dissertation was published as a book under the same title, which has 307 printed pages.

The structure of the content is conditioned by the purpose and tasks of the research and includes an introduction, four chapters, a conclusion and a bibliography of the literature used. The chapters contain paragraphs and items in which the thematic questions relating to the examination of the subject matter are divided. The bibliography of the sources used in the research comprises 238 titles in Bulgarian and foreign languages.

## Main content of the dissertation

**Chapter One**, 'Division by types of leave depending on whether it is a subjective right or a legal possibility' includes three paragraphs.

**Paragraph One** provides a historical review of the opinions in Bulgarian labour law science regarding the thesis of the existence of leave, which is a legal possibility only and not a subjective right. The opinions of scientists such as Prof. L. Radoilski, Dr. B. Mihaylov, Prof. V. Mrachkov, Prof. K. Sredkova, Prof. A. Vasilev, S. Simeonova both under the operation of the first Bulgarian Labour Code of 1951 (repealed) and under the current Labour Code of 1986 are presented.

In **paragraph Two**, the legal conclusion of classification of types of leave is made, namely those which are a legal possibility and those which are a subjective right.

The unpaid leave under Art. 160, para. 1 LC has traditionally had its legal regulation in labour law and has always been defined in labour law as a legal possibility. It is a regulatory model and a classical theoretical example of leave-legal opportunity, this distinguishing it from the leave-subjective right of the employee. All authors assume that the current labour law distinguishes between 'leave-subjective law' and 'leave-legal possibility', and the unpaid leave under Art. 160, para. 1 LC is unambiguously defined as a legal possibility. Therefore, one of the classification criteria for the division of leave under the positive Bulgarian labour law in force is a leave-subjective right and a leave-legal possibility.

**Paragraph Three**, which is entitled 'Unpaid Leave', analyzes the unpaid leave of a civil servant under Art. 64, para. 1 of the Law on Civil Servants.

In the context of the subject matter of the dissertation, it is argued that the unpaid leave of the civil servant under Art. 64, para. 1 of the Law on Civil Servants (LCS) is not an autonomous type of unpaid leave regulated in the Bulgarian legislation in force, and by its nature, its social and legal purpose and procedure for its use, it is completely identical to the unpaid leave of an employee under Art. 160, para. 1 LC.

The issue of the unpaid leave of a civil servant under Art. 64, para. 1 LCS, compared to the unpaid leave of an employee under Art. 160, para. 1 LC, is a manifestation and part of the more general question of relationship between the subjects of legal regulation of the Law on Civil Servants and the Labour Code; the relationship between the employment relationship and the service relationship of a civil servant; the relationship between labour law and civil service law.

The opinions of Assoc.Prof. V. Angusheva, Prof. V. Mrachkov, DSc, Prof. K. Milovanov, Prof. K. Sredkova, Prof. E. Mingov, Dr. M. Topalov are presented.

It is argued that, as regards the civil servant, the law provides for a complex relationship which includes the relatively distinct service relationship and individual employment relationship. This complex relationship has a number of specificities, both in its occurrence and in its content and termination, incl. in the aspect of the two legal relationships that stand out therein. This shows the diversity of types of employment relationships that arise every day, and exist and are terminated in legal reality.

**Chapter Two** 'Legal nature and characteristic of unpaid leave under Art. 160, para. 1 of the Labour Code' contains 12 paragraphs.

**Paragraph One** examines the possibility of using unpaid leave under Art. 160, para. 1 LC without any legal prerequisites.

In the scientific analysis, a historical retrospection is made of the various versions of the provision of Art. 160, para. 1 LC after its adoption in 1986 and they are compared with its current version. The opinions of Bulgarian scientists are presented, these opinions concerning the expression 'whether or not the person has taken his/her paid annual leave and regardless of his/her length of employment' used by the legislature.

It is concluded that, for the proper understanding of the nature and the socio-legal purpose of the unpaid leave under Art. 160, para. 1 LC, the beginning of the provision is essential as it provides grounds for the legal theory to define this type of leave as a legal possibility and not as a subjective right of the employee. As a proposal *de lege ferenda*, the entire expression mentioned may be repealed as unnecessary in the case of a legislative change in the future.

**Paragraph Two** analyses various aspects of the employee's request for using unpaid leave under Art. 160, para. 1 LC.

The provision of Art. 160, para. 1 LC makes it clear that the initiative to take unpaid leave should come from the employee. The time dependency and consistency of the respective statements of will of each of the two parties to the employment relationship are laid down in the regulations. First, the employee's request must be made, and then, if appropriate, the employer's authorisation will follow. On the occasion of this question of principle, the opinions expressed in legal theory are presented.

By its legal nature, the request constitutes the employee's unilateral statement of will addressed to the employer, expressing his/her will to take unpaid leave. The use of this type of leave (as well as any leave) is the exercise of the entitlement to leave. The problem is that, at the time this will is expressed, a subjective right to leave does not exist yet, there is only a legal possibility regulated by law. At the time the statement is made, a legal expectation arises for the employee that he/she will take unpaid leave, and this expectation may turn into a subjective right if and when permission is obtained from the employer.

The request should necessarily indicate the duration of the unpaid leave requested. If there is no indication of the duration of the leave requested, the employee's will cannot give rise to any legal effect. This is because each type of leave has a definite duration that is known to both parties to the employment relationship at the time the leave starts.

Another essential aspect concerning the employee's request for unpaid leave under Art. 160, para. 1 LC is that of the form of the request as a statement of will. The Labour Code does not regulate the form (written or oral) in which this statement should be made. It must therefore be assumed that the oral request is also relevant and gives rise to the intended legal effects. It is another matter altogether that the written form is preferable because it gives clarity and explicitness to the relations between the parties to the employment relationship and significantly limits the probability of legal disputes.

**Paragraph Three** presents a legal characteristic of unpaid leave under Art. 160, para. 1 LC.

In the labour law literature, unpaid leave under Art. 160, para. 1 LC is defined by some researchers as annual. Such a legal characteristic (the adjective 'annual') is also found in the grounds for certain judgments.

Argumentation is given for the author's thesis of not accepting the definition of unpaid leave under Art. 160, para. 1 LC as annual. The legislature does not define it as such, unlike the paid leave, which is expressly defined as annual leave (basic, extended and additional – Art. 155 and Art. 156 LC). This ensues from the different socio-legal purpose and the social and legal objective achieved through their legal framework, which manifests the two functions of labour law in respect of paid annual leave and unpaid leave under Art. 160, para. 1 LC.

**Paragraph Four** discusses the question of duration (term) of unpaid leave under Art. 160, para. 1 LC and the method of counting it (calculation).

The first aspect of the question of duration of unpaid leave under Art. 160, para. 1 LC is what it is, i.e. what is the duration of this type of unpaid leave? Authors' views in the labour law literature which concern the absence of a limit on the duration of unpaid leave under Art. 160, para. 1 LC are presented.

Due to its socio-legal purpose, its essence of legal possibility, and its characteristic of being unpaid, the law does not regulate the maximum possible duration of unpaid leave under Art. 160, para. 1 LC, neither does it regulate any mandatory minimum duration (within a calendar year or another time period). The legal framework concerning the minimum duration of this type of unpaid leave is devoid of any worldly, economic or legal logic. As for this aspect of the legal framework, unpaid leave under Art. 160, para. 1 LC differs from all other types of paid and unpaid leave laid down in the Labour Code.

The second question is about the method of counting (calculation) of the period of unpaid leave under Art. 160, para. 1 LC, the theses set out in the legal literature being presented.

The opinion of the author is that the duration (term) of unpaid leave under Art. 160, para. 1 LC can be determined (calculated, counted) in working or calendar days. The distinction specified in Art. 160, para. 3 LC, namely 'up to 30 working days' and 'more than 30 working days' in a calendar year has another legal meaning and is not related to the way in which the duration of unpaid leave is determined. Unlike other types of leave, in which it is of importance whether their duration is counted in working or calendar days, this being a consequence of their socio-legal purpose, in the case of unpaid leave under Art. 160, para. 1 LC this does not have any legal significance.

**Paragraph Five** analyses the problem of the agreement for the use of unpaid leave under Art. 160, para. 1 LC as a contractual amendment to the employment relationship and the need for its explicit legal regulation.

The hypothesis under Art. 160, para. 1 LC can be defined as the conclusion of a contract (agreement) between the employee and the employer to amend the employment relationship. By requesting unpaid leave, the employee makes an offer to the employer to conclude such a contract to amend his/her employment relationship. The employee's statement of will contains the essence and the parameters of the requested amendment: the effect of the employment relationship to be discontinued (suspended) for a certain period of time (that is the essence of any type of leave), and

for that time the employee will not receive remuneration because his/her workforce will not be engaged. The employee only makes an offer of certain content to the employer and does not exercise a subjective right to leave because there is no such right. The legal possibility of using unpaid leave under Art. 160, para. 1 LC should be understood as being a possibility of concluding such a contract between the employee and the employer for the use of unpaid leave of certain duration, within a specific time period, the beginning of the use of leave being the point in which the change in the employment relationship occurs.

The employer may accept or refuse the offer made by the employee. If the employer accepts the employee's offer, there is consent to the use of the requested leave, which means that a contract is concluded. The 'authorisation' of unpaid leave under Art. 160, para. 1 LC (of its use) by the employer is, in fact, employer's giving his consent and concluding a contract with the specified content. In the event that the employer 'refuses to grant leave', this means that the employer has not accepted the offer made to him by the employee, and has not made a counter-statement of will showing consent, and all this does not bring about the conclusion of a contract.

The Labour Code does not provide for a specific form in relation to the employee's request or in relation to the employer's authorisation. The considerations regarding the form of the employee's request are also valid for the employer's statement of will.

The employee's request and the employer's authorisation of the unpaid leave under Art. 160, para. 1 LC, considered as an agreement (contract) between the parties to the employment relationship to amend the latter, is a particular hypothesis of a general legal situation, which is regulated in Art. 119 LC. By definition, this contractual amendment to the employment relationship is made for a certain time (for a certain period). That's because there is no leave of unlimited duration. This is a typical example of an amendment to the employment relationship by mutual consent (contractual amendment) for a certain time.

Even in the absence of the provision of Art. 160, para. 1 LC, it is on the grounds of Art. 119 LC that the parties to the employment relationship may conclude an agreement with each other, according to which the employee's workforce shall not be engaged for a certain period of time and the employer shall not owe him/her remuneration for the said period of time. Such an agreement shall be within the framework of the freedom of contract and the autonomy of the will of the parties within the meaning of Art. 9 and Art. 20a, para. 2 of the Law on Obligations and Contracts.

In this context, the question of why it is necessary to have explicit legal regulation on such unpaid leave is discussed. The leading argument in favour of the explicit regulation of unpaid leave under Art. 160, para. 1 LC concerns the conversion of a legal possibility into a subjective right to leave for the employee under an authorisation granted by the employer. The legal regulation on this type of unpaid leave is necessary in order to ensure that, on the occasion of using such leave, other provisions of the Labour Code can have their application when the legal fact in question actually occurs.

If the use of unpaid leave arises solely on the basis of an agreement between the parties to the employment relationship (i.e. where there is no explicit legal framework), it would be impossible for the other provisions of the Labour Code relevant to the use of leave to find their application. This is because their implementation would not be covered by the agreement (the concerted will) of the parties thereto. The applicability of these provisions is even less excludable through a contract not only because of their imperative nature, but also because of the general situation that any waiver of labour law rights is invalid (Art. 8, para. 4, sentence 2 LC), which is, in principle, applicable not only to the labour law rights of the employee, but also to the labour law rights of the employer.

**Paragraph Six** presents the author's thesis on the conversion of the legal possibility of unpaid leave under Art. 160, para. 1 LC into a subjective right to take that leave.

Art. 160, para. 1 LC provides for the legal possibility for the employee to take unpaid leave. Where the employee makes a request for the use of unpaid leave under Art. 160, para. 1 LC, a legal expectation arises in his/her patrimony. It is through the employee's statement of will that a corpus of facts begins to take place, yet incomplete, in legal reality and there occurs a possibility that the subjective right to leave will arise at a later time if and when the missing legal fact occurs (the employer's statement of will through which authorisation is granted for the leave). The legal expectation is a consequence of the preliminary stage which gives rise to the subjective right to unpaid leave. It constitutes the germ of a subjective right, it being uncertain whether the latter will develop into a full-value right or will fall away. The legal possibility provided for by law becomes a legal expectation and, subsequently, a subjective right to unpaid leave may arise as well.

As soon as the employer makes a statement of will agreeing to the use of the requested unpaid leave, the legal expectation turns into a subjective right to unpaid leave. During the period of the leave, a full-value subjective right under labour law is present. The employee is relieved of

his/her legal obligation to perform his/her employment function and the other employment obligations arising therefrom, while the employment relationship continues to exist. The employer is obliged to put up with the factual and legal situation thus created.

The subjective right to the use of unpaid leave under Art. 160, para. 1 LC arises from the agreement (contract), which is concluded between the employee and the employer as parties to the employment relationship. This is the essential particularity of this type of leave that differentiates it when compared to the vast majority of other types of leave that are regulated in the Labour Code and arise *ex lege*. At the time of conclusion of the agreement between the parties to the employment relationship, the content of this employment relationship is enriched by one more labour law subjective right within the patrimony of the employee.

The labour law subjective right to unpaid leave under Art. 160, para. 1 LC is not included in the legal content of the employment relationship, as is the case in the subjective right to paid annual leave, for example. The newly occurred labour law subjective right is included in the content of the employment relationship contract.

The exercise of the labour law subjective right to unpaid leave under Art. 160, para. 1 LC (the use thereof) has its legal consequence consisting in a change in the implementation of the employment relationship. This employment relationship continues to exist between its parties as a legal phenomenon, however, its active and full-value implementation ceases to exist, as its operation and active status have been discontinued (suspended).

The agreement (contract), which is concluded between the employee and the employer for the use of unpaid leave is not only a legal fact giving rise to the emergence of the subjective right to unpaid leave in the content of the employment relationship, but also a legal fact bringing about a change concerning the current employment relationship itself. This is what the dual legal effect of the agreement between the employee and the employer means. Owing thereto, the exercise of the right to unpaid leave (the use of leave) should also be regarded as a hypothesis of an amendment to the employment relationship.

**Paragraph Seven** discusses the possibility of existence of contractually established unpaid leave.

The problem is whether a type of leave that is not regulated by law can be agreed upon through a collective bargaining agreement or an employment contract, and how this possibility fits

into the provision of Art. 118, para. 1 LC? The author's view is that it is perfectly admissible and lawful to negotiate such leave. I call this leave a 'contractually established' one, as opposed to the 'statutory leave'.

An example of contractually established unpaid leave is a clause in an employment contract, according to which 'the employee is entitled to five working days of unpaid leave per each calendar year that is taken on the written request of the employee at a time that is mutually agreed between him/her and the employer, and the leave not taken during the calendar year may be transferred to and accumulated for subsequent years, yet not for more than three consecutive calendar years'. The admissibility of such a contractual clause in the employment contract ensues from the provision of Art. 66, para. 2 LC. There is no imperative provision in the law that prohibits such a contractual clause. At the same time, such a clause in the employment contract is in line with the idea of protection in labour law, as well as with the interests of the employer. Both answerability and manifestation of the two functions of this legal branch are present – the protective function and the business function. The arguments for including such a clause in a collective bargaining agreement (Art. 50, para. 1 LC) are identical. What is specific here is that the employee will have a subjective right to unpaid leave if the collective bargaining agreement is effective with respect to him/her in either of the two ways regulated by law (Art. 57 LC).

The difference between this contractually established unpaid leave and the unpaid leave under Art. 160, para. 1 LC is that the unpaid leave agreed in a collective bargaining agreement or an employment contract is a subjective right of the employee, whereas the unpaid leave under Art. 160, para. 1 LC is a legal possibility only. Such a contractual clause gives rise to a subjective right of the employee to unpaid leave of a certain duration and a legal obligation for the employer to grant the use of unpaid leave on the employee's request.

The dissertation also addresses the issue of recognition of such contractually established unpaid leave as length of employment and contributory service.

**Paragraph Eight** discusses the question of the type of rights that the subjective right to leave belongs to. The author argues that the labour law right to any type of leave is a subjective right to alter a legal relationship (a transformative right).

Once the legal possibility of unpaid leave under Art. 160, para. 1 LC is transformed into a subjective right to unpaid leave, that subjective right belongs to the category of subjective rights

unrelated to claims, and particularly, to the labour law rights to alter a legal relationship (transformative rights). Its exercise (the use of leave) brings about a unilateral legal change in an outer legal sphere – the one of the employer as a counterpart to the legal relationship. It belongs to the type of transformative subjective rights that are exercised out of court, as is the case with most transformative labour law rights.

In this case the term 'right to leave' refers to the right of the employee to actually take the leave, regardless of its type. It does not matter whether the leave is paid or unpaid, or how the right to leave has arisen. It can be assumed that the concept of 'right to leave' is polysemantic and, in each particular case, its meaning is different. One of these meanings is used when talking about the 'right to take leave'. This is the only way of explaining the difference between leave-legal possibility and leave-subjective right, and the proposed legal structure for the transformation of unpaid leave under Art. 160, para. 1 LC from a legal possibility into a subjective right.

**Paragraph Nine** deals with the reflexive legal consequences in the exercise of the occurring subjective right to unpaid leave under Art. 160, para. 1 LC.

In addition to the legal consequence already analysed, namely, an amendment to the employment relationship, there are other legal consequences of the exercise of a subjective right to unpaid leave under Art. 160, para. 1 LC (the use of leave), which manifest themselves in the applicability of several provisions of the Labour Code. The agreement between the employee and the employer concerning the use of unpaid leave under Art. 160, para. 1 LC gives rise to reflexive (accessory) legal consequences, which also form part of the content of the employment relationship: new labour law subjective rights of the employee and the relevant legal obligations of the employer.

In the case of Art. 175, para. 1 LC there exists a competition between subjective rights to leave that occur at the same time. Where a subjective right to a certain type of leave arises during the exercise of the right to paid annual leave, priority is given to the exercise of the newly occurring subjective right to leave. A legal conclusion is made, according to which, where the agreement between the employee and the employer concerning the use of unpaid leave under Art. 160, para. 1 LC is reached in the course of the paid annual leave, this agreement gives rise not only to a subjective right to unpaid leave under Art. 160, para. 1 LC, but also to another labour law subjective right of the employee, namely, to his/her right to interrupt the use of the paid annual leave that has already commenced.

The provision of Art. 194, para. 3 LC concerns any type of leave, whether paid or unpaid, and irrespective of its duration and socio-legal purpose. The unpaid leave under Art. 160, para. 1 LC is 'statutory leave'. Once the use of unpaid leave under Art. 160, para. 1 LC has started, this type of leave has already undergone transformation from being a legal possibility into being a subjective right of the employee.

An employee who has started the use of his/her authorised leave enjoys preliminary protection upon dismissal on certain grounds (Art. 333, para. 1, item 4 LC). The type of leave is of no importance, and, therefore, the unpaid leave under Art. 160, para. 1 LC is included as well. The exercise, on the part of the employee, of his/her subjective right to unpaid leave under Art. 160, para. 1 LC (commencement of the use of the leave) brings about the hypothesis of emergence of a preliminary protection situation in the event of dismissal.

All the hypotheses analyzed in the scientific research have dual legal meaning.

First of all, they represent reflected (reflexive) legal consequences of the agreement between the employee and the employer regarding the use of unpaid leave under Art. 160, para. 1 LC. The main legal consequence is the conversion of the statutory legal possibility of unpaid leave into a labour law subjective right and the employment relationship change, which occurs when the right to leave is exercised. In the event that a subjective right to leave occurs, the subjective right itself is the legal fact generating other labour law subjective rights of the employee within the content of the employment relationship, namely the right to interrupt the use of his/her paid annual leave; his/her right not to have disciplinary proceedings carried out against him/her while on leave; protection in the case of dismissal on certain grounds while on leave.

Secondly, the said hypotheses and the labour law subjective rights of the employee which arise when using the leave constitute legal guarantees for its use.

**Paragraph Ten** examines the issue of termination of unpaid leave under Art. 160, para. 1 LC the use of which has already commenced.

The Labour Code regulates situations of interruption, termination and postponement of the use of leave – they are mentioned in the research because of the direct connection with the analyzed problem. A legal conclusion is drawn according to which the concepts of 'interruption' and 'termination' of leave must be clearly distinguished. The termination of the use of the leave may be an early one, i.e. it can take place before the expiry of the authorised (established in law)

duration of the leave, as well as due to the expiry of its duration (the normal and desired hypothesis). And I underline that what is interrupted or terminated is the use of the leave, and not the leave itself as a legal concept.

How is the stated problem of principle placed in case of unpaid leave under Art. 160, para. 1 LC that has been authorised and has started being used? The law does not give a positive legal framework either on the grounds for its interruption or on the grounds for its termination. It is for purely legal and logical reasons that the question of postponement of unpaid leave under Art. 160, para. 1 LC is not put forward.

Once authorised, the unpaid leave under Art. 160, para. 1 LC may only be terminated at the request of the employee and with the express consent of the employer. These requirements must be fulfilled cumulatively in order for the use of authorised unpaid leave under Art. 160, para. 1 LC to be terminated. This is what ‘an early termination of the leave’ means.

The legal conclusion that has been reached is a direct consequence of the argument that the use of unpaid leave is the result of an agreement (a contract) between the parties to the employment relationship and a consequence of the legal principle that, during the use of authorised unpaid leave, the employee has already acquired a labour law subjective right to take the said leave. If the use of unpaid leave under Art. 160, para. 1 LC is a consequence of a contract concluded between the parties to the employment relationship, the said contract may be terminated by mutual agreement of the parties at any time, that is to say, by conclusion of a new contract as well.

If, upon the employee’s request, the employer refuses to give consent to the termination of the use of the unpaid leave, the employee does not have a legal remedy as the employer does not violate the provisions of law. Where the employer does not consent to the termination of the use of the unpaid leave, an individual non-legal employment dispute arises. It can only be resolved through mediation as an extrajudicial means of resolving such disputes.

The employer has no legal option to terminate the use of authorised unpaid leave on his own initiative. As with the authorisation of unpaid leave under Art. 160, para. 1 LC, a principle is to be respected, namely, that the initiative to terminate the leave in this case must come from the employee.

On the basis of the aforesaid, two legal conclusions are drawn.

As for the use of authorised unpaid leave under Art. 160, para. 1 LC, the logic of law makes it impossible to interrupt the use thereof. Just like the impossibility of postponing its use for another time period, this ensues from the legal nature of the leave and its socio-legal purpose. Interruption of its use is only possible in the case of certain statutory leave, which is a subjective right of the employee, and the socio-legal purpose of which logically allows its use to be interrupted or postponed for another calendar period. Therefore, the situations of interruption and postponement of the use of certain types of leave are explicitly regulated in the Labour Code.

The second legal conclusion is that the legal regime of unpaid leave under Art. 160, para. 1 LC is a separate one and is independent of the other types of leave regulated by the Labour Code, and, particularly, it is independent of the provisions laying down the rules governing the use, interruption, cessation and postponement of the leave, in particular the paid annual leave.

**Paragraph Eleven** deals with the legal characteristic of the leave under Art. 160, para. 1 LC as an unpaid one.

For deeper understanding of the unpaid leave under Art. 160, para. 1 LC, consideration is given to its place among the other types of unpaid leave covered by labour law. The theoretical views on the issue of some Bulgarian labour law jurists are presented, and special attention is given to a terminological, yet essential question concerning the nature of certain types of leave as unpaid ones.

Some researchers (Prof. N. Yosifov, Assoc.Prof. A. Andreeva) assume that ‘depending on whether the leave is of a non-gratuitous or gratuitous nature, it is paid or unpaid’. It is not proper to attach the paid or unpaid nature of any leave to the criterion of ‘non-gratuitous or gratuitous’.

It is not at all a question of gratuitousness or non-gratuitousness in the legal sense of these terms. This question is raised with regard to the division into various types of transactions and treaties (bilateral transactions). Leave is not a deal, it is a subjective right and, respectively, a legal possibility, and therefore it can be of a pecuniary or a non-pecuniary nature, yet not of a gratuitous or a non-gratuitous nature. The nature of the leave has nothing to do with the principle of the non-gratuitous nature of the employment contract and the employment relationship in general (Art. 242 LC). As for the payment of paid leave (that is paid by the employer or by another legal entity), the Labour Code uses the term ‘consideration’ (in various versions) and not ‘remuneration’. In respect of paid leave which is related to the realization of social security risks insured under short-term

social security, a cash benefit is paid by the insurance body, namely the National Social Security Institute. It is this legal situation that gives that type of leave the character of paid leave, and not any ‘non-gratuitous nature’ of its.

It is true that the remuneration paid by either the employer or another entity under any special law, as well as the social security cash benefit, are measured by the remuneration received by the employee for a previous time period. However, because of the nature of the leave as a period of time during which the employee does not engage his/her workforce for the employer, the latter does not have the obligation (counter-consideration) to pay remuneration and, therefore, no remuneration is payable for the time of use of any leave of the employee. The remuneration payable by the employer to the employee for the period of use of paid annual leave, as is the case with other types of paid leave, may be defined as a type of guarantee payment under the employment relationship. The paid or unpaid nature of a certain type of leave is the result of another circumstance and not a result of the remuneration being due for it or not. Therefore, the nature of leave cannot be called ‘gratuitous’ or ‘non-gratuitous’. In labour law, the legal terms have been ‘paid leave’ and ‘unpaid leave’ for decades.

The introduction of elements of the legal characteristic of one legal phenomenon into another must be done carefully and not mechanically, because otherwise it may bring about a distortion of the essential meaning and nature of the legal phenomenon under analysis.

The last **Paragraph Twelve** of this chapter deals with a hypothesis of the unpaid leave under Art. 160, para. 1 LC as a subjective right of the employee.

It is for a long time that the Labour Code has explicitly regulated the hypothesis in which unpaid leave under Art. 160, para. 1 is a subjective right of the employee and not only a legal possibility. This is the hypothesis under Art. 173, para. 2 LC.

The provision of Art. 173, para. 2 LC is one of the numerous legal guarantees to ensure religious tolerance in Bulgarian society and, particularly, in labour relations. It is a legal level development of legal guarantees regarding the freedom of religion as a fundamental human right that are contained in Art. 37 of the Constitution.

The employee has the right to choose between two options, namely to take part of his/her annual paid leave or to take unpaid leave under Art. 160, para. 1 LC. The employer must take into account the choice made by the employee and must authorise the type of leave which the

employee has requested. The employer is disallowed not to agree with the choice made by the employee as to what type of leave to take, much less has the employer the right to authorise the use of another type of leave and not the one requested by the employee.

Where an employee who professes a religion other than Eastern Orthodoxy chooses to take unpaid leave, he/she exercises a labour law subjective right. The expression in Art. 173, para. 2 LC is 'the employer is obliged to authorise', which denotes a labour law obligation of the employer which corresponds to the labour law subjective right of the employee.

The use of unpaid leave under Art. 160, para. 1 LC (and the use of a part of the paid annual leave) in the case of Art. 173, para. 2 LC must be requested by the employee. He/She must make a statement of will to his/her employer indicating the motive for his/her request (and this significantly differentiates the unpaid leave under Art. 160, para 1 LC from the general hypothesis); the specific day or days (if the religious holiday is celebrated in more than one day); and the type of leave he/she wishes to take, i.e. the choice he/she has made from the two legal possibilities.

A legal conclusion has been drawn, according to which Bulgarian labour law regulates a hypothesis of unpaid leave under Art. 160, para. 1 LC, which is a subjective right of the employee and not just a legal possibility. If the terminology of physics and chemistry is used, it can be figuratively said that the unpaid leave under Art. 160, para. 1 LC has two 'allotropic forms', namely, leave-legal possibility and leave-subjective right of the employee. The unpaid leave in the case of Art. 173, para. 2 LC is that under Art. 160, para. 1 LC, however, it has another form. And that is why, in Art. 173, para. 2 LC the legislature correctly specifies it as 'unpaid leave under Art. 160, para. 1'. This is important because in the current legislation there are other types of unpaid leave, which have their specific legal nature and socio-legal purpose and 'resemble' the unpaid leave under Art. 160, para. 1 LC, but are not of its type or form of manifestation.

Following the argumentation, a proposal *de lege ferenda* is made, according to which, in case of a legislative change in the Labour Code, the systematic place of the provisions of Art. 173, para. 2 and para. 3 LC should be changed as well.

**Chapter Three** 'Differentiation of the unpaid leave under Art. 160, para. 1 of the Labour Code from other types of unpaid leave' contains 4 paragraphs.

The first paragraph examines the unpaid leave under § 3e, para. 1 of the Transitional Provisions (TP) of the Labour Code.

In the short period between 30 July and 31 December 2010, there used to be a possibility that, in the case of a reduction in the volume of work and presence of additional legal conditions, the employer could grant the employee unpaid leave of up to 60 working days during the calendar year even without the consent of the latter. This is one of the anti-crisis measures of the then government as a countermeasure to the growing global and national financial and economic crisis.

The provision of § 3e, para. 1 of the Transitional Provisions (TP) of LC is no longer in force, but it is given consideration because of the principle nature of the legal structure it contains and for comparison with the current provision of Art. 54 of the Ordinance on Working Time, Rest and Leave (OWTRL), which is also being examined. Although, to date, the employer cannot unilaterally grant unpaid leave without the employee's consent on the factual basis referred to in the said provision, it continues and will continue to have its legal significance. It consists, first and foremost, in the applicability of § 3e, para. 2 of the TP of the LC (recognition of the time of use of the unpaid leave as length of employment) and § 22p, para. 2 of the Transitional and Final Provisions (TFP) of the Social Security Code (SSC) (recognition of the said time period as contributory service as well). In order for these two legal norms (a labour law one and a social security law one) to be applied both now and in the future, the provision of § 3e, para. 1 TP of LC is necessary.

Where § 3e, para. 1 TP of LC is applied, the employer has a subjective transformative right under the labour law, namely, to unilaterally grant the employee the use of unpaid leave for a certain period of time. The subjective right of the employer is included in the legal content of the employment relationship. The employee has a legal obligation 'to go on leave' and to put up with the legal change in his legal sphere.

The unilateral granting by the employer of the use of unpaid leave on the part of the employee for a certain time period is a typical manifestation of the employer's managerial power. This is also a hypothesis of admissible unilateral change of employment relationship by the employer. This legal norm is also a typical example of realisation of the economic function of labour law, while at the same time there is no manifestation of the protective function of labour law.

The significant legal difference between the unpaid leave under Art. 160, para. 1 LC and the unpaid leave under § 3e, para. 1 TP of LC consists not only in their legal nature and procedure of use, but also in the duration of unpaid leave which the law recognizes as length of employment, namely, up to 30 working days in a calendar year under Art. 160, para. 1 LC and up to 60 working days in a calendar year under § 3e, para. 1 TP of LC. The provision of § 3e, para. 2 of TP of LC is also a particular case of the hypothesis under Art. 160, para. 3 LC.

Pursuant to Art. 327, para. 1, item 11 LC, the employee may terminate the employment contract in writing without prior notice where the employer has granted unpaid leave to the employee without his/her consent. This ground is laid down in July 2010 along with § 3e of TP of LC. I argue that, as early as the summer of 2010, it was unnecessary to create this ground for termination of an employment contract. It is even more unnecessary after the termination of the legal effect of § 3e of TP of LC.

In general, i.e. if there is no explicit legal norm regulating such a right, as § 3e, para. 1 TP of LC used to be and the operative Art. 54, sentence 1 OWTRL is, the employer has no subjective right to unilaterally grant the employee unpaid leave without his/her consent. Although the Labour Code does not explicitly impose a legal obligation on the employer not to unilaterally grant unpaid leave to the employee without his/her consent, this legal obligation is derived from the current positive legal regulation by means of interpretation. This legal obligation is 'established by a normative act', i.e. by the Labour Code, and exists in objective labour law. It forms part of the statutory content of any employment relationship, regardless of the reason for its occurrence. The unilateral granting of unpaid leave without the consent of the employee as a legal fact is subsumed to the actual composition of the grounds for unilateral termination of the employment contract by the employee without notice under Art. 327, para. 1, item 3, second hypothesis LC, namely where the employer fails to fulfil other obligations laid down in a legal act. The ground under Art. 327, para. 1, item 11 LC is one of the many possible particular hypotheses of the grounds of Art. 327, para. 1, item 3, second hypothesis LC, and therefore the existence of Art. 327, para. 1, item 11 LC is unnecessary. As a proposal *de lege ferenda*, the provision of Art. 327, para. 1, item 11 LC should be explicitly repealed.

**Paragraph Two** analyzes the unpaid leave under Art. 54, first sentence of the Ordinance on Working Time, Rest and Leave (OWTRL).

The provision of Art. 54, first sentence OWTRL regulates the employer's subjective transformative right under labour law to unilaterally grant the employee the use of unpaid leave for a certain period of time. The subjective law of the employer forms part of the statutory content of the employment relationship. The employee is obliged, i.e. he/she has a legal obligation to start using the unpaid leave as well as to put up with the legal change in his/her legal sphere. The provision of Art. 54, first sentence OWTRL also regulates the hypothesis of admissible unilateral change of the employment relationship by the employer.

As for its legal nature and procedure for use, the unpaid leave under Art. 54, first sentence OWTRL differs from the unpaid leave under Art. 160, para. 1 LC. The unpaid leave under Art. 54, first sentence OWTRL is of the same type in legal nature and procedure for use as the analyzed unpaid leave under § 3e, para. 1 TP of LC.

The most significant problem with regard to unpaid leave under Art. 54, first sentence OWTRL is whether it is recognised as contributory service. The provision of Art. 9, para. 2, item 3 LC is not applicable to this type of unpaid leave or, at best, only 30 working days will be recognized as contributory service. Unlike the unpaid leave under § 3e, para. 1 LC IP, this type of unpaid leave has no social security law norm of a similar content – see § 22p, para. 2 TFP SSC. This is an omission on the part of the legislature, which injures the interests of employees when they have forcibly taken unpaid leave under Art. 54, first sentence OWTRL. It is necessary for the legislature to lay down an express social security law norm identical to that of § 22p, para. 2 TFP SSC, namely that the unpaid leave under Art. 54, first sentence OWTRL of up to 60 working days in a calendar year is also counted as contributory service. On the basis of the aforesaid, a proposal *de lege ferenda* is made for a legislative amendment to Art. 9, para. 2, item 3 SSC.

In **Paragraph Three** a comparison is made between the unpaid leave under § 3e, para. 1 TP LC, Art. 54, first sentence OWTRL and the leave under Art. 160, para. 1 LC.

The difference between the three types of unpaid leave, namely those under § 3e, para. 1 TP LC, Art. 54, first sentence OWTRL and Art. 160, para. 1 LC is disclosed in several directions.

First of all, there is a difference in the grounds in the presence of which the employer may grant unpaid leave to the employee – under Art. 54, first sentence OWTRL this is the presence of days and months unfavourable for work due to climatic conditions, while under § 3e, para. 1 TP LC it is the reduction in the volume of work and some additional legal requirements. Secondly,

there is a difference in the scope of application of the two provisions as regards the personal effect of the legal norm – Art. 54, first sentence OWTRL is only applicable to a limited range of employees working in agriculture and livestock breeding, timber industry and agricultural and forestry mechanization, while § 3e, para. 1 TP LC is applicable to all employees and employers within the country when the enterprise is affected by the economic and legal situation of 'reduction in the volume of work'.

From another point of view, there is a clear difference between the unpaid leave under Art. 54, first sentence OWTRL and § 3e, para. 1 TP LC, on the one hand, and the unpaid leave under Art. 160, para. 1 LC, on the other hand. The first two types of unpaid leave are created in the best interests of the employer and his business activity, and, for this reason, they are a specific manifestation of the economic function of labour law. In the case of unpaid leave under Art. 160, para. 1 LC, the reason for which the employee seeks unpaid leave is legally irrelevant and, because of that, it is not required to indicate it in his/her request to the employer.

In view of the aforesaid relationship between the unpaid leave under Art. 160, para. 1 LC and the unpaid leave under Art. 54, first sentence OWTRL, a proposal *de lege ferenda* is made, namely that the words 'under Art. 160 LC' at the end of the first sentence of Art. 54 OWTRL must be deleted in the case of a change in subordinate legislation.

What is common between the provisions of Art. 54, first sentence OWTRL and § 3e, para. 1 TP LC is that, in both hypotheses of unpaid leave granted unilaterally by the employer, the leave is recognised as length of employment if it is up to 60 working days in a calendar year. Both hypotheses fall within the scope of application of Art. 160, para. 3 LC, the difference being that the recognition as length of employment of the unpaid leave under § 3e, para. 1 TP LC is provided for 'in this Code' (§ 3e, para. 2 TP LC), while the recognition of the unpaid leave under Art. 54, first sentence OWTRL is provided for (regulated) in an act of the Council of Ministers (Art. 54, second sentence OWTRL).

The analysis in this paragraph ends with a legal conclusion of general theoretic importance.

In the current Bulgarian law there is a hypothesis regulating the admissible unilateral provision, on the part of the employer, of unpaid leave without the consent of the employee – Art. 54, first sentence OWTRL. Years ago, there used to be another similar hypothesis – the one of § 3e, para. 1 TP LC. This leave granted unilaterally by the employer is often referred to as 'forced

leave', with good grounds for using that adjective insofar as unpaid leave is granted 'without the employee's consent'. However, this forced unpaid leave is admissible because, and only where, it is expressly regulated by the legislature. Art. 54, first sentence OWTRL does not specify that unpaid leave is granted to the employee 'without his/her consent', but this ensues from the logical interpretation of the expression used, namely 'the unpaid leave is taken by order of the Head of the enterprise'.

The admissible unilateral granting by the employer of unpaid leave without the consent of the employee (forced unpaid leave) is the theoretical and statutory antipode of unpaid leave – a legal possibility under Art. 160, para. 1 LC, on the one hand, and, on the other hand – a subjective right of the employee. From another point of view, it is apparent that the legislature has created a legal structure of unpaid leave, which is a subjective reformative labour law right of the employer to grant its use unilaterally and without the employee's consent, and therefore its use is both a legal employment obligation and a labour law subjective right of the employee.

**Paragraph Four** examines the unpaid leave under Art. 160, para. 2 LC.

The analysis is necessary not only because its legal framework is systematically included in Art. 160 LC, but also for comparing it with the unpaid leave under Art. 160, para. 1 LC.

The unpaid leave under Art. 160, para. 2 LC is not only a subjective right of the employee, but also a type of leave which arises *ex lege* when the respective legal ground provided for in law occurs. There exists one legal ground: the employee has started working under a relationship with an institution of the European Union or an international governmental organization. Once the employee's request for taking leave has reached the employer, the employer's consent (authorisation) regarding the ground, length and time of using this type of leave is not necessary.

It is from the theoretical analysis that a legal conclusion is drawn, namely that the unpaid leave under Art. 160, para. 2 LC is a typical example of unpaid targeted leave, which is a subjective right of the employee, while at the same time the period of its use is not recognised as length of employment or contributory service.

The research also addresses the systematic place of Art. 160, para. 2 LC. This place is chosen inappropriately by the legislature. The systematic place of unpaid official leave under Art. 160, para. 2 LC is either in the form of independent provision (e.g. Art. 160a LC) or in the form of a new (fifth) paragraph of Art. 161 LC, which contains the legal framework of several types of

official leave under the Labour Code. A proposal *de lege ferenda* is made to change the systematic place of the legal framework of this type of unpaid official leave.

**Chapter Four** 'Commentary on the case law of application of Art. 160, para. 1 LC' consists of five paragraphs.

Most often, the question of lawfulness of the use of unpaid leave under Art. 160, para. 1 LC is indirectly raised in connection with another subject of an employment dispute, or in the course of exercising administrative control of compliance with labour law and the administrative sanction liability for its infringement; and also in relation to the recognition or, respectively, the non-recognition of the period of use of such unpaid leave as a period of contributory service, this being connected with the emergence and exercise of subjective social security rights under state social security. The dissertation briefly analyzes court judgments in the motives for which the court discusses various aspects of unpaid leave under Art. 160, para. 1 LC.

The systematics of the content of this chapter follows the case law of the courts of various types and levels. This is due to the specific nature of any legal dispute and, accordingly, the specific procedure for its examination by the court in which the dispute is put to discussion by the court as regards its content and the application of the provision of Art. 160, para. 1 LC.

**Paragraph One** deals with the case law of civil courts and the Supreme Court of Cassation (SCC) in labour disputes.

The following judgments have been examined: Decision (Dec.) No. 292 of 14.10.2015 on civil case (c.c.) No. 395 of 2015 of Dobrich Regional Court; Dec. No. 89 of 07.03.2014 on c.c. No. 1044 of 2014 of Stara Zagora Regional Court; Dec. of 01.06.2015 on c.c. No. 19892 of 2014 of Sofia Regional Court; Dec. No. 1974 of 14.12.2000 of SCC, 3rd civil division (c.d.).; Dec. No. 1396 of 04.11.1999 on c.c. No. 349 of 1999 of SCC, 3rd c.d.

Decision No. 169 of 02.06.1997 on c.c. No. 130 of 1997 of 3rd c.d.: The analysis focuses on the key motives of the judgment regarding the concept of 'cessation of work' and the application of the provision of Art. 160, para. 1 LC. What impresses is the following part of the motives for the SCC's decision: 'in case of cessation of work, the employer has several options at his disposal that are regulated by law: to unilaterally change the place or nature of the employee's work for the duration of the cessation – Art. 120 LC; to grant employees their paid annual leave without their consent – Art. 173, para. 4 LC; to offer employees to take unpaid leave under Art. 160, para. 1 LC;

to place the employees in a stoppage with all the consequences thereof under Art. 267 LC. The fifth option to which the employer may proceed as a last resort is the dismissal under Art. 328, para. 1, item 4 LC when the stoppage lasts for more than 30 calendar days (currently, for more than 15 working days).

The SCC's analysis of the possibilities given to the employer's by labour law in the event of a stoppage in his enterprise is correct, except for the third option thus formulated, namely 'to offer employees to take unpaid leave under Art. 160, para. 1 LC'. I cannot agree with this opinion of the SCC, which is also found in numerous subsequent court judgments of the cassation instance.

The research pays particular attention to this problem, giving arguments as to why the opinion of the SCC is unacceptable and, in this connection, an analysis is also made in comparative terms of some other hypotheses of change and termination of the employment relationship. A brief overview is presented of the theoretical theses on this issue set out in the Bulgarian labour law literature over the years.

The **Second Paragraph** examines the case law of the administrative courts in administrative cases the subject matter of which is a social security law dispute.

The problem of recognition of the period of time of unpaid leave under Art. 160, para. 1 in conjunction with para. 3 LC as length of employment and contributory service, respectively, has its peculiar impact on case law. I define this impact as 'peculiar' because the subject matter of the dispute is not a labour law one, but rather a social security law one, and yet, the labour law aspects of this type of unpaid leave are analysed. This is one of the peculiar relationships between labour and social security law as separate legal sectors of the Bulgarian legal system.

The motives of Dec. No. 406 of 25.11.2013 in administrative case No. 1 of 2013 of Veliko Tarnovo Administrative Court are discussed, the subject matter being the challenge of a pension order for the granting of a pension for contributory service and old age under Art. 68 SSC.

**Paragraph Three** examines the case law of regional courts and administrative courts in administrative cases.

Aspects concerning the application of the provision of Art. 160, para. 1 LC can also be found in the motives for court judgments rendered on administrative sanction cases. The reason for this is the exercise of administrative control over the activity of an employer for checking compliance with labour legislation. When discussing the main subject matter of the case – the fact of

administrative violation and the lawfulness of the administrative sanction imposed, labour law facts are inevitably examined and legal conclusions are drawn on the application of the labour legislation in force. Here again, there is correlation between and interlinking of two separate legal sectors of the Bulgarian legal system, namely, labour law and administrative law, and, particularly, administrative sanction law.

The research analyzes: Dec. No. 703 of 02.07.2013 on Administrative Sanction Case (ASC) No. 10 of 2013, Dec. No. 315 of 09.04.2013 on ASC No. 294 of 2013 and Dec. No. 545 of 23.05.2013 on ASC No. 308 of 2013, all of them being on the docket of Stara Zagora Regional Court. The three ASCs are instituted on an appeal of the same employer, who is a defendant in the labour dispute dealt with in § 1, item 2 of this Chapter. Owing thereto, some of the facts and evidence gathered in the four lawsuits are the same. This is yet another piece of evidence of how an unlawful act of the employer – unilateral inadmissible granting of unpaid leave under Art. 160, para. 1 LC – may give rise to two litigations, namely an administrative sanction one and a labour law one, which occur and develop, incl. before a court, and differ in their subject matter, but share common factual circumstances and evidence. It is possible that, on the basis of the same legal fact – the unilateral unlawful granting of unpaid leave under Art. 160, para. 1 LC (although the workers actually worked during that time period) – a social security law dispute arises and develops, the subject matter of which is either the recognition and, respectively, the non-recognition of this period of time as contributory service, and/or the occurrence and, respectively, the non-occurrence of social security law rights. It is easy to see a multifaceted problem, seemingly 'insignificant', which regards the legal application of Art. 160, para. 1 LC.

The administrative violation under Art. 415, para. 1 LC – non-compliance with a mandatory prescription of a supervisory authority for compliance with labour legislation – is also the subject of examination in Dec. of 26.06.2014 on ASC No. 962 of 2014 of Ruse Regional Court.

The subject matter of ASC No. 11393 of 2014 on the docket of Sofia Regional Court is an administrative violation of the provision of Art. 160, para. 1 LC. In its Dec. No. 392 of 18.09.2015 on ASC No. 1027 of 2015, Sliven Regional Court discusses the question of the form in which the employee's request for unpaid leave under Art. 160, para. 1 LC should be made and the form of the employer's authorisation. The administrative violation of Art. 160, para. 1 LC is also discussed in other court judgements, for instance Dec. of 08.07.2014 on ASC No. 2220 of 2014 of Sofia

Regional Court; Dec. No. 1286 of 07.07.2014 on ASC No. 513 of 2014 of Burgas Regional Court; Dec. No. 17 of 21.03.2015 on ASC No. 1592 of 2014 of Dobrich Regional Court.

As far as violations of Art. 160, para. 1 LC are concerned, two other conclusions can be drawn from the brief analysis of the case law on ASCs the subject matter of which is an administrative violation of Art. 160, para. 1 LC (forming part of the administrative sanction *corpus delicti* of Art. 414, para. 1 LC), and those the subject matter of which is non-compliance with a mandatory prescription of a supervisory authority for compliance with labour legislation (Art. 415, para 1 LC).

The first conclusion is that employers in different parts of the territory of the country commit a violation of Art. 160, para. 1 LC, i.e. they unilaterally grant unpaid leave without the employee's consent.

The second conclusion concerns the application of two of the main legal principles of Bulgarian legal system – the principle of humanism and the principle of fairness – having their specific manifestations in administrative sanction law, namely, in Art. 27, paras 2 through 4 of the Law on Administrative Violations and Sanctions (LAVS) and Art. 12 LAVS, which relates to the objectives of administrative sanctions. What is concerned here is the amount of the pecuniary administrative penalty (referred to in the examples as 'pecuniary sanction' – Art. 412a, item 2 LC) imposed by the administrative punishing authority and subsequently subject to judicial review of its lawfulness.

**Paragraph Four** deals with the understanding of unlawful forced unpaid leave as grounds for compensation under Art. 214 LC.

A legal consequence of the inadmissible unilateral granting of unpaid leave under Art. 160, para. 1 LC is the employee's temporary suspension from work during the period of employment relationship. This temporary suspension is unlawful because the corpus of facts for granting unpaid leave under Art. 160, para. 1 LC is not present. The inadmissible forced unpaid leave is also an unlawful unilateral amendment to the employment relationship on the part of the employer, and, in this sense, it is also a violation of the general prohibition set out in Art. 118, para. 1 LC, because the two substantive law prerequisites laid down in Art. 118, para. 1 in fine LC are not cumulatively present.

In legal literature, the unlawful forced unpaid leave is not considered a hypothesis of unlawful temporary removal of an employee from work within the meaning of Art. 214 LC. All authors link the unlawful temporary removal of an employee from work under Art. 214 LC with the application of the coercive disciplinary measure under Art. 199 LC.

I believe that the said interpretation should be overcome by way of including into the provision of Art. 214 LC – in addition to the unlawful application by the employer of the coercive disciplinary measure under Art. 199 LC – all other hypotheses of unlawful temporary removal from work of an employee on an order given by the employer, these hypotheses being possible yet not regulated in law. One of these possible hypotheses is the inadmissible unilateral granting of unpaid leave by the employer (unlawful forced unpaid leave under Art. 160, para 1 LC). A positive law argument for this view is that the provision of Art. 214 LC does not contain a direct reference to the provision of Art. 199 LC.

A claim for compensation arises for an employee who has been on inadmissible forced unpaid leave as a form of unlawful temporary removal from work, the amount of this claim being measured by the amount of the employee's gross remuneration at the time of the unlawful removal.

The inadmissible unilateral granting of unpaid leave on the part of the employer (unlawful forced unpaid leave) has numerous legal dimensions. It constitutes misconduct, while at the same time it is also a unilateral inadmissible amendment made by the employer to the employment relationship; it is also an unlawful order of the employer in the exercise of his employer's managerial authority; it is an inadmissible temporary removal from employment of the employee causing material damage to the latter; it is non-performance on the part of the employer to fulfil his legal obligation forming part of the content of the employment relationship and, therefore, there is a good reason for unilateral termination of the employment contract on the part of the employee without prior notice under Art. 327, para. 1, item 11 LC.

The last **Fifth Paragraph** analyses the relationship of labour law with other legal sectors in the light of the case law examined.

From the critical analysis of the case law on the application of the provision of Art. 160, para. 1 LC a legal conclusion is made, namely, that labour law as an independent legal sector is closely interrelated to many other legal sectors. The said interrelations are multidirectional and mutually

dependent. Given the specific subject matter of the research, this complex of interrelations is only presented with respect to one legal institute of labour law – the unpaid leave under Art. 160, para. 1 LC.

Consideration is given to the interrelation between labour law and civil law through the subsidiary application of the legal rules of the latter in labour law – the issues of invalidity of transactions, especially unilateral ones (Art. 44 of the Law on Obligations and Contracts), their number in labour law not being inconsiderable. The autonomy of the will and its limitation in contract law is addressed as well, and so are the dimensions of these issues in the unpaid leave under Art. 160, para. 1 LC. A single example of a judgment on a commercial case (non-performance of a privatization contract) illustrates the interrelation between labour law and commercial law.

It is, again, by a single judgment on social security law litigation concerning the awarding of a pension for contributory service and old age that the interrelation between labour law and social security law as separate legal sectors of Bulgarian legal system is illustrated.

The presented judgments on administrative sanction cases show the close link between labour law and administrative law in the field of administrative control over compliance with labour legislation and administrative sanction liability for violation of labour legislation.

This interrelation between labour law and the other legal sectors of Bulgarian legal system underlines the great social importance of labour law as a legal branch and the need for its in-depth knowledge required for the lawful application of its legal rules.

## Contribution points in the dissertation

1. In Bulgarian legal literature, the dissertation is the first comprehensive research of unpaid leave under Art. 160, para. 1 LC under positive labour law in force.

2. The dissertation research attempts at giving a theoretical definition of the term ‘leave-legal possibility’, and, in particular, the unpaid leave under Art. 160, para. 1 LC; a legal characteristic is made of the concept of ‘unpaid leave’, which is differentiated from paid leave.

It is argued that the employee’s leave-legal possibility, a typical representative of which is the unpaid leave under Art. 160, para. 1 LC, turns into a labour law subjective right of the

employee through a legal mechanism set out in law. Following the employee's request to take such leave, there is a legal expectation, which turns into a labour law subjective right when the employer authorises the leave (gives his consent) and the agreement is concluded.

The dissertation justifies the view that the use of authorised unpaid leave under Art. 160, para. 1 LC is an exercise of a fundamental labour law subjective right, the type of which is classified as transformative.

The use of any type of leave is regarded as a hypothesis of making an amendment to the employment relationship – the latter has a suspended effect without being completely deprived of its content. In the case of unpaid leave under Art. 160, para. 1 LC this is done by concluding an agreement (contract) with the employee. This is a labour law contract, and there is a particular hypothesis of an amendment to the employment relationship being made by mutual consent of the parties on the grounds of Art. 119 LC. By definition, an amendment to the employment relationship when using any type of leave is made for a certain time.

When using any type of leave, including unpaid leave under Art. 160, para. 1 LC, new labour law subjective rights arise for the employee, which, by their legal nature, are legal guarantees for the use of the leave, that is to say, guarantees of the reality of the subjective right to leave.

3. A classification is proposed in the scientific research, this being a classification of the types of unpaid leave under the Bulgarian objective labour law in force, according to different classification criteria.

The legislature has created three legal structures for unpaid leave. These are types of unpaid leave (classification of types of unpaid leave under current labour law):

– unpaid leave – legal possibility for the employee (Art. 160, para 1 LC);

– unpaid leave – subjective right of the employee (Art. 160, para 2 LC and some other types of unpaid leave), and here the unpaid leave under Art. 160, para. 1 LC should be added because, in its legal nature, it is a subjective right of certain employees in the special hypothesis under Art. 173, para. 2 LC;

– unpaid leave which is a labour law subjective transformative right of the employer to grant its use unilaterally and without the employee's consent, and, therefore, its use is both a legal employment obligation and also a labour law subjective right of the employee (§ 3e, para. 1 TP of

LC (with the remark that to date the provision is not an effective law) and Art. 54, first sentence OWTRL) – the so-called ‘admissible forced unpaid leave’.

The classification criterion used is the legal framework of the type of unpaid leave in the Bulgarian positive law in force, which is a direct consequence of the socio-legal purpose of the respective type of unpaid leave.

The legislature has differently regulated the situation concerning the recognition of the time of use of the respective unpaid leave as length of employment and/or contributory service. The time period for which the use of the respective unpaid leave is recognised as length of employment and/or contributory service is also different. This can be regarded as a second classification criterion for dividing unpaid leave into different types. According to this division, there are three types of unpaid leave: unpaid leave the entire period of use of which is recognised as length of employment and contributory service; unpaid leave the period of which is not recognised as length of employment or contributory service; unpaid leave part of the period of use of which is recognised as length of employment and contributory service, while the remaining period is not recognised as such. On principle, the unpaid leave unilaterally granted by the employer without the employee’s consent, as well as the unpaid leave which is a subjective right of the employee, are recognised (counted) as length of employment and contributory service in their full amount of use. A major exception from this general rule is the unpaid leave under Art. 160, para. 2 LC, which is a subjective right of the employee, but the period of its use is not recognised as length of employment or contributory service, respectively.

A third possible classification criterion relates to where the legal framework of the respective unpaid leave is contained, or, more precisely, which legal act gives rise to the said unpaid leave and its existence. The types of division here are ‘statutory unpaid leave’ where the legal framework is contained in a state source of labour law (law or subordinate legislation acts) – such is the unpaid leave referred to above in relation to the first classification criterion, and ‘contractually established unpaid leave’ where the leave exists by virtue of an employment contract or a collective bargaining agreement (non-state source of labour law).

When comparing the three legal structures of unpaid leave, what clearly stands out is the legal nature, the socio-legal purpose and the procedure for use of unpaid leave under Art. 160, para. 1 LC.

4. The dissertation examines the accessible case law on various aspects of application of the legal framework of unpaid leave under Art. 160, para. 1 LC, including the so-called ‘forced unpaid leave’.

5. The conclusions drawn from the scientific examination of the issues in the legal framework of unpaid leave under Art. 160, para. 1 LC, and the particular aspects of leave as a labour law institute, including the social security law aspects of these issues, are summarised in the proposals *de lege ferenda,* both as new wording of existing texts and as proposals for creating new provisions. These are the following proposals *de lege ferenda* for improving labour and social security legislation:

a.) amendments to the provision of Art. 160 LC.

– in Art. 160, para. 1 LC: explicit regulation in a written form of the employee’s request and the employer’s authorisation of unpaid leave, as well as elimination of the expression ‘whether or not he/she has taken his/her paid annual leave and irrespective of his/her length of employment’. The new wording can be:

‘Upon the employee’s written request, the employer may authorise his/her unpaid leave in writing’.

– repealing the rule in Art. 160, second hypothesis of para. 3, LC – deletion of the words (expression) ‘and over 30 working days, if so provided for in this Code, in another law or in an act of the Council of Ministers’.

– changing the systematic place of unpaid leave under Art. 160, para. 2 LC by making it either a separate provision (e.g. Art. 160a LC) or a new para. 5 of Art. 161 LC. As a consequence, it is necessary to renumber the paragraphs of Art. 160 LC – there remain two paragraphs with the corresponding amendments to their wording.

b.) a change in the provision of Art. 118, para. 1 LC – the end of the provision should be re-edited in the following way: ‘in the cases of and in accordance with the procedure laid down in law or a collective bargaining agreement or an employment contract’.

c.) repeal of the provision of Art. 327, para. 1, item 11 LC.

d.) amendments to the provision of Art. 54 OWTRL.

– in the first sentence of Art. 54 OWTRL: the words ‘under Art. 160 LC’ at the end of it should be deleted.

– in the second sentence of Art. 54 OWTRL: the expression ‘leave under Art. 160, para. 2 LC’ should be replaced by ‘the unpaid leave’.

e.) amendments to the provision of Art. 9, para. 2 SSC. The first version of the amendment is to have Art. 9, para. 2, item 3 SSC re-edited with new content: ‘of the unpaid leave under Art. 160, para. 1 of the Labour Code up to 30 working days in a calendar year, and over 30 working days in a calendar year – in the amount at which, by law or an act of the Council of Ministers, the unpaid leave is recognised as length of employment’. A second version of the amendment is to create a new item 3a or a new item 4, without amending item 3, and, accordingly, to renumber the subsequent items in para. 2 of Art. 9 SSC, the wording of the new item being: ‘of used unpaid leave laid down by law or by an act of the Council of Ministers, in the amount of working days in a calendar year at which it is explicitly recognised as length of employment’. The third version, which is the most appropriate one in my opinion, is to adopt the above-mentioned proposals for amendments to Art. 160 LC and to change the wording of the current provision of Art. 9, para. 2, item 3 SSC into: ‘of used unpaid leave laid down by law or by an act of the Council of Ministers, in the amount of working days in a calendar year at which it is explicitly recognised as length of employment’.

## Approbation of the results on the subject of dissertation research

**1.** The results of the scientific research of unpaid leave under Art. 160, para. 1 LC (theoretical points, summaries and conclusions), some other aspects of leave as a labour law institute, and various particular issues of labour law and social security law have been presented at national scientific conferences and subsequently published in scientific reports collections. The results of the scientific research have also been used in updating the educational material in connection with teaching the educational disciplines ‘Labour Law’ and ‘Social Security Law’ at the New Bulgarian University.

**2.** The basic points and the results of the dissertation research are reflected in the monograph ‘The unpaid leave under Art. 160, para. 1 of the Labour Code’. Sofia: ‘Avanguard Prima’

Publishing House, 2016, 307 pages, 15 scientific studies and articles in scientific journals and scientific conferences collections.

## Publications on the topic of the dissertation

1. Стайков, Ивайло. Прекъсване на ползването на платения годишен отпуск. – В: Актуални проблеми на трудовото и осигурителното право. Том IV. С.: УИ „Св. Кл. Охридски“, 2010, с. 95-107.
2. Стайков, Ивайло. Характеристика на правото на отпуск. – В: Сборник доклади от научно-практическата конференция посветена на живота и делото на проф. д-р Георги Боянов, 21 ноември 2015 г., ЮФ на Русенския университет „Ангел Кънчев“. Русе: РУ „Ангел Кънчев“, ЮФ, 2015, с. 72-83 електронна книга на интернет адрес https://www.uni-ruse.bg/Faculties/YUF/SiteAssets/conferences/%d0%a1%d0%91%d0%9e%d0%a0%d0%9d%d0%98%d0%9a%20-%202015.pdf [електронен ресурс].
3. Стайков, Ивайло. Субективни права и правни възможности в трудовото право. – В: Право и права. Сборник в памет на проф. д-р Росен Ташев. С.: УИ „Св. Кл. Охридски“, 2016, с. 420-439.
4. Стайков, Ивайло. Допустимо едностранно предоставяне на неплатен отпуск от работодателя без съгласието на работника или служителя. – Годишник на Департамент „Право“ на Нов български университет 2015 година. Година четвърта, книга 5. С.: Издателство на НБУ, 2016, с. 163-193.
5. Стайков, Ивайло. Неплатеният отпуск по чл. 27, ал. 2, изр. първо от Закона за радиото и телевизията. – В: Приложение на конституционните принципи в публичното и частното право. Сборник доклади от Юбилейна международна научна конференция по повод 25 години ЮФ на ВТУ „Св. св. Кирил и Методий“ и 25 години от приемане на Конституцията на Р България, 6-7 октомври 2016 г. В. Търново: УИ „Св. св. Кирил и Методий“, 2017, с. 377-394.
6. Стайков, Ивайло. Ползването на отпуск като хипотеза на изменение на индивидуалното трудово правоотношение. – В: 25 години Департамент „Право“ на Нов български университет. Сборник с доклади от Национална научна конференция, НБУ, 14 декември 2016 г. С.: Издателство на НБУ, 2017, с. 149-162, електронна книга на интернет адрес http://ebox.nbu.bg/dp25/pdf/17.pdf [електронен ресурс].
7. Стайков, Ивайло. Правомощия на работодателя при престой в предприятието. – Годишник на Департамент „Право“ на Нов български университет 2016 година. Година пета, книга 6. С.: Издателство на НБУ, 2017, с. 199-221.
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10. Стайков, Ивайло. Комплексно правоотношение, в което е включено трудово правоотношение. – В: Право и бизнес – усъвършенстване на нормативната уредба. Сборник доклади от Юбилейна научна конференция 2016. Том I. Частно право. С.: Издателски комплекс – УНСС, 2017, с. 359-367.
11. Стайков, Ивайло. Допустимо ли е работодателят да предложи на работниците и служителите да ползват неплатен отпуск по чл. 160, ал. 1 от Кодекса на труда в случай на престой в предприятието? – В: Сборник доклади от Годишна университетска научна конференция на Национален военен университет „Васил Левски“, 14-15 юни 2018 г. Том 8 – Научно направление „Социални, стопански и правни науки“. В. Търново: Издателски комплекс на НВУ „Васил Левски“, 2018, с. 202-210.
12. Стайков, Ивайло. Продължителност на неплатения отпуск по чл. 160, ал. 1 от Кодекса на труда и начин за неговото броене. – Бизнес и право, III, 2020, № 3, с. 41-54.
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14. Стайков, Ивайло. Аспекти на проблематиката във връзка с ползването на различните видове отпуски. – В: Предизвикателства към правото: Научни четения в памет на Кристиан Таков. [Сборник]. С.: Издателство на НБУ, 2021, с. 227-242.
15. Стайков, Ивайло. Договорноустановен неплатен отпуск. – В: 70 години Закон за задълженията и договорите. Сборник. Редакционен съвет. Пловдив: Сиби и УИ „Паисий Хилендарски“, 2022, с. 395-412.