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## EMPLOYMENT OF EX-CONVICTS IN THE REPUBLIC OF SERBIA

The effective realization of the right to work for persons who have been sentenced to prison is of great importance, not only from the perspective of ensuring their economic security and the possibility to develop their personality through work, but also from the perspective of their resocialization and reintegration into society.

In addition to being important for convicts serving their sentences, work is important for ex-convicts, after their sentence has been served. However, their employment can be hindered by prejudices and stereotypes, making it difficult to find and maintain employment, or advance in their professional careers. Possible answers to these challenges lie in raising awareness and educating employers and the general public about the importance of work in resocializations (especially bearing in mind the retributive disposition of the Serbian public), improving the legal and institutional framework for prevention and protection against discrimination based on convictions, as well as strengthening the cooperation between the National Employment Service, employers, organizations for post-penal support and the Department for Execution of Criminal Sanctions, i.e. probation and parole services.

Low employability of ex-convicts in the Serbian labour market can be explained by various factors, starting with prejudices and negative stereotypes associated with their work. In addition, ex-convicts' opportunities for employment are reduced due to longer absence from the labour market, which is oftentimes accompanied by a decline in professional skills further weakening their employability. During their time in prison, convicts aren't always in a position to acquire knowledge and skills that improve their employability and possibility of later finding quality jobs and earning decent wages. Furthermore, modest work experience and low level of education should be mentioned as factors in low employability of ex-convicts<sup>1</sup>. The low employability of these workers in the Republic of Serbia is affected by the absence of formal recognition of ex-convicts as the unemployed who are hard to employ, their exclusion from active employment policy measures, and the absence of incentives for employers who employ ex-convicts. Due to the difficulties in finding and maintaining employment, ex-convicts face numerous other problems, such as ensuring economic security and obtaining access to health care, as well as solving the housing issue, especially if there is no solidarity from the family or appropriate institutional support. Consequently, it is not uncommon for ex-convicts to see the return to the criminal path as the only way to secure means of support. This prompted the Commissioner for the Protection of Equality to submit to the National

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1 J. Srnčić and D. Vulević, *Moderno društvo i postpenalna praksa*, Centar za prevenciju kriminala i postpenalnu pomoć NEOSTART, Belgrade, 2016, p. 41.

Employment Service on June 12, 2023 a Recommendation on measures to achieve equality and protection for ex-convicts against discrimination<sup>2</sup>.

In the Republic of Serbia, the Law on Employment and Unemployment Insurance introduced affirmative action in favour of the hard-to-employ persons, by giving them priority, i.e. by giving them special rights in the implementation of certain measures of active employment policy<sup>3</sup>. Hard-to-employ persons are the unemployed who, due to objective circumstances, find it more difficult to find employment, which is how ex-convicts should be qualified, even though the Law does not explicitly do so. This gap is corrected to some extent by the Guidelines on Inclusion of Unemployed Persons in Active Employment Policy Measures<sup>4</sup>, since it stipulates that the appropriate measures of active employment policy are set out in the individual employment plan, after an interview with an employment counsellor. During the individual interview, the characteristics of the unemployed person that are relevant to their employment and inclusion in the measures of active employment policy will be analyzed, as well as the assessment of employability of the unemployed person based on objective criteria, where the ex-convict status is explicitly stated as a « notable risk factor ». The cited provisions of the Guidelines state that all persons who are expected to encounter difficulties and reduced opportunities for employment due to risk factors and characteristics relevant to their employment and inclusion in the measures of active employment policy - are to be considered hard-to-employ.

Also, ex-convicts remained invisible in the strategic documents in the field of employment. Therefore, qualified women, the young, the elderly, the long-term unemployed, people with disabilities and Roma are considered to be hard-to-employ, as per the Employment Strategy in the Republic of Serbia for the period from 2021 to 2026<sup>5</sup>. The Strategy, however, does not make clear that the assessment of employability of the unemployed, with the aim of including them in the active employment policy measures, may identify other people as hard-to-employ, in relation to the risk factors listed in the Guidelines<sup>6</sup>. In addition, the Strategy does not mention ex-convicts as members of the hard-to-employ category who are often in a difficult position in the labour market and who, because of this, have priority in being included in the financial measures of the active employment policy.

On the other hand, the Action Plan for the implementation of this strategy for the period 2021-2023<sup>7</sup> explicitly mentions «former perpetrators of crimes» as one of

2 Commissioner for the Protection of Equality, Recommendation of Measures for Achieving equality and Protection against Discrimination, no. 021-01-909/2023-02, of 12 June 2023.

3 Law on Employment and Unemployment Insurance (*Official Gazette of the RS*, no. 36/09, 88/10, 38/15, 113/17, 113/17 and 49/21), art. 5, subparagraph 4, and art. 31 § 3.

4 Guidelines on the Conditions for the Inclusion of the Unemployed in Active Employment Policy Measures (*Official Gazette of the RS*, no. 97/09), § 4, subparagraph 1.

5 Employment Strategy in the Republic of Serbia from 2021 to 2026 (*Official Gazette of the RS*, no. 18/21 and 36/21).

6 Recommendation of Measures for Achieving Equality and Protection against Discrimination (2023).

7 Action plan for the period from 2021 to 2023 for the implementation of the Employment Strategy in the Republic of Serbia 2021 to 2026 (*Official Gazette of the RS*, no. 30/21).

the major hard-to-employ categories that should be included in active employment policy measures. At the same time, this document states that the categories of hard-to-employ persons have been widely considered and that they include a large number of persons who differ according to their levels of employability. As a result, it is necessary to only include into active employment policy measures the members of these categories who need support in order to integrate into the labour market. As the selection of the type of support represents a *de facto* issue in each individual case, inclusion in active employment policy measures is carried out in accordance with the employability assessment and the individual employment plan.

Bearing in mind the legal and strategic framework for the employment of ex-convicts, as well as the need to take measures at the national, regional and local levels to achieve the equality of vulnerable social groups, including the convicted persons who face the risks of discrimination and stigmatization in the employment process, the Commissioner for the Protection of Equality adopted the Recommendation of Measures to Achieve Equality and Protection against Discrimination. The recommendation refers to the assessment of the registry of the unemployed persons with regards to ex-convicts, as well as to the review of the measures that have been taken so far with the aim of encouraging their employment, especially when it comes to inclusion in the measures of active employment policy. In this regard, it was underlined that the purpose of serving a prison sentence is reintegration of ex-convicts into society, and that their preparation and training in the correctional institutions is not going to be enough for successful reintegration. Besides, the success of reintegration crucially depends on the support and programs available to ex-convicts, especially if we take into account the high percentage of recidivism in the Republic of Serbia (estimated at 65-70%)<sup>8</sup>. The reason for the high percentage of recidivism is an inadequate post-penal assistance. More precisely, we are dealing with the absence of appropriate assistance in obtaining personal documents, housing, health care and livelihood, but also solving problems related to finding employment. The latter is very important since finding work contributes to successfully overcoming many of the aforementioned problems, as employment is critical in ensuring economic security, developing self-esteem and social ties. In this regard, the Commissioner for the Protection of Equality called on the National Employment Service to contribute to the creation of conditions for the effective exercise of the right of ex-convicts to work through activities within their jurisdiction, in order to enable them to have the opportunity to earn a living on the basis of a freely chosen profession and employment, just like everyone else.

On the other hand, the position of ex-convicts on the labour market is essentially determined by legal rules that create barriers for their employment. Convictions for particular crimes or particular penalties represent a barrier for employment. More precisely, it is a *justifiable limitation of the right to work*, as this right can exceptionally

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8 Recommendation of Measures for Achieving Equality and Protection against Discrimination (2023). Ilijic and Maljkovic estimate this percentage to be around 60-70% (L. Ilijic and M. Maljković, « Postinstitucionalni tretman osuđenika », *Zbornik Instituta za kriminološka i sociološka istraživanja*, no.1/2015, p. 181).

be limited by law, which is attested by the Constitution of the Republic of Serbia<sup>9</sup>. The barrier to employment, with regards to the conviction status of the worker, is introduced in order to protect the interests of the employer and the community and prevent the perpetrators of crimes from working the jobs that are related to said crimes, and to prevent the consequences that their work could have on life, health, safety, property and other rights and freedoms of citizens. The rules regarding barriers to employment must not unjustifiably and/or excessively prevent ex-convicts from exercising their right to work to ensure their livelihood or develop their personality through work, offend their dignity and the right to respect for private life, or prevent their successful resocialization, which is also in the interest of the community.

The barrier to employment for ex-offenders can also be examined from the angle of *legal consequences of a conviction*. In accordance with the Criminal Code, convictions for particular crimes or particular penalties may result in the prohibition to acquire particular rights<sup>10</sup>. This consequence can be manifested as the prohibition to establish employment at a particular job, as entering into employment relationship is a way of exercising the right to work. The legal consequences of a conviction, however, do not fall under the category of criminal sanctions, but rather under the category of special measures, which are not imposed by the court, because they occur *ex lege*. More precisely, this means that the legal consequences of a conviction occur automatically, assuming a conviction which carries a particular outcome provided by law is handed, in order to prevent recidivism and ensure the protection of society from criminality, and, more broadly, the protection of various components of public interest that exist in connection with the performance of certain jobs and professions. In this regard, we should note that the legal consequences of a conviction can only be introduced by law (not by-laws or sources of autonomous law). This means that in the Republic of Serbia, consequences concerning barriers to employment are regularly determined by special laws. The Law on Civil Servants cites being sentenced to a prison term of at least six months as a legal consequence of a conviction and barrier to employment<sup>11</sup>, although it can be argued that this is too broadly defined barrier, bearing in mind that it prevents persons who were sentenced to the said penalty from entering into employment relationship at any job in the state administration<sup>12</sup>. The same barrier is established by the Law on Employees in Autonomous Provinces and Local Self-Government Units<sup>13</sup>, while barriers are also established by many laws that regulate the organization and functioning of state authorities or public services (e.g.

9 Constitution of the Republic of Serbia (*Official Gazette of the RS*, no. 98/06 and 115/21), art. 60, § 1.

10 Criminal Code (*Official Gazette of the RS*, no. 85/05, 88/05, 107/05, 72/09, 111/09, 121/12, 104/13, 108/14, 94/16 and 35/19), art. 94, § 1.

11 Law on Civil Servants (*Official Gazette of the RS*, no. 79/05, 81/05, 83/05, 64/07, 67/07, 116/08, 104/09, 99/14, 94/17, 95/18, 157/20 and 142/22), Art. 45, § 1.

12 L. Kovačević, « Osuđivanost radnika kao smetnja za zasnivanje radnog odnosa », *Radno i socijalno pravo*, no. 1/2023, p. 92.

13 Law on Employees in Autonomous Provinces and Local Self-Government Units (*Official Gazette of the RS*, no. 21/16, 113/17, 95/18, 114/21, 113/17, 95/18, 86/19, 157/20 and 123/21), art. 80, subparagraph 4.

Law on Higher Education, Law on the Fundamentals of the Education System)<sup>14</sup>. This is mirrored by the laws that apply to the so-called licensing occupations, since they establish barriers to issuance of licenses, which consequently makes it impossible to establish employment in certain fields of work (e.g. Health Care Law)<sup>15</sup>. On the other hand, according to the provisions of the Law on Audit being sentenced to prison for a crime in the Republic of Serbia or a foreign country will result in "becoming unfit to perform audits, obtain licenses and perform other tasks in the field of auditing", which is a barrier to getting an auditing license<sup>16</sup>.

The main effect of employment barriers is reflected in the legal impossibility of establishing employment relationship, even though a person may fulfil the general and special occupational requirements. The aforementioned consequences come into effect on the day the verdict becomes final. Three years after the served, expired or pardoned sentence, the court, at the request of the convicted person, can rule on ending the legal consequences of the conviction, assuming they haven't already ended due to rehabilitation. If rejected by the court, the ex-convict may re-submit the request.

By introducing the conviction status of employees as a barrier to establishing employment, legislators are indirectly regulating the processing of information on the conduct of criminal proceedings and the conviction status<sup>17</sup>, even though most of the aforementioned laws do not regulate the method or authorization for obtaining evidence of someone's conviction status, and the same goes for the laws cite conduct of criminal proceedings against candidates as an employment barrier (certificate from the registry of the Ministry of Interior about having no criminal record, or a court certificate that no criminal proceedings are being conducted against the candidate).

In accordance with the provisions of the Criminal Code, no one has the right to ask a citizen to submit proof of his/her conviction status, although citizens can be provided with this information, upon their request. Information from the criminal records can « upon reasoned request, be provided to the state authority, company, other organizations or entrepreneurs, if the legal consequences of the conviction or the security measures are ongoing and if there is a justified interest based in law »<sup>18</sup>. On the other hand, the rules of procedure of the court stipulate that the court can issue a certificate on the facts stemming from its official records, at the request of a

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14 Law on Higher Education (*Official Gazette of the RS*, no. 88/17, 73/18, 27/18, 67/19, 6/20, 11/21, 67/21 and 67/21), art. 72, § 4; The Law on the Fundamentals of the Education System (*Official Gazette of the RS*, no. 88/17, 27/18, 10/19, 6/20 and 129/21), art. 139, § 1, subparagraph 3.

15 Healthcare Law (*Official Gazette of the RS*, no. 25/19), art. 182, § 2, subparagraph 4.

16 Law on Audit (*Official Gazette of the RS*, no. 73/19), art. 5, and art. 6, § 2, subparagraph 5.

17 Response of the Commissioner for Information of Public Importance and Personal Data Protection no. 011-00-00240/2015-05, of 15 April 2015.

18 Criminal Code, Art. 102, § 3-5.

client or a third party that has a legitimate interest or otherwise when the regulations allow<sup>19</sup>.

In practice, confusion is often caused by the employer's request that the candidate submit a signed (non)certified statement that there is no barrier to his/her employment related to previous convictions or criminal proceedings. We should note that such a statement does not create an assumption of truth of its content, even if the statement is certified by a public notary, since notaries only certify the signature (not the content of the document). Moreover, requiring this statement to be provided doesn't seem acceptable from the point of view of personal data protection, since information regarding previous convictions is sensitive information. According to the Law on Personal Data Protection, the legality of personal data processing is conditioned upon the requirement that the processing is necessary in order to achieve the legitimate interests of the controller or a third party<sup>20</sup>. However, collectig certificates on the criminal records from the Ministry of Interior or court certificates that no criminal proceedings are being conducted against the candidate, cannot be considered as necessary processing of data, because the special requirements applicable to data processing related to convictions, punishable acts and security measures have not been met. The latter group of personal data can only be collected under the supervision of a competent authority, or if this is permitted by law, with the application of appropriate special measures to protect the rights and freedoms of the persons to whom the information refer<sup>21</sup>. Ultimately, this means that the employer can request the criminal records on the candidate from the competent court, based on a reasoned request and if there is a justified interest based on the law. If the employer were to require the employee to provide proof of his conviction status, such processing would be illegal in terms of the Law on Personal Data Protection<sup>22</sup>.

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19 Rules of Procedure of the Court (*Official Gazette of the RS*, no. 110/09, 70/11, 19/12, 89/13, 96/15, 104/15, 113/15, 39/16, 56/16, 77/16, 16/18, 78/18, 43/19, 93/19 and 18/22), art. 99, § 1.

20 Law on Personal Data Protection (*Official Gazette of the RS*, no. 87/18), art. 12, § 1, subparagraph 6.

21 *Ibid.*, art. 19, § 1.

22 Response of the Commissioner for Information of Public Importance and Personal Data Protection, no. 072-03-893/2017-05, of 13 March 2017.