

## PRINCIPAL OF EQUAL OPPORTUNITIES AS AN IMPLICATION FOR SUSTAINABLE HUMAN RESOURCES MANAGEMENT: LEGAL AND MANAGERIAL APPROACHES

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### **Abstract**

*The well-being of employees is inseparable from the concept of sustainable human resources management. To fully guarantee the well-being of an individual in a market economy, the state must inevitably control this area of legal relations by establishing certain principles and methods binding in both public and private labor relations. Every employer must implement equal opportunities in all areas related to the employment relationship. Reviewing the situation in the Lithuanian labor market, it can be seen that as many as 57 per cents of employees say they have experienced age discrimination in employment, 12.2 percent - due to disability, 9.3 percent - due to the social situation. Therefore, it is obvious that research on the implementation of the principle must focus on several aspects: identification of possible social, cultural, and legal reasons for the violation of this principle; analysis of the legal environment and legal measures to prevent possible breaches of the principle of equal opportunities; the search for management solutions to maximize the right of employees to equal opportunities. The aim of the paper is through theoretical and practical approaches to reveal problematic issues in the implementation of the principle of equal opportunities in Lithuanian labor law, formulate conclusions and submit proposals for more effective implementation of the principle of equal opportunities by using both legal and managerial solutions. The article was carried out presenting two different perspectives on research object - legal and managerial. The aim is not only to analyze legal regulation and legal solutions for effective implementation of the principle of equal opportunities but also to reveal another dimension of the problem - the presumption that the employer's perception of social responsibility and managerial competencies have a direct impact on ensuring equal implementation.*

### **Keywords**

*Equality of opportunities; legal regulation; managerial measures.*

### **Introduction**

The well-being of employees is inseparable from the concept of human rights protection. The protection of human rights in labor relations takes a special form, first of all, to protect the rights and legitimate interests of the economically weaker party to the labor relations (Bell, 2019). To fully guarantee the well-being of an individual in a market economy, the state must inevitably control this area of legal relations by establishing certain principles and methods binding in both public and private labor relations. This requires a legal framework that is logical, consistent, and aligned with international human rights instruments (Lahuerta, 2016; Zbyszewska, 2016), at the same time state interference must be reasonable and justified (Bell, 2018; Waddington, 2011). Lithuania

is no exception, and there have been recent qualitative changes in employer-employee relations (for example, the re-conceptualized approach of work-family reconciliation (Busby, 2018) has been introduced). Paradoxically, however, in a market economy, the state has decided to tighten control over some aspects of this largely private relationship. This is especially true discussing the theoretical paradigm of labor law, where the state, at the highest, legislative level, established modern, contemporary principles of employee protection, obliging the employer to take concrete actions and measures to implement these theoretical concepts (new Labor Code entered into force on July 1, 2017). Among such fundamental principles of labor law is the principle of equal opportunities, which implements the theory of non-discrimination. The principle of equal opportunities in labor law includes the concepts of gender equality (Buribayev & Khamzina, 2019), non-discrimination on the grounds of race, nationality, language, origin, social status, age, sexual orientation, disability, and ethnicity. Every employer must implement equal opportunities in all areas related to the employment relationship: in hiring, paying, creating conditions for professional development, determining the duration of work, adapting working conditions to people with disabilities, and so on. Reviewing the situation in the Lithuanian labor market, it can be seen that as many as 57 per cents of employees say they have experienced age discrimination in employment, 12.2 percent - due to disability, 9.3 percent - due to the social situation. In 2018, the Office of the Equal Opportunities Ombudsman was mostly contacted regarding possible discrimination on the grounds of gender (40% of all applications) (Office of the Equal Opportunities Ombudsman 2018). However, in case enshrining the principle of equal opportunities in legislation is not based on a strong mechanism to guarantee its effectiveness, equal opportunities policy will only be seen as just a formal concept. Individual aspects of the implementation of the principle of equality are still not uniformly and sufficiently revealed in the doctrine (Caracciolo di Torella & Masselot, 2020; Bogg et al., 2015; Cebrelli, 2014), neither well understood by the entities using the legal acts nor entities applying the guarantees provided for in the legislation in practice. Therefore, it is obvious that research on the implementation of the principle must focus on several aspects: identification of possible social, cultural, and legal reasons for the violation of this principle; analysis of the legal environment and legal measures to prevent possible breaches of the principle of equal opportunities; the search for management solutions to maximize the right of employees to equal opportunities.

Although the legal framework formally enables the protection of the principle of equal opportunities and obliges employers to take appropriate real measures to implement this principle, legal measures are usually analyzed by researchers in isolation, i.e. as if legal norms operate autonomously, without a real social, managerial, economic context. It is therefore important to examine the relationship between the legal obligations imposed on employers and the potential factual management decisions that the latter may use in carrying out their duties. Research of this interdisciplinary nature are lacking, but this type of research will likely contribute to the sustainable management of human resources. The aim of the paper is through theoretical and practical approaches to reveal problematic issues in the implementation of the principle of opportunity in Lithuanian labor law, to formulate conclusions and submit proposals for more effective implementation of the principle of equal opportunities by using both legal and managerial solutions.

For that purpose, the structure of the article was chosen appropriately: the theoretical paradigm of the principle of equal opportunities was discussed, indicating the most

important research in the field, the present situation of Lithuanian labor law and other relevant regulations, and presenting the most important case-law practice of the EU level. The second part of the article analyzes the correlation between legal provisions and managerial measures that could be introduced in the management of human resources implementing the principle of equal opportunities. Due to limitations of the article, the focus is made on the aspect of work-life balance as a criterion of non-discrimination based on family status, specific managerial measures applied by employers, in this case, are introduced and discussed.

The article was carried out presenting two different perspectives on research object - legal and managerial. The aim is not only to analyze legal regulation and legal solutions for effective implementation of the principle of equal opportunities but also to reveal another dimension of the problem - the presumption that the employer's perception of social responsibility and managerial competencies have a direct impact on ensuring implementation of the principle of equal opportunities.

### **Theoretical perspective: principal of equal opportunities in labor law**

Both scientific discourses and jurisprudence have repeatedly confirmed that the principle of equality is one of the fundamental principles of the modern democratic state. Concepts of equality, discrimination, manifestations of discrimination on different grounds, and related issues have been addressed by many foreign law scientists: Barbera (2002), Bell (2001, 2008), Bamfort, Malik and O'Kinneide (2008), Fredman (2008), McColgan (2005), McCrudden and Prechal (2009), Waddington and Lawson (2009), and other. The Court of Justice of the European Union (further ECJ) has repeatedly held that the social damage caused by acts which infringe the principle of equal opportunities cause physical, pecuniary, and non-pecuniary damage not only to the victim but to the whole society as well (for example, ECJ cases Case 149/77, *Gabrielle Defrenne v Société Anonyme Belge de navigation aérienne Sabena* [1978] ECR 01365; Case 283/83, *Firma A. Racke v Hauptzollamt Mainz* [1984] ECR 03791; Case C-292/97, *Kjell Karlsson and others* [2000] ECR I-02737; Case C-15/95, *EARL de Kerlast v Union régionale de coopératives agricoles (Unicopa) and Coopérative du Trieux* [1997] ECR I-01961; Joined cases 75/82 and 117/82, *C. Razzouk and A. Beydoun v Commission of the European Communities* [1984] ECR 01509; Case C-13/94, *P v S and Cornwall County Council* [1996] ECR I-02143).

The prevailing model of individual remedies for violated rights is common to many countries, enshrined in the relevant legislation, and is an unquestionable right of every individual to defend his or her violated rights in the relevant courts or quasi-judicial institutions. However, to ensure equal opportunities in the employment relationship based on the application of only individual remedies, that is, by appealing before the judicial authorities, is not entirely sufficient to achieve equality, therefore parallel proactive measures must be encouraged – the changes at the institutional level must be initiated, which means embedding positive duties on employers.

The first step to the development of the sustainable implementation of the principle of equal opportunities is at the legislation level, as it reflects the official position of a state and its determination to provide legal measures for the protection of this principle. There are quite a few legal documents in Lithuania, determining the concept of the

principle and foreseeing measures for its implementation: EU directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (2006), EU Directive on work-life balance for parents and carers (2019), Lithuanian Labor Code (2016), The Law on Equal Opportunities (2003), the Law on Equal Opportunities for Women and Men (1998), Law of the Republic of Lithuania on Social Integration of the Disabled (2004). According to these acts, equal opportunities must be granted in all stages of employment relations: recruitment; creating equal working conditions and opportunities for professional development; evaluating the work performed; dismissal; paying wages; adapting working conditions for people with disabilities; prevention of discrimination, harassment and sexual harassment; ensuring the possibility of reporting discrimination and harassment and effective and impartial handling of complaints; planning and implementing the organization's equal opportunities policy. Directive 2006/54/EC prohibits direct or indirect discrimination on the grounds of gender in the labor market, including conditions of access to self-employment. It stresses the importance of equal treatment concerning access to employment (including vocational training), working conditions (including payment), and social security schemes.

The Lithuanian Labor Code (Article 26) prohibits discrimination on the following grounds: gender; races; nationality; languages; origin; social situation; age; sexual orientation; disability; ethnicity; membership in a political party or association; religions; faith; beliefs or opinions, except for cases where this is necessary professional activity requirement religious organizations; intention to have a child (ren); circumstances unrelated to employee's properties. Discrimination occurs when: the person is treated or subjected to an unfavorable measure (for example, a lower salary is paid for the same work, different promotion criteria apply, etc.) than another person is subject to or with similar circumstances treated; this conduct or measure is unlawful (subject to the laws prohibited grounds such as gender, race, nationality, ethnicity addition, etc.); the conduct or measure is unreasonable (there are no compelling and objective reasons; measures are not proportionate to the aim pursued). Article 26, Para. 1 and 2 of the Labor Code, Article 7 of the Law on Equal Opportunities, and Article 5 of the Law on Equal Opportunities for Women and Men provisions relating to the principles of gender equality and non-discrimination are applied for all employers, regardless of the number of employees. Article 26, Para. 6 of the Labor Code provides for the obligation to draw up an equal opportunities policy, its implementation and enforcement supervisory measures to employers having more than fifty employees. Labor law governing the principles of gender equality and non-discrimination is applied to all current and potential employees and job candidates' places. They apply regardless of the type of employment contract concluded with the employee. Any policy or rule of the organization that may have unequal effects on different groups of workers should be formally enshrined in the organization's rules or be well-known and consistently applied practice for all employees.

Another important factor is the procedural legal norms, that impose the burden of proof on the employer. In case a person claiming to have been discriminated against or harassed presents a complaint to the judicial authorities, it is sufficient for him or her to bring the so-called *prima facie* evidence. This evidence means that "at first sight" shows that discrimination or harassment was actually. Such evidence is generally considered as sufficient for the court to find discrimination unless the contrary is stated very clearly presenting objective evidence by the employer. Thus, when a court accepts *prima facie*

*evidence*, the burden of proof is transferred to the employer, i. e. the employer must prove that he did not discriminate. Whether specific evidence will be considered sufficient, it is decided by the court on a case-by-case basis. For example, the woman who reported the pregnancy to her employer was a week later dismissed, indicating insignificant, with the performance of work functions unrelated reasons. The woman suspected of being discriminated against and presented a lawsuit, such unjustified dismissal shortly after notification of pregnancy in court could be considered *prima facie* discrimination on the grounds of gender. In this case, the employer should prove that the woman was fired for reasons other than pregnancy.

However, it should be noted that those legal provisions are still on the level of theoretical norms. The individual aspects of the implementation of the principle of equality are still not unanimous and sufficiently reveal in both scientific doctrine and jurisprudence. Basic anti-discrimination legal concepts are not uniformly applied and interpreted by the courts, therefore it is not yet possible to talk about the effective implementation of the principle of equal opportunities. Despite the abundant and sufficiently detailed regulation, many implementation programs, and practical measures, the principle of equal opportunities is not universally implemented in practice. Violations of equality occurring in many forms have deep social, economic, political, historical, cultural reasons that are closely interlinked. Although discrimination in Lithuania, as in many European countries, is a widespread common phenomenon and manifests itself in various forms, participants of the legal relationship (employees, employers, trade unions, employers' organizations), and sometimes even subjects of application of the law (courts, institutions implementing the principle of equality) (for example, the Decision of the Chamber of Judges Lithuanian Supreme Administrative Court, in 2010 May 10, in the case *S.B. and Prosecutor General's Office of the Republic of Lithuania v. Vilnius City Municipality Administration*, case No. No. AS(822)-339/2010) does not recognize discrimination occurring in various situations, or if discrimination is recognized, its victims do not defend their violated rights.

### **Legal and managemental measures for sustainable implementation of the principle of equality: a practical approach**

„Having laws and institutions to prevent discrimination at work and offer remedies is not enough; keeping them functioning effectively is a challenge“ (ILO, 2011). The management of an organization affects the quality of life of all its employees, so the organization is bound by a legal and moral responsibility to implement an equal opportunities policy. According to a broad study, performed by a group of scholars (Sansonetti, De Micheli, Palmen, & Wroblewski, 2017) some procedural innovations have been suggested preventing a violation of equality: *analysis phase*, including data collection/analysis and procedures, processes, and practices for possible violations assessment (where is your organization at the moment? Where do you want to be (and why)?) – diagnostics of equal opportunities; *a planning phase*, where objectives are defined, targets are set, actions and measures are planned, resources and responsibilities are attributed and timelines are agreed upon – strategy of equal opportunities; *an implementation phase*, in which activities are implemented and outreach efforts are undertaken – plans of actions; and *a monitoring phase*, in which the process and the progress are regularly followed through and assessed - impact assessment. The management of organizations must not only adopt and introduce

measures for the implementation of equal opportunities policies in the usual way in the workplace but also decide how the implementation of the measures will be monitored. Once the equal opportunities strategy and the annual action plan have been developed and approved, it is important to set goals, objectives, and constantly monitors the indicators, i.e. monitor equal opportunities policy.

Employment ensures social well-being, full life, and social security protection. It is therefore clear that this area is very sensitive to irregularities and can lead to quite relevant consequences if the unlawful conduct involves discriminatory actions such as the refusal of employment, dismissal, payment of not the same salary for work of equal value because of a person's sex, race, ethnic group, age category, sexual orientation, etc. According Lithuanian labor law (Lithuanian Labor Code, Article 26), in implementing the principles of gender equality and non-discrimination on other grounds, the employer, regardless of gender, race, nationality, language, origin, social status, age, sexual orientation, disability, ethnicity, religion, belief, belief or opinion, intends to have a child (children) basis or other grounds provided by law, must apply non-discriminatory norms and measures in all levels and areas related to the employment relationship: hiring, paying, creating conditions for professional development, determining the duration of work, adapting working conditions to people with disabilities (for example, to apply the same selection criteria and conditions when recruiting; to create equal working conditions, opportunities to improve qualifications, pursue professional development, retrain, gain practical work experience, as well as provide equal benefits; to use the same job evaluation criteria and the same dismissal criteria; to pay equal pay for equal work and work of equal value; to take measures to ensure that the worker is not harassed, sexually harassed or instructed to discriminate in the workplace, and that he or she is not persecuted and protected from hostile behavior or adverse consequences if he or she files a complaint of discrimination or participates in a discrimination case; to take appropriate measures to enable persons with disabilities to access employment, work, careers or training, including appropriate accommodation, provided that such measures do not impose a disproportionate burden on the employer).

Employees' "well-being" indicates that working people perceive their work as meaningful and rewarding in a safe, healthy, well-managed work environment with competent management. The adequate implementation of the principle of equal opportunities is one of the key components of this perception. It is important to note that research of recent years (Skučienė et al., 2015; Šumskienė, Jankauskaitė, & Levickaitė, 2014) have indicated that discrimination on the grounds of sex, discrimination against older persons in the labor market, and the issues of equal opportunities for employees with family responsibilities are the most common grounds for breaches of the principle of equal opportunities. The latter two criteria are relevant to almost every individual - in case it is a young employee - he or she most probably will need to balance between family and work responsibilities, and when this criterion is no longer applicable - most often that means that an employee has entered into the zone of being "older", as in the age classification proposed by the World Health Organization the category of people includes persons who are 45 years of age and older (WHO, 1993); according to International Organization for Economic Co-operation and Development (OECD), the age limit of 50 years is the one after which participation labor market indicators are starting to decline in many countries (OECD, 2006), also is important the fact that due to increasing life duration and steadily declining birth rates Lithuanian

society is aging rapidly. According to Eurostat statistics (Eurostat, 2020), this phenomenon is common to many European Union countries and this trend is likely to continue for the next few decades. That is why until 2060 about one-third of the EU citizens will be 65 years old or even older. In this research, we shall discuss more broadly as an example the field where management measures have the biggest potential to be implemented to ensure the implementation of the principle of equal opportunities – balancing work and family responsibilities

The work-life balance felt by employees is an important condition for experiencing their well-being. Such employees have less stress, greater motivation to work, and workability, better physical and mental health, greater job satisfaction (Jang, 2009). Until 2017, the idea of socially responsible management of the enterprises and implementation of practices ensuring the possibility to balance between family and work obligations (forming and maintaining positive attitudes towards employees seeking to exercise their rights granted by the state and related to family responsibilities, for example, paid incapacity to work due to the child's illness or additional rest days) were recognized more in a theoretical level and depended exclusively from the benevolence of a particular employer and his/her level of understanding of social responsibility. From 2017, Article 28 of the Labor Code of the Republic of Lithuania explicitly provides that the employer must take measures to assist the employee in fulfilling his or her family responsibilities. According to this norm, all requests of employees related to the fulfillment of family obligations must be considered by the employer and answered in a reasoned manner in writing. Besides, the employee's behavior and actions at work must be assessed by the employer to implement the principle of work-life balance practically and comprehensively. Thus, for example, in a situation where a worker raising a young child is late for work, the employer should assess the reasons for such a delay and should inspect whether the delay was due to certain family responsibilities, such as transporting the child to school and so on.

Neither Article 28 nor other norms specify what includes the employee's family responsibilities, therefore both parental responsibilities for children or spouse (for example, the possibility to care for a sick child or go to his or her holiday in kindergarten, school) and responsibilities for other close relatives (for example, the need to care for elderly parents or to care for another cohabiting relative should be understood as the family responsibilities of the worker. It should be noted that the Labor Code provides for certain benefits and more flexible working conditions for employees raising children. These benefits and guarantees for reconciling family and work responsibilities will be briefly discussed below.

Different provisions of the Labor Code foresee certain additional benefits and more flexible working conditions for employees raising children. Article 40 provides the possibility for employees having children to reduce their working hours simply upon the request of such an employee. The employer must also comply with the employee's request to work remotely at least one-fifth of the total working time requirement, in case such a request is presented by a pregnant employee, employees who have recently given birth or employees who are breastfeeding, employees raising a child under three years age and employees raising a child under fourteen as a single parent or raising a disabled child to eighteen years alone. The principle of reconciling family responsibilities and work is also understood in the context of the right to longer holiday periods and additional rest days established in Article 138. For example, employees raising a child

under the age of fourteen or a disabled child under the age of eighteen are granted twenty-five working days of annual leave (if working five days a week), in comparison with twenty-two standard terms of the holidays for other employees. Employees raising a disabled child under the age of 18 or two children under the age of twelve are entitled to one additional day of rest per month and those raising three or more children under the age of twelve are entitled to two additional days of rest per month by paying the employee his average wage. The queuing for annual leave at the workplace is also based on the priorities of employees with family responsibilities. Employees raising small children are often confronted with working and family responsibilities, as they face the difficulty of not being able to find pre-school for a child, as well as in summertime when pre-schools or primary education institutions are not working. In such cases, managerial decisions could be applicable, and there are quite a lot of institutions – employers (not only in a private sector), that implement innovative managerial decisions to create favorable and attractive working conditions for employees and could share good practice with others.

Some of the measures require investments, and therefore big corporations are those who can afford it. There are certain examples in Lithuania when private enterprises established children's rooms - a space in the workplace, intended for the care and education of employees' children during work (according to information gathered by the authors, there are about twenty private enterprises that have implemented this possibility). It is easier for employers to provide childcare services to retain qualified employees, attract more potential candidates for jobs, increase the productivity of the company, reduce the absence of employees. Interestingly, public sector institutions are at the forefront of implementing those measures, for example, in 2018 the room for children has been established in the Ministry of Social Security and Labor, and the Government Office. There are 2 workplaces and a children's play area in the room. Children's toys, books, and other means of educating and employing children were provided by the children's parents themselves.

However, some measures do not require financial investments, for example, settling flexible working time. Work flexibility and flexible working time arrangements facilitate the reconciliation of work and family life, as well as reduce stress and improve the microclimate. Setting a flexible work schedule does not require additional investment, but it is where the manager's principled approach to equal opportunities and creativity, innovation, and the ability to make non-standard decisions are revealed. Another innovative and very simply implemented managerial measure could be an appointment of a contact person (or a permanent group, a commission) to whom employees can safely tell about a problem related to the violation of equal opportunities at work. The contact person, at the request of the employee, depersonalizes the situation, and raises the issue, resolving it at the management level.

In summary, it is necessary to emphasize that the individualized approach to employees is decisive, it is necessary to consider individual circumstances. There is no one-size-fits-all solution - people of different ages working in different positions and different type of work may consider different working conditions as relevant



## Conclusions

Despite the recent qualitative changes in legal regulation and the development of the principle of equal opportunities from a purely theoretical concept to a real norm requiring factual implementation, real changes in labor relations are not happening as fast. Research shows that a large proportion of employees continue to experience discrimination in one form or another. The legislator has taken the initiative to establish obligations in the legal regulation for the employer to take specific measures to implement this principle. However, at the legislative level, it is not possible to describe all management methods and tools available to employers to implement the principle of equal opportunities properly and fully. Some of these measures (such as setting up children's rooms in the workplace) require some financial or other investments. Other measures (such as flexible working hours or the introduction of clear and transparent salary calculation standards) do not require financial investment but managerial decisions and expertise. Therefore, it is obvious that it is not possible to ensure the protection of the principle of equal opportunities only through legal regulation, this requires changes in the mentality of both society and employers, as well as employers' competencies of qualitatively another level, determined by the perception of social responsibility.

It is considered that the research analysis of the implementation of the principle of equal opportunities is relevant not only from a theoretical but also from a practical point of view, as the research conducted creates preconditions for a clearer understanding of the principle of equal opportunities, defining which phenomena fall within the scope of the prohibition of discrimination, also the research implicates improvement of the implementation mechanisms (legal and managerial), using the burden of proof shift methodology, testing, questionnaire. This article should be valuable both for employees and employers and their representatives, as well as the institutions implementing the principle of equal opportunities (Office of the Equal Opportunities Ombudsman, State Labor Inspectorate, courts). However, the research is limited to the scope of the principle of equal opportunities itself, more precisely, the content of this principle. The principle of equal opportunities includes non-discrimination on grounds such as race, nationality, language, origin, social status, age, sexual orientation, disability, ethnicity, such a broad content of the principle actualizes the need for more detailed and deeper analysis and other aspects of this principle than were discussed in this article.

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