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### THEORETICAL AND LEGAL PROBLEMS OF PERFORMANCE REVIEW OF CERTAIN CATEGORIES OF EMPLOYEES

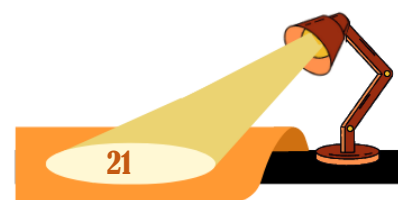
**Abstract.** The article is devoted to covering issues related to the concept and legal regulation of performance review of certain categories of employees in order to verify their suitability for the position held or the work performed. It is noted that the legal regulation of performance review is regulated by the Law of Ukraine On Professional Development of Employees No. 4312-VI of January 12, 2012. It is emphasized that employees who pass performance review have the opportunity to establish themselves as qualified, competent and proactive employees, and to ensure career growth.

Please note that dismissal of an employee due to the detected unsuitability for the position held or the work performed can take place only if an employer took measures to transfer an employee to another job, but an employee refused such a transfer or an employer did not have the possibility to transfer an employee with their consent to another job at the same enterprise.

Please note that the qualification mismatch is an evaluation category that depends on the specific circumstances of the case. It is emphasized that the decision of the Performance Review Board on unsuitability of an employee for the position held or the work performed must be justified. It is concluded that performance review should always be carried out within legal framework.

Not only the legal aspects of physician performance review are studied, but also the case law on this issue. It is noted that there are a number of problems in this area, both legal and organizational. A number of scientific publications on this issue have been studied. General conclusions have been made that the current legislation in this area requires reform, and proposals have been made to improve legal regulation in this area, which will allow improving the procedure for employee performance review, in particular, making it more effective.

**Keywords:** Constitution of Ukraine, unsuitability of an employee for the position held, employee performance review, professional competence, labor dispute,





protection of labor rights, professional development of employees, Performance Review Board, employee proficiency testing.

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## **ТЕОРЕТИКО - ПРАВОВІ ПРОБЛЕМИ АТЕСТАЦІЇ ОКРЕМИХ КАТЕГОРІЙ ПРАЦІВНИКІВ**

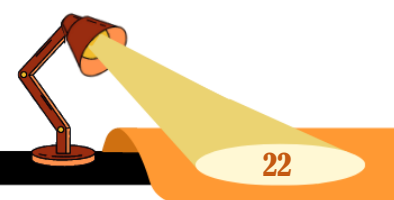
**Анотація.** Стаття присвячена висвітленню питань щодо поняття та правового регулювання проведення атестації окремих категорій працівників з метою перевірки відповідності займаній посаді або виконуваній роботі. Звертається увага, що правове регулювання проведення атестації регулюється Законом України «Про професійний розвиток працівників» від 12.02.2012 року №4312-VI. Підкреслюється, що працівники, які проходять атестацію, мають можливість зарекомендувати себе як кваліфіковані, компетентні й ініціативні співробітники.

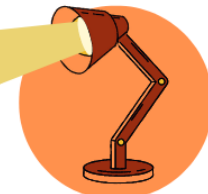
Звертається увага, що звільнення з роботи працівника у зв'язку з виявленою невідповідністю займаній посаді або виконуваній роботі може мати місце лише за умови, якщо роботодавець вживав заходів щодо переведення працівника на іншу роботу, але працівник відмовився від такого переведення або роботодавець не мав можливості перевести працівника за його згодою на іншу роботу на тому самому підприємстві.

Акцентується увага, що невідповідність кваліфікації займаній посаді - це оціночна категорія, яка залежить від конкретних обставин справи. Наголошується, що рішення атестаційної комісії про визнання працівника невідповідним займаній посаді або виконуваній роботі має бути обґрунтованим. Сформульовано висновок, що атестація завжди має бути проведена у правому полі.

Досліджуються не лише правові аспекти атестації лікарів та педагогічних працівників, а також судова практика з цього питання. Звертається увага, що у даному напрямку існує низка проблем, як правового, так і організаційного характеру. Досліджена низка наукових публікацій щодо цієї проблематики. Зроблені загальні висновки, що чинне законодавство у цій сфері потребує реформування, а також надані пропозиції щодо вдосконалення правового регулювання у цій сфері, які дозволять покращити процедуру атестації працівників та зроблять її більш ефективною.

**Ключові слова:** Конституція України, невідповідність працівника займаній посаді, атестація працівників, професійна компетенція, трудовий спір, захист трудових прав, професійний розвиток працівників, атестаційна комісія, підтвердження кваліфікації працівників.





**Problem statement.** In Ukraine, there is such a form of evaluation of employee competencies as performance review, which is aimed not only at compliance of an employee with a certain level of qualification, but also at checking business and professional qualities of each employee. One of the most pressing issues of our time is the dismissal of an employee due to the detected unsuitability for the position held or the work performed. It is worth emphasizing that today, unfortunately, employee performance review is far from perfect and that is why it requires further research in order to eliminate the challenges of its implementation.

**Analysis of recent studies and publications.** The problems of personnel performance evaluation, as well as performance review of certain categories of employees, were studied by such scientists as M. Albert, M. Woodcock, K.M. Plietsov, V.I. Shcherbyna, K.Yu. Melnyk, L.V. Balabanova, N.M. Vapniarchuk, O.A. Hryshnova, H.A. Dmytrenko, H.T. Zavynovska, O.V. Krushelnytska, V.Ya. Burak, K.Ye. Hryb, I.M. Yakushev, K.H. Harbuzuk, N.B. Bolotina, O.V. Stasiv, S. Tishchenkova and others. However, today, there are some legal problematic issues regarding performance review of certain categories of employees that require further scientific research.

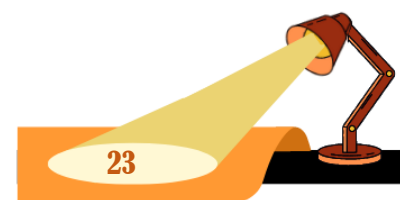
**Purpose of the study** is to study legal problems related to the main stages of organizing performance review of certain categories of employees, to determine problematic issues that arise during performance review, and to make proposals for improving legislation in this area.

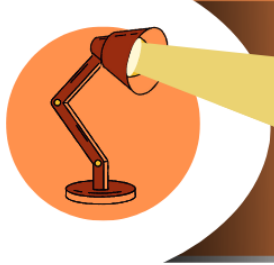
**Presentation of main material.** According to Article 43 of the Constitution of Ukraine, everyone has the right to work, which includes the opportunity to earn a living by work that they freely choose or freely agree to [1].

In today's conditions, labor activity occupies a special place in the structure of human social priorities. This is because work is not only the most important function for sustaining life, but also a fundamental need.

Thus, on January 12, 2012, the Verkhovna Rada adopted the Law of Ukraine On Professional Development of Employees, which regulates not only the conduct of performance review, but also stipulates that employee performance review is a procedure for evaluating compliance of professional level of employees with qualification requirements and job responsibilities, and evaluating their professional level [2]. Therefore, under this Law, Performance Review Board, based on all the data, decides on suitability or unsuitability of an employee for the position held or the work performed.

Thus, the Labor Code of Ukraine regulates the procedure for dismissal due to unsuitability of an employee for the position held or the work performed. Such dismissal is carried out under Clause 2 of Part 1 of Article 40 of the Labor Code of Ukraine only if it is impossible to transfer an employee with their consent to another job (Part 2 of Article 40 of the Labor Code of Ukraine). Therefore, the administration should take measures to transfer an employee to another job regardless of the presence





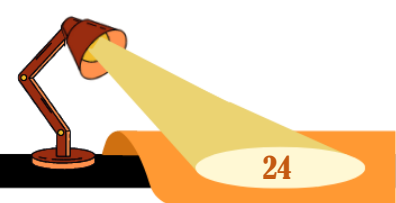
or absence of recommendations from the Performance Review Board. Such dismissal is carried out with the consent of the trade union committee (Article 43 of the Labor Code of Ukraine) and in compliance with other organizational and legal guarantees established by labor legislation for dismissal at the initiative of an employer [3].

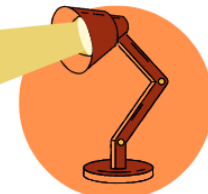
It should be noted that neither the above regulatory legal act, nor the Labor Code of Ukraine, nor other regulatory legal acts contain a definition of “unsuitability” category. The literature emphasizes that “unsuitability” category is, unfortunately, not defined by law and is therefore evaluative in nature, which allows for a subjective approach by an employer and may lead to violation of the labor rights of employees [4, p. 59].

Thus, some legal experts not only attempt to scientifically interpret the concept of “unsuitability of an employee for the position held or the work performed”, but also scientists in their scientific research identify essential signs of unsuitability of an employee for the position held or the work performed [5, p. 45]. Thus, K.M. Pliesnirov concludes that unsuitability of an employee for the position held or the work performed is the inability of an employee to continue to properly perform the labor function assigned to them, as established in the manner prescribed by law, due to insufficient qualifications or health condition of an employee, and this may be the ground for their dismissal according to the procedure established by law and with provision of additional benefits and guarantees. In turn, N.M. Vapniarchuk concludes that if it is detected that an employee is unsuitable for the position held or the work performed due to insufficient qualifications or health condition, an employer has the right to dismiss an employee under Clause 2 of Part 1 of Article 40 of the Labor Code of Ukraine, if as a result the latter cannot ensure the proper fulfillment of their job duties and when such an employee cannot be transferred with their consent to another job [6, pp. 159-166].

It should be noted that performance review is one of the ways to identify unsuitability of an employee for the position held. It is important to remember that dismissal on the grounds of unsuitability can only take place after proving the unsuitability of an employee for the position held or the work performed. It should be emphasized that burden of proof in this case rests with an employer. The proof of unsuitability of an employee for the position held or the work performed may include poor fulfillment of job duties due to insufficient qualifications, persistent decline in work capacity, conclusions of the Performance Review Board on recognizing an employee as unsuitable for the position they hold, etc.

The conclusions of the Performance Review Board on recognizing an employee as unsuitable for the position held or the work performed are not an absolute ground for dismissal, but serve as evidence of unsuitability of an employee for the position held or the work performed and are subject to thorough verification and evaluation in conjunction with other evidence in the case. This was the position expressed by the Supreme Court in its Resolution in case No. 297/3092/15-ц of May 30, 2018 [7].



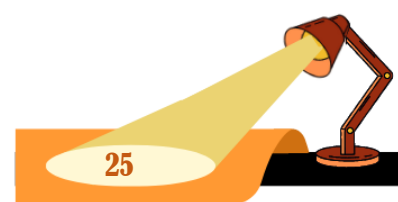


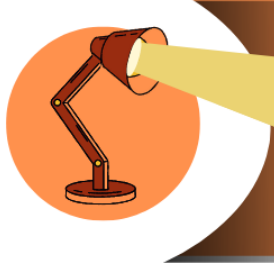
An issue that is extremely important at any time, and it is important not only for an employer, but also for an employee, is becoming increasingly widespread – the issue of dismissing employees if it is detected that an employee is unsuitable for the position held or the work performed due to insufficient qualifications. Since the performance review results serve as a reasonable ground for an employer to make important personnel decisions in order to avoid labor disputes between an employee and an employer, we consider it necessary to define the concept of “unsuitability of an employee for the position held or the work performed” at the legislative level. We propose to consider “unsuitability of an employee for the position held or the work performed” as the lack of qualifications (knowledge, skills, experience, special training) necessary for an employee to fulfill their job duties in a high-quality manner, or the inability to properly fulfill the assigned work due to qualifications or health conditions.

It should be noted that Article 12 of the Law of Ukraine On Professional Development of Employees provides for categories of employees who are not subject to performance review under any circumstances. These include employees who have been in their position for less than one year; pregnant women; persons caring for a child under the age of three or a child with a disability, a person with a disability since childhood; single mothers or single fathers with children under the age of fourteen; minors, as well as persons working part-time. At the same time, the Law or collective agreement may establish other categories of employees who are not subject to performance review [2].

It should be noted that Section III “Employee Performance Review” of this Law stipulates that employers may, but are not obliged to, conduct employee performance review, and that the categories of employees subject to performance review and frequency of such performance reviews must be determined by collective agreement [2]. Therefore, employee performance review is not a mandatory procedure as a general rule, since it is conducted only if an employer decides to exercise their right to do so. It should be noted that if no collective agreement has been concluded, the categories of employees subject to performance review, as well as the terms and schedule for its conduct, are determined by an employer with mandatory approval of this decision by the elected body of the primary trade union organization.

Please note that the procedure for conducting performance review for certain categories of employees is regulated by numerous legislative and other legal acts. Thus, the following is basic regulatory legal acts that not only regulate the work of teaching staff in the period between performance reviews, but also the procedure for conducting performance review: Laws of Ukraine On Education, On Complete General Secondary Education, On Preschool Education, as well as Resolution of the Cabinet of Ministers of Ukraine On Some Issues of Advanced Training of Pedagogical and Scientific-Pedagogical Workers No. 800 of August 21, 2018, order of the Ministry of Education

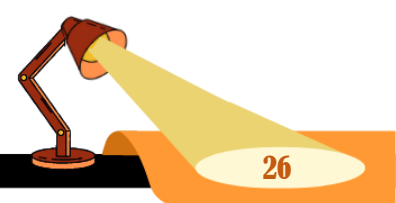


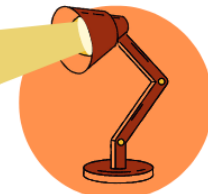


and Science of Ukraine On Approval of the Professional Standard “Teacher of a Secondary Education Institution” No. 1225 of August 29, 2024, order of the Ministry of Education and Science of Ukraine On Approval of the Regulations on Teacher Performance Review No. 805 of September 9, 2022. It should be noted that to date, order of the Ministry of Education and Science of Ukraine No. 1277 of September 10, 2024 approved a new version of the Regulations on Teacher Performance Review, approved by order of the Ministry of Education and Science of Ukraine No. 805 of September 9, 2022 (came into force on November 5, 2024). The emphasis should also be placed on the fact that teacher performance review is not only a thorough, but also a comprehensive evaluation of their teaching activities, which determines the suitability of a teacher for the position they hold, their level of qualification, and assigns them a qualification category and teaching title.

Before focusing on the legal aspects of physician performance review, it should be noted that physician performance review is aimed at improving the activities of health facilities of all forms of ownership to further improve the provision of medical care to the population [8]. The main task of physician performance review is to determine the level of professional training of physicians and the possibility of further use of specialists, and their advanced training.

Based on the analysis of case law regarding the dismissal of employees in connection with the detected unsuitability for the position held, namely, disagreement of an employee with the results of their performance review with subsequent dismissal, we suggest focusing on the fact that such disputes are mostly resolved by the court not always in favor of the employee. We believe that such case law once again confirms that performance review really allows an employer to learn more about the productivity of each of the employees. Thus, the plaintiff appealed to the court with a claim to the hospital to reinstate him at the position of physician, to recover his average earnings for the time of forced absenteeism and to obtain compensation for moral damage in the amount of UAH 10000. The plaintiff supported his claims by the fact that he worked in positions of cardiologist, and physician at functional diagnostics office. By order No. 123-K, on the fourth day upon expiration of the Certificate of Specialist Physician and the end of his stay on sick leave, he was dismissed from his position by the defendant due to the detected discrepancy between his position and the work performed due to insufficient qualifications under Clause 2 of Part 1 of Article 40 of the Labor Code of Ukraine. The ground for his dismissal was the resolution of the chief physician upon expiration of the Certificate of Specialist Physician in the specialty “Cardiology”. The plaintiff considers his dismissal illegal and refers to the relevant provisions of the laws that at that time regulated disputed legal relations. In addition, the plaintiff draws the attention of the court to the violation by the defendant of many regulations on passing performance review and believes that inconsistency with the work performed is considered to be the inability to properly fulfill the assigned work due to insufficient

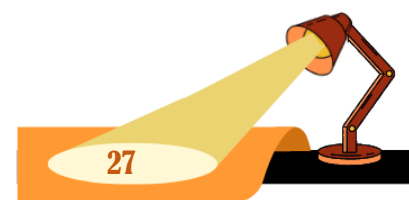


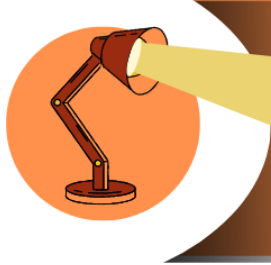


qualifications, and there is no such inability on his part, as a result of which it is impossible to identify this case with the guilty labor obligation. The claim also draws attention to the fact that the head of the facility could have made a decision on his dismissal only after the conclusion of the Performance Review Board and his refusal to transfer. Since the procedure for his dismissal was violated, the plaintiff asks to reinstate him as a specialist physician in the specialty of “cardiologist”.

In the statement of defense, the defendant asked to dismiss the claim, referring to the fact that the plaintiff was aware of the validity period of his Certificate. In addition, Plan for Physician Advanced Training and Performance Review for 2016 was developed, according to which the plaintiff should pass advanced training courses. After all, persons who are assigned a qualification category pass performance review to confirm it at least once every five years. But the plaintiff refused the facility's offer for the advanced training. Therefore, upon expiration of his Certificate, the plaintiff could not fulfill his duties, as he did not confirm his qualifications and had no grounds for exemption from performance review, and the staffing table of the facility did not provide for the position of a resident in cardiology. Therefore, it was not possible to transfer to this position. Therefore, it was not possible to transfer to this position. The defendant also insists on applying the statute of limitations to claims of the plaintiff, in particular, he believes that the plaintiff missed the time limits for applying to the court, which are defined in Part 1 of Article 233 of the Labor Code of Ukraine. Having examined the submitted evidence, the court concluded that the plaintiff in his claim did not give grounds for restoring the time limit for applying to the court. After all, the time limit for applying to the court cannot be absolute. Therefore, it is the missing the time limit for applying to the court with a request for reinstatement that is the basis for refusing the plaintiff to satisfy his claim. Although in its decision the court drew attention to several facts. In particular, the defendant provided the court with a Plan for Physician Advanced Training and Performance Review for 2016, according to which the name of the plaintiff is included among the persons to determine knowledge of skills with the assignment (confirmation) of the required title. The court received no information on establishing a specific schedule for conducting performance review and bringing it to the attention of the plaintiff. In addition, analysis of the evidence submitted provides the court with sufficient information that order No. 123-K on dismissal of the plaintiff due to the detected unsuitability for the position held and the work performed was issued in violation of Part 2 of Article 40 of the Labor Code of Ukraine, in particular the defendant did not provide evidence of the impossibility of transferring the plaintiff to another job, did not receive his refusal to transfer to another job in the proper manner, and did not resolve the issue of transferring the plaintiff to the position of resident [9].

It is necessary to emphasize that activity dimension of employee performance review should not be underestimated. Analysis of relevant case law once again

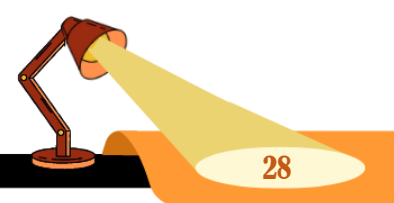


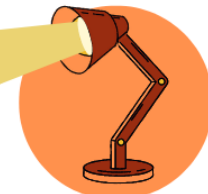


confirms how important it is to pay attention not only to the time limits for applying to the court to protect one's rights and to monitor the frequency of performance reviews, but also, more importantly, to the wording of the claims. After all, the correctness of their wording determines whether the case has a chance of successful resolution.

Please note that case law on the dismissal of employees unsuitable for the position held or the work performed confirms the fact that, in practice, there are quite often cases when the inability to fulfill official duties is not proved by proper, sufficient and permissible evidence, and the decision of the Performance Review Board is unjustified. Undoubtedly, one cannot ignore the Supreme Court Resolution in case No. 622/36/15-ц of October 9, 2019, where the plaintiff filed a claim against municipal enterprise Zolochiv Central Raion Hospital to reinstate her as head nurse, to cancel the dismissal order, to recover her average earnings for the time of forced absenteeism, and to obtain compensation for moral damage in the amount of UAH 20000 in connection with illegal dismissal. Since the employer was aware of her lack of a valid certificate of assignment (confirmation) of a qualification category at the time of hiring, she considers her dismissal on the specified grounds to be illegal. In support of her claim, she also noted that on the date of hiring, the validity of her certificate of passing performance review and assigning qualification category had expired, so she was immediately included in the schedule for advanced training for junior medical specialists. She was unable to pass advanced training courses earlier than specified in the schedule. That is why the plaintiff was dismissed from her position under Clause 2 of Part 2 of Article 40 of the Labor Code of Ukraine, namely due to the detected unsuitability of an employee for the position held or the work performed as a result of insufficient qualifications and the inability to transfer her to another position (lack of vacant position). In addition, the plaintiff stated that an employee is dismissed on the grounds provided for in Clause 2 of Part 2 of Article 40 of the Labor Code of Ukraine if it is impossible to transfer an employee with their consent to another job. Contrary to the requirements of labor legislation, she was not offered vacant positions, although such positions were available.

By decision of Zolochiv Raion Court of Kharkiv Region of February 23, 2017, the claim was partially satisfied. The plaintiff was reinstated as a nurse, her average earnings for the period of forced absenteeism were recovered in her favor, and UAH 2000 was recovered in her favor as compensation for moral damage. The appeal was dismissed by a court order of Kharkiv Regional Court of Appeal. In 2018, the case was referred to the Supreme Court. Thus, on October 9, 2019, in case No. 622/36/15-ц, the Supreme Court expressed the position that if an employee was hired without educational document required by qualification requirements, they cannot be dismissed due to the absence of such a document under Clause 2 of Part 2 of Article 40 of the Labor Code of Ukraine, because an employer was aware of this discrepancy earlier when hiring an employee. The Supreme Court also concluded that since the plaintiff

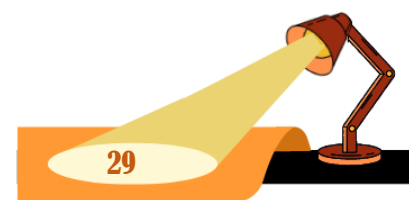


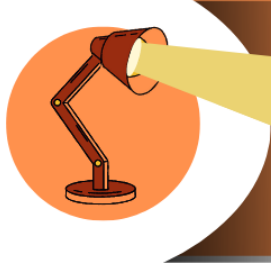


was not offered any vacant positions upon dismissal, availability of which at the enterprise was not denied by the defendant, the conclusion of the courts of previous instances regarding violation of the procedure for dismissing an employee established by labor legislation under Clause 2 of Part 2 of Article 40 of the Labor Code of Ukraine, which is permitted only if it is impossible to transfer an employee to another job, is correct. Thus, the Supreme Court ruled that the contested court decisions should remain unchanged [10].

It should be noted that at the beginning of martial law, physician performance review was suspended by order of the Ministry of Health of Ukraine No. 426 of March 7, 2022 (no longer in force). Later, the Ministry of Health of Ukraine issued a new order No. 1415 of August 4, 2022 (no longer in force), which suspended performance review for the duration of martial law not only for physicians, but also for pharmacists, professionals with higher non-medical education working in the healthcare sector, junior specialists with medical education, and pharmacy technicians. However, on November 17, 2023, order of the Ministry of Health of Ukraine No. 1555 of August 31, 2023 came into force. This order currently establishes the extension of the validity of qualification category certificates expired during the war for the entire period of martial law and for three months after its termination or cancellation. It should be emphasized that physician performance review is not conducted during martial law. Moreover, physician performance review is not conducted for another 6 months after its termination or cancellation.

It is important to highlight some developments, in particular, on May 29, 2025, a new Procedure for Healthcare Worker Performance Review, approved by the order of the Ministry of Health No. 650 of April 16, 2025, came into force. It should be noted that the document introduces an updated performance review model, in particular, instead of five separate regulations, there will be a single nomenclature of specialties and a common performance review procedure for all healthcare professionals and specialists (physicians, nurses, pharmacists, rehabilitation specialists, professionals with higher non-medical education, and others). The key development is the introduction of a single document – Certificate of assignment/confirmation of professional qualification, which will be valid throughout a person's professional career. It should be noted that Order No. 650 stipulates that healthcare worker performance review will be resumed six months after the termination or cancellation of martial law. If the validity period of existing specialist certificates or qualification category certificates expires during martial law, it shall be extended for up to six months from the date of termination or cancellation of martial law. The relevant order provides for a personal educational portfolio (hereinafter referred to as PEP) and the recording of continuing professional development points (hereinafter referred to as CPD) for employees specified in Clause 2 of the Resolution of the Cabinet of Ministers of Ukraine No. 725 of July 14, 2021, that shall commence within 10 working days from





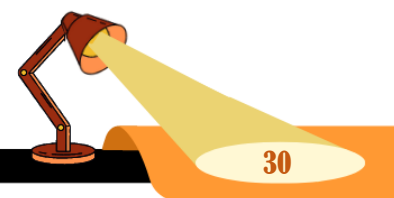
the date of entry into force of this order, and the annual review of PEP based on CPD points shall commence in 2026. It is expected that the annual points will be calculated by June 30, 2025 according to criteria set out in Annex 4 to the Procedure for Physician Performance Review approved by the order of the Ministry of Health No. 446 of February 22, 2019, and from July 1, 2025 –according to criteria set out in the Annex to Order No. 650. It should be noted that according to the specified Procedure, an annual minimum is provided for most healthcare workers: physicians, pharmacists, and others – 50 CPD points, and for nurses, pharmacist assistants, and others – 30 points. In addition, another key feature is that regular performance review will now be conducted at the primary place of work, namely in health facilities, and not by central and regional Performance Review Boards. It will be conducted once every five years and will be aimed at verifying compliance with CPD requirements. Order No. 650 also provides for extraordinary performance review. It will be conducted by a Board created by order of the head of the health facility in case of violations or failure to fulfill duties [8].

It is necessary to separately mention the position of S. Tishchenkova, who not only provides her own synthetic definition of employee performance review, but also believes that only an approach to performance review as an institution of labor law and a special type of labor relations can reveal the labor law essence of performance review [11, pp. 139-142]. We would like to draw your attention to the fact that set of rules governing evaluation of employee competencies does not constitute an independent legal institution of labor law, as these rules belong mainly to the institution of the employment agreement. We consider it expedient to allocate a separate institution of employee competencies in the system of national labor legislation. In our opinion, not only regulations on probation, but also competitive selection of employees, employee performance review, and some other methods of evaluating employee competencies should be considered part of this institution.

**Conclusions.** Considering the above, it can be concluded that performance review is one of the ways to detect that an employee is unsuitable for the position held. We believe that performance reviews should be conducted not only to periodically check the personal qualities of employees for compliance with their competencies, but also to increase employee interest in continuous professional development, as well as to improve personal qualities, competencies, and results of the work performed.

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