

18 November 2015

*To all our clients and friends*

## **INFORMATION MEMORANDUM**

### **Amendments to the Kazakhstan's Legislation in Connection with Joining the World Trade Organization**

Law of the Republic of Kazakhstan (hereinafter, the "RK") "On Introduction of Amendments into Certain Legislative Acts of the Republic of Kazakhstan in Connection with Joining the World Trade Organization" (hereinafter, the "Law") was adopted on 27 October 2015 and put into effect starting 9 November 2015.

The Law enactment entailed introduction of amendments into the RK Civil Code, Code on People's Health and Healthcare System, RK Law on Population Employment, RK Law on Population Migration, RK Law on Trademarks, Service Marks and Appellations of Origin, RK Law on Subsoil and Subsoil Use and other RK normative legal acts.

In this Information Memorandum we have presented brief analysis of those amendments introduced into certain RK normative legal acts in connection with the Law adoption, which we deem most important.

The amendments under consideration are generally intended to bring the norms of the national legislation in line with the norms of agreements of the World Trade Organization (hereinafter, the "WTO").

#### **1. Amendments Related to Labor Legislation**

##### *1.1 Intra-corporate transfer*

The Law introduces amendments affecting foreign labor engagement procedure in the framework of intra-corporate transfer.

From now on, understood as the intra-corporate transfer is a temporary (for the term determined by an employment agreement, but not for more than three years, with the right to extend for one year) transfer of a foreigner or a stateless person carrying out labor activities in the position of an executive, manager or specialist in a legal entity organized in the territory of WTO member state and located and acting outside the RK territory to branches, subsidiaries or representative offices of such legal entity organized in the RK territory in accordance with the Kazakhstan's legislation.

Thus, in the framework of intra-corporate transfer it is possible to involve employees of certain categories (executives, managers and specialists) only of the companies organized in the territory of WTO member states, who will be sent to their Kazakhstan structural subdivisions or subsidiaries.

##### *1.2 Foreign labor engagement quota*

According to the general rule, foreign labor engagement permits are issued in the RK within the limits of quota defined by the Government for a respective year.

According to the introduced amendments, foreign labor is to be engaged in the framework of intra-corporate transfer subject to the authorized agency's permit, but beyond quota.



### *1.3 Ratio between the Kazakh and foreign employees*

According to the Foreign Labor Engagement Rules<sup>1</sup>, work permits are issued to employers subject to observation of a certain ratio between the number of local and foreign employees (with some exceptions). According to the Foreign Labor Engagement Rules, this requirement remains in effect until the moment Kazakhstan joins the WTO.

However, the amendments introduced by the Law do not reflect the issue of cancellation of the requirement on the percentage ratio between the Kazakh and foreign employees after the Kazakhstan's joining the WTO. On the contrary, the Law on Population Migration introduces a provision on intra-corporate transfer of managers and specialists to be conducted subject to observation of the percentage ratio between the number of foreign and Kazakh employees. The only exception from such regulation will include executives of organizations carrying out activities in the RK territory.

For example, the RK Law on Subsoil and Subsoil Use establishes an ultimate threshold in respect of the percentage ratio between the number of foreign and Kazakh employees, which is not to exceed 25% of the total number of managers and specialists in each respective category; starting 1 January 2022 such threshold is not to exceed 50%.

### *1.4 Employer's and employee's obligations in the framework of intra-corporate transfer*

According to the Law, apart from necessity to obtain foreign labor engagement permit an additional obligation to notify employment agency within ten-day period of the moment foreign employees enter the Kazakhstan territory is now imposed on employers. A notice is to contain information on the number of engaged employees, name of organization and country from which they are transferred, educational level, qualification, profession and work experience, as well as the term of carrying out labor activities.

An employee carrying out labor activities in the RK in the framework of intra-corporate transfer is imposed with an obligation to leave the country after expiration of the term of an employment agreement, which is not to exceed in total four years.

## **2. Amendments to Subsoil and Subsoil Use Legislation**

Certain amendments affected the RK Law No. 291-IV "On Subsoil and Subsoil Use" dated 24 June 2010. This time the introduced amendments improve the position of a number of subsoil users.

### *2.1 Changes in requirements in respect of local content and acquisition of goods, work and services when performing subsoil use operations*

Obligations in respect of local content in goods are excluded for the newly concluded contracts. Requirements to local content remain in effect in respect of work, services and staff. The minimum amount of local content in work and services announced by the state under the conditions of holding a competitive tender for subsoil use right and contained in a notice regarding holding an auction is not to exceed 50%.

A requirement on mandatory use of equipment, materials and finished products manufactured in the RK, as well as on mandatory acquisition of the Kazakhstan manufacturers' goods, is excluded from legislation.

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<sup>1</sup> Decree No. 45 of the RK Government "On Approval of the Rules for Defining Quota for Foreign Labor Engagement in the RK" dated 13 January 2012.

The above legislation improvements do not cover contracts concluded prior to 1 January 2015. The legal regime secured in such contracts remains in effect in respect of them until expiration of the term thereof or until 1 January 2021, whichever comes first.

In case of changing the term of a contract concluded prior to 1 January 2015, it is to be supplemented with amendments providing for exclusion of subsoil user's obligations on local content in goods and obligations in respect of acquisition of the Kazakhstan manufacturers' goods and compliance with the requirements associated therewith.

Acquisition by a subsoil user and its contractors of work and services from the Kazakhstan manufacturers, provided that they comply with requirements of a design document and RK legislation on technical regulation, remains to be a mandatory condition for exercising subsoil use right.

### *2.2 New definition of the "Kazakhstan manufacturer of work and services"*

Concurrently with amendment of the requirements to local content in goods, work and services, the definition of the "Kazakhstan manufacturer of work and services" has also been changed. From now on, understood as such are individual entrepreneurs and/or legal entities organized under the RK laws and located in its territory, using at least 95% of the RK citizens in the total number of employees without regard to the number of managers and specialists carrying out labor activities in the RK territory in the framework of intra-corporate transfer in accordance with the legislation on employment and migration of population.

The number of such managers and specialists is not to exceed 25%, and starting 1 January 2022 – 50%, of the total number of managers and specialists in each respective category.

### *2.3 Requirement in respect of local staff engagement*

The legislation requirement on absolute preference of local staff has been changed. A subsoil user is now obligated to give preference to local staff in the course of subsoil use operations, except for managers and specialists in case of engagement of which in the framework of intra-corporate transfer in accordance with the RK legislation on employment and migration of population the number of the RK citizens is to be not less than 50% of the total number of employees in each respective category.

## **3. Amendments to Legislation on Intellectual Property**

### *3.1 Toughening of liability for violation of rights to trademarks*

The amendments introduced by the Law obligate a person unlawfully using a trademark or a confusingly similar designation to destroy the goods or goods packing containing a trademark, appellations of origin or a confusingly similar designation. The same requirements are established in respect of the goods confiscated in connection with committing an administrative violation in the sphere of illegal use of a trademark, service mark or appellations of origin<sup>2</sup>.

The goods destruction was previously stipulated only in cases where it was impossible to delete the image of illegally used trademark from the goods or packing.

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<sup>2</sup> RK Law No. 456-I "On Trademarks, Service Marks and Appellations of Origin" dated 26 July 1999 (Article 44).

### *3.2 Additional grounds for issuing compulsory non-exclusive license*

The term of non-use of an industrial safety item by a patent holder has been reduced from 4 to 3 years, upon expiration of which any interested person may file to court an application for the compulsory issuance of a non-exclusive license.

A compulsory non-exclusive license is a permit issued by a competent agency without the patent holder's consent to use a patented invention for commercial purposes to a person who is not a patent holder.

The Law provides for additional grounds for issuing a compulsory non-exclusive license, specifically:

- a necessity to ensure national security or protection of people's health;
- abuse by a patent holder of its exclusive rights, assistance in, or non-prevention from, the abuse of such exclusive rights by another person.

Any compulsory non-exclusive license is to be primarily issued to satisfy the needs of the RK domestic market, except for the cases where such license is sought for a medicine or a medicine manufacture process for the purposes of exporting a patented medicine or a medicine manufactured using a patented process, to the territory which lacks or does not have enough manufacturing facilities, in accordance with the international agreements ratified by the RK.

## **4. Prohibition to Disclose and Use Confidential Information by Authorized Agencies in the Sphere of Medicines Circulation**

The state expert organization and governmental agency in the sphere of circulation of medicines, medical products and medical equipment are now explicitly prohibited to disclose and use for commercial purposes confidential information contained in an application for state registration, materials on medicine expert examination and master file of a medicine containing new chemical substances, without the applicant's consent within six years of the date of state registration of such medicine.

The provisions prohibiting the disclosure and use of confidential information for commercial purposes do not cover individuals or legal entities that have been issued a compulsory license to use a medicine in accordance with the RK Patent Law, as well as the use, manufacture, import, export or distribution of medicines for non-commercial purposes.

The Law specifies the grounds excluding the prohibition to disclose and use confidential information for commercial purposes, including in cases as follows: a) supplies of a medicine are insufficient to satisfy the consumer demand within 12 months of the date of registration in the RK; b) it is necessary to protect people's health in case of emergency situations or in order to ensure national security; and c) detection of actions violating the requirements of the RK legislation in the competition protection sphere<sup>3</sup>.

Should you have any additional questions in connection with this Information Memorandum, we would be happy to provide you with more detailed information.

Best regards,  
AEQUITAS Law Firm

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<sup>3</sup> RK Code "On People's Health and Healthcare System" (Article 71).