UNIFIED ACCOUNTING SYSTEM OF EMPLOYMENT CONTRACTS AND OTHER IMPORTANT AMENDMENTS IN THE LABOR LEGISLATION

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During the state of emergency in effect in Kazakhstan, the Parliament forced the adoption of the Law which disappointed the HR services of employers.
Many discussions and disputes concerning this Law have taken place long ago, and there was a hope that the quarantine would freeze or delay its adoption.

IMPORTANT!

The key point of this Law causing the community's concern is the introduction of the **employers' obligation to introduce information about employment contracts into the Unified Accounting System of Employment Contracts** ("UASEC").

Beside this, the law contains many other amendments, whether useful, disputable or neutral.

We would like to focus on certain amendments in the labor legislation, which may be important for employers and employees.

UASEC

Employers must use UASEC [www.enbek.kz] for the introduction of information concerning:

- conclusion of an employment contract;
- amendments introduced into an employment contract with respect to the parties' details, labor function (position, specialty, occupation, qualification), place of work performance, term of employment contract, work commencement date, date of conclusion and the employment contract number; and
- termination of an employment contract.

The Rules for submission and obtainment of information about employment contracts from UASEC will be determined by the Ministry of Labor and Social Protection of Population of Kazakhstan.

The law does not provide for any transition period. Information must be introduced once the said Rules enter into legal force.

The law does not obligate to introduce "historical data" into the system. However, we do not exclude that the Rules will obligate employers to introduce information about the current employment contracts.

Information from UASEC is not a document confirming labor activities of an employee in accordance with Article 35 of the Labor Code.

⚠ Introduction of information into the system is associated with a range of technical, practical and legal complexities and nuances, which will affect most employers.

e-ECs and e-acts of employers

The carte blanche for electronic employment contracts and employer's acts has been received. However, practical implementation of this helpful option requires as follows:

- Employee and employer must have EDS of NCA of Kazakhstan.

  ⚠ *Internal corporate digital signature and digital handwritten signature cannot be applied to e-ECs!*

- Use of a respective "shell program" allowing to identify and use EDS of NCA of Kazakhstan for these purposes.
- Evaluation of potential risks for e-document.

  ⚠ *Please check the real, not declared, confidentiality and security reliability; settle disputable issues of making an employee familiar with e-acts of employer; elaborate on other practical complexities and ambiguous issues.*

The institute of payment for unmotivated dismissal was cancelled

Article 50.3 was excluded from the Labor Code. This means that it is no longer possible to apply the employment contract condition on the employer's right to cancel the employment contract paying a compensation based on the ground "agreement of parties" without agreeing the date of such cancellation with an employee.

The reason for such law maker's decision is numerous labor disputes associated with the application of the excluded rule. The disputes were mainly caused by the fact that the employees were dissatisfied by the level of compensation (which was determined, as a rule, by an employer in the model form of an employment contract and rarely exceeded 3 base salaries) or by the fact of such sudden dismissal.

⚠ Exclusion of this rule may give rise to:

- dismissals of employees based on a "negative Article" without paying any compensation;
- number of official dismissals; and
- "requests" from bad faith employees with whom the good faith companies would like to amicably terminate relations "by agreement."

Production and living conditions

An employer must provide employees with equal production and living conditions without any discrimination.

Production and living conditions are the labor conditions required for the employee's stay at a work place, including in the event of rotation-based work regime, which encompass provision of sanitary facilities and amenities and conditions for rest and meals.

The potential of "equation" based on this rule is wide enough. This rule contemplates equality of all employees of an organization, regardless of the position held, work performed and place (region) of performing work.

⚠ In the event of positive social orientation, this rule is likely to strengthen the activities of trade unions. We do not exclude significant growth of individual and collective labor disputes. The issues may relate to the dimensions of rooms and furnishings at rotational villages, sanitary facilities and amenities, number of "stars" of hotels during business trips and other "production and living" details.

⚠ The situation is worsened for employers by administrative liability for "inequality" – the fine under Article 90.1 of the Administrative Code is 30 MCI (small-scale business entities and non-profit organizations), 60 MCI (medium-scale business entities) and 100 MCI (large-scale business entities).

Labor disputes

The elements of labor disputes that do not require pretrial settlement with a conciliation board were changed. From now on, the exception covers the labor disputes of:

- microbusiness entities (small-scale business entities whose average annual number of employees ≤ 15 persons or the average annual income ≤ 30,000 MCI);
- non-profit organizations with the number of employees ≤ 15 persons;
- domestic workers;
- executive bodies of legal entities (sole or a member or a head of a collective body); and
- in some other instances.

Labor disputes of other categories of employees (including former) and their employers must be considered, prior to applying to court, by a constantly functioning conciliation board composed of the representatives of employees and employer.

Conciliation board

An employer *must* establish a conciliation board. This obligation, however, is not accompanied by the employees' obligation to elect their representatives for the participation in such conciliation board.

It is obvious that in the absence of the employees' representatives an employer has no *legal mechanisms* for the establishment of a conciliation board.

The quantitative composition of a conciliation board, its operating procedure, content and procedure for issuing resolutions by a conciliation board, its term of powers, and the issue of involving a mediator *are still to be determined in a written agreement between an employer and the employees' representatives or in a collective agreement*.

This means that prior to conclusion of a special agreement or a collective agreement between an employer and the employees' representatives on these issues the employer will not be able to establish a conciliation board by its act of volition. An employer is not authorized to itself determine the quantitative composition and term of powers of a conciliation board.

⚠ Despite these legal inconsistences, in practice the overall "blame" for a failure to establish a conciliation board may be largely put on employers.

Therefore, we recommend the employers who have not yet established a conciliation board to immediately take measures to make the employees elect their representatives, sign an agreement with them and establish a conciliation board. This will require a significant block of thoroughly elaborated documents on election of the employees' representatives, establishment and activities of a conciliation board.

Employees' representatives

In addition to trade unions and elective representatives of employees "in pure form," the Law introduced the "mixed" representation option. The employees can now be represented by:

- *trade unions and their associations* (please note – represented by their bodies) – key option;
- *elective representatives* – in case of absence of a trade union within an organization;
- *both a trade union and elective representatives*, if the employees' membership in trade unions is < ½ of the staff number of employees.

Payment for overnight on holidays and days off

In the event night work coincides with a holiday or a day off, payment must be made separately for the night hours and hours of holidays and days off.

Dismissal of persons using job positions for personal gain

The Labor Code now contains a new ground for the employment contract cancellation in connection with loss of confidence – Article 52.1.13 includes an *employee using his/her job position for personal interests or for the interests of third parties* contrary to the employers' interests in exchange for material or other benefits for oneself or other persons.

Furthermore, this ground was removed from the procedure for imposing disciplinary sanctions.

Cancellation of an employment contract based on the ground stipulated by Article 52.1.13 of the Labor Code must be confirmed by an act of internal investigation containing the substantiation that confirms the commitment of wrongful acts or omissions of an employee. The internal investigation procedure is established by an employer's act.

Sending correspondence

Certain documents defined by the Code (e.g. order on termination of an employment contract, imposition of a disciplinary sanction, etc.) should have been previously sent by a letter with advice of delivery. From now on, **by post** by a registered letter with advice of delivery.

⚠ If sending a document by a courier service, please make sure that the courier company enjoys the status of a "postal operator" and provides the services of forwarding a registered letter with advice of delivery in accordance with the acts of the Universal Postal Union and the Post Law of Kazakhstan. Otherwise, it is necessary to use the services of KazPost JSC.

It is worth mentioning that, in addition to the above characteristics of posting, it is reasonable to send all legal correspondence after executing the note of contents at post.

Increased penalty

Penalty for late settlements with an employee (including in the event of termination of an employment contract) = 1.25 of the refinancing rate of National Bank of Kazakhstan.

Forced military service

In the event an employee is called up for compulsory military service or for military gatherings, his/her employment contract must not be terminated (as it was before). Such employee retains his/her work place.

Discipline on rotation

An important and helpful amendment was introduced for employers of rotation employees. The employee's obligation to comply with regulations, while being on rotation, as established by an employer at a facility and in places specifically equipped for living (rotation villages) is now legalized.

Safety in the event of remote work

The Law introduced the rule that the procedure for compliance with requirements on occupational safety and labor protection and on safe performance of labor duties by a remotely working employee is determined by an employer's act.

This amendment is commented as an important "feature" of remote work. At the same time, occupational safety and labor protection instructions must be adopted by an employer and trainings must be conducted not only for "remote" work: this is a mandatory requirement for all types of work without any exceptions.

⚠ At the same time, after the introduction of this rule , special attention should be paid to the adoption of the required instructions and other employer's acts with respect to the employees involved in remote work (which must include the *procedure* for their *compliance* with requirements on occupational safety and labor protection and safe performance of labor duties), especially with a view to the current quarantine regime.

Employment contract with the executive body

Important amendments were introduced with respect to relations with the executive body. Please see Article 140.2 of the Labor Code. Previously, the first and the second indented paragraphs of Article 140.2 related solely to a special situation where the same person acted as both the *sole* founder (participant, shareholder) and the *sole* executive body. Given the situation, an employment contract with him/her ("with himself/herself") was not concluded; and changes in the composition of participants (shareholders) logically entailed conclusion of an employment contract with him/her in accordance with the general procedure.

The sense of the second indented paragraph now drastically differs. It relates not only to the above situation, but also to all cases of changes in the composition of founders (participants, shareholders), and not only to the sole, but to all members of a collective executive body.

> *In the event of changes in the composition of founders (participants, shareholders) a **new** employment contract shall be concluded with the **head of the executive body, members of the collective executive body** or labor relations with **them** shall be terminated based on a resolution of the founders, owner of the legal entity's property or (body) authorized by the founders, entity owner or authorized body of the legal entity.*

⚠ Such regulation twist gives rise to perplexity… and numerous unjustified problems for business, especially for joint stock companies where shareholders may change one after another and very often (even several times a day).

? From now on, each change in the composition of participants or shareholders requires conclusion of new employment contracts with all members of the executive body. So, what should be done with the old employment contract? Should it be terminated by terminating the powers of the executive body, its "dismissal" (with "zero setting" of the leave and settlements with respect to all payments)? And if no new employment contract is concluded, does this mean that the conditions of the old one will terminate? This is only a part of the arising issues...

Payment for forced absence

In the event of forced absence (in case of reinstatement at work) payable will be not the *average* salary, but "just" the employee's salary. 6-month limitation is still in force.

Liability of the general contractor

The general contractor is now liable for the total coordination of work on compliance with occupational safety and labor protection requirements concurrently by several organizations (≥ 2) in the course of operations at a construction site.

Miscellaneous

Other important amendments affected:

- secondment;
- suspension from work;

- EC termination for the term of substitution of a temporarily absent employee;
- EC termination in the event an employee refuses to continue labor relations;
- termination of additional work (sideline job, substitution, expansion of service areas);
- labor of women (including in the course of pregnancy);
- leaves;
- work of rotation employees and shift men;
- working hours of disabled persons;
- employer's obligations in the sphere of occupational safety and labor protection;
- accidents;
- attestation of work places as to labor conditions;
- conciliation board's operating procedure;
- status and powers of communities (unions, associations) of employers;
- and other.

CHECK PLAN: WHAT AN EMPLOYER SHOULD DO?

Æ Key actions to be taken by employers in connection with the amendments in the labor legislation:

- To bring model forms of employment contracts (general, shift, rotation-based work, contracts for the term of substitution of a temporarily absent employee, etc.) into compliance with the amendments.
- To amend the current employment contracts (if employees agree).
- To ensure the presence of the employees' representatives, and conclude agreements with them on the conciliation board's operating procedure and establish such conciliation board by an employer's act (in case of absence, if necessary).
- To amend the current agreements on the conciliation board's operating procedure.
- To amend the internal labor regulations, regulations on payment for labor and leaves, and other acts of an employer.
- To adopt the new required employer's acts (e.g. on the issues of internal investigation procedure, rotation employee regulations, use of EDS, introduction of data into EASEC, remote work, etc.).
- To amend the employees' job descriptions.
- To form occupational safety and labor protection system at a proper level required by legislation.
- To conduct an inspection as to compliance with requirements on equality of production and living conditions and to exclude discrimination.
- General contractors should strengthen contracts with subcontractors in order for them to ensure occupational safety and labor protection and include the required protection mechanisms.
- To ensure adjustment of other business processes of companies.

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

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