

# Azerbaijan

## Introduction

All labor issues and, in particular, termination and discrimination matters, in Azerbaijan are mainly regulated by the Labor Code of the Republic of Azerbaijan, effective July 1, 1999 (the “Labor Code”). Other significant legislation in this area includes the laws On Employment, On Trade Unions and On Social Insurance.

Additionally, Azerbaijan is a signatory to a number of international conventions adopted under the auspices of the International Labor Organization (ILO). International conventions to which Azerbaijan is a party form part of Azerbaijan’s legal system and prevail over national (domestic) laws in case of conflict.

The ILO conventions, ratified by Azerbaijan, most relevant to employment discrimination, are the Equal Remuneration Convention (1951), the Discrimination (Employment and Occupation) Convention (1958), and the Employment Policy Convention (1964). As of June 2008, Azerbaijan has not acceded to ILO’s Termination of Employment Convention (1982) and, therefore, employment termination issues are regulated by domestic law, particularly the Labor Code.

## Termination of Employment

Termination of employment is arguably the most complicated process in Azerbaijan’s labor law, with comprehensive guidelines aimed predominantly at protection of employees. Certain socially vulnerable categories of staff may only be dismissed on an employer’s initiative in exceptional circumstances.

The Labor Code sets forth minimum standards for both employer and employee, which they must follow strictly. Therefore, unlike other jurisdictions and areas of law (such as civil law), the parties’ ability to agree to additional grounds for termination is significantly limited. Conceptually, the principles governing Azerbaijani labor law are fundamentally different from those in civil law where parties have more freedom in determining the terms and conditions of the contract. For this reason and to avoid confusion, the term “agreement” is preferred for employment relations because the term “contract” is predominantly used in civil law context.

In general, an employment agreement may be terminated:

- On the employer's initiative on the grounds set out in the Labor Code (described in more detail below);
- On the employee's initiative;
- On the mutual consent of the parties, provided that the employment agreement included termination on this basis;
- On the expiry of a fixed term employment agreement, unless the employment relationship effectively continues for more than a week after expiration and neither party expresses a desire to discontinue the relationship;
- On an employee's refusal to accept or the employer's inability to provide terms of employment satisfactory to both parties following a legitimate change in working conditions intended to improve productivity;
- For managerial personnel (directors, their deputies, chief account and heads of key departments with managerial responsibilities only) due to a change in ownership of the enterprise;
- Due to circumstances beyond the control of the parties; or
- Due to circumstances determined by the parties in the employment agreement but only to the extent permitted by law and in line with the minimum standards.

By law, this list of grounds for termination of employment is exhaustive. Many of these are further divided into more detailed sub-categories, creating a comprehensive system of legal rules for different types of termination. The restrictions examined hereafter are, however, limited to the restrictions imposed on termination on an employers' initiative only.

## **Restrictions On Employers**

As for termination of an employment agreement on an employer's initiative, the law requires employers to (i) strictly comply with grounds for termination; (ii) diligently follow the termination procedure; and (iii) provide a justification. By comparison, when regulating termination on an employee's initiative, the Labor Code speaks only of the "procedure" for termination (Article 69), although certain grounds for termination are listed in the same Article 69, but only for specific circumstances.

As mentioned above, the Labor Code prohibits termination of an employment agreement with certain employees even in cases of gross violation of employment duties. Pursuant to Article 79 of the Labor Code, except for termination in case of liquidation of an enterprise or expiry of the term of a fixed term employment agreement, the employment agreement may not be terminated with the following employees or in the following situations:

- With pregnant women and women who have children under the age of three (this provision covers both naturally born and legally adopted children);
- With employees whose sole source of income comes from the enterprise where they work and who are raising children younger than school age (this provision also covers both naturally born and legally adopted children);
- With employees who have temporarily lost their employability (due, for example, to an injury not causing permanent disability);
- For participating in trade unions or political parties; or
- During the employee's absence due to vacation, business trips or participation in collective bargaining.

Under the Labor Code, an employment agreement may only be terminated on the employer's initiative due to:

- (i) Liquidation of the enterprise;
- (ii) Staff redundancy (downsizing);
- (iii) The employee's failure to meet the specified skill levels as confirmed by a decision of a skills assessment body; and
- (iv) The employee's failure to perform work duties or obligations under the employment agreement including specific cases of gross violation as set out in the Labor Code.

### Liquidation Of An Enterprise

The Labor Code does not define what liquidation of an enterprise means. Under the Civil Code of the Republic of Azerbaijan (the "Civil Code"), an enterprise is deemed "wound up" when it ceases to exist without a legal successor. Such liquidation is normally registered with relevant state authorities. Consequently, employment

agreements may not be terminated on this ground in the event of privatization of an enterprise (in which case the newly incorporated enterprise will, by law, be the legal successor) or as a result of a change in corporate legal structure (for example, conversion from a limited liability company into a joint stock company). In the latter case, the employment agreement may be terminated due to downsizing, if such downsizing is justified.

As briefly mentioned above, in the event of a change of ownership (e.g., via merger or acquisition), only those employment agreements with the director(s) of the enterprise, their deputies, chief account and heads of key departments with managerial responsibilities may be terminated.

Finally, an employer must provide at least three months' notice to the relevant trade union prior to the expected liquidation, and the parties must consult with each other to mitigate the negative impact of termination of employment.

## Downsizing

Downsizing may result, for example, from an employer's decision to reduce costs or from merger of two different entities sharing similar overheads.

Generally, an employer is free to determine the members of staff who are subject to redundancy based on their qualification levels and past performance. Certain employees, however, have priority rights to remain employed during any redundancy. These are: members of families of *shahids* (martyrs – civilians killed in a 1990 military operation against protesters of the Soviet regime as well as people who died or are missing in the fight for the freedom, sovereignty and territorial integrity of Azerbaijan); war veterans; spouses of soldiers and officers; individuals raising two or more children under the age of 16; individuals who were disabled or who contracted work-related diseases at that enterprise; employees with the status of refugee or displaced person; other employees as provided in collective bargaining contracts and employment agreements.

Furthermore, before proceeding with a downsizing, an employer must consider the possibility of transferring the affected employees to a different job within the same enterprise in line with their professional qualifications.

In the case of downsizing, the following process must be followed:

- (i) The employer must give three months' notice to any relevant trade union, indicating the categories of staff scheduled for redundancy;

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- (ii) The employer must also give at least two-months' prior notice to the employment authorities indicating the profession, specialization and salary of the employees to be terminated due to downsizing;
  - (iii) Finally, the employer must notify the affected employees at least two months prior to the expected termination of the employment agreement (this notice period may be substituted by two months' average salary if agreed by the parties);
  - (iv) During the two months' notice period, the affected employee must be given free time (at least one paid day off per week) to look for another job;
  - (v) All effected employees must be paid a one-off severance amount of not less than an average monthly salary, including benefits and bonuses;
  - (vi) Upon completion of the steps outlined above, the employer must issue a final order (written notice) of termination to the relevant trade union, which must review the entire redundancy process and make a determination as to whether the process was adequately followed and whether the employer may proceed with the termination.
  - (vii) If a dismissed person remains unemployed for another two months following termination of the employment agreement, as confirmed by a letter of the relevant state unemployment agency, he or she must be paid not less than two month's average monthly salary.

### Termination Following A Skills Assessment

Under the Labor Code, an employer may appoint a skills assessment body, comprised of experienced staff members and trade union representatives, to perform a skills appraisal of employees. A skills assessment process is designed to review employee skills and knowledge *in general*, and their professional suitability to perform assigned duties or fitness for a particular position. A skills assessment, therefore, is not a forum for reviewing specific instances of violation of employment duties, such reviews being part of the disciplinary process.

An employee may not be assessed more than once in three years. Certain staff members, such as those working in a given position for less than a year, may not be assessed at all. Additionally, a person confirmed as suitable at least three times for his or her assigned duties at the same enterprise may not be re-assessed for the same position.

A decision of an assessment body, e.g., about a person's unsuitability for a particular job, is not mandatory for an employer. Such decision, however, is a legitimate ground for termination of an employment agreement unless there is a possibility (e.g., vacancy) at an enterprise to transfer the employee to another job in line with his or her skill-base.

### Failure To Duly Perform Work Duties

Failure to duly perform or violating employment duties may be in two forms: (i) a gross violation of employment duties in the specific cases set out in the Labor Code; or (ii) other (presumably less serious) violations of employment duties and the terms of the employment agreement.

The cases of gross violation are expressly set out in the Labor Code (Article 72):

- Absence from work for an entire day without justifiable cause, except for cases of personal illness or illness or death of close relatives;
- Reporting to work under the influence of alcohol, narcotics or other intoxicating substances;
- Causing financial damage to an owner of the enterprise as a result of the employee's culpable act or omission;
- Causing injury or death to fellow employees, due to failure to adhere to safety rules which results from an employee's culpable act or omission;
- Deliberate disclosure of sensitive (confidential) information or failure to observe rules designed to protect those;
- Causing serious damage to the lawful interests of the employer, enterprise or enterprise owner resulting from gross mistakes or illegal acts committed during working hours;
- Repeated violation of work duties during six months after disciplinary sanctions have already been imposed; or
- Commission of a crime or administrative offense in the workplace and during working hours.

In cases of gross violation, an employer has the right to terminate the employment agreement immediately. Other cases of less serious violation could involve any

breach of labor law or the employment agreement, which could give rise to disciplinary action, including termination if termination is proportionate to the gravity of breach.

### **A Potential Additional Ground For Termination**

The Labor Code contains a rather controversial and much criticized provision in Article 57.4, which could potentially be interpreted as giving the right to terminate an employment agreement despite the fact that this article does not appear in any other provision of the Labor Code dealing with termination. Article 57 deals with the terms of employment in general and changes to such terms that can only be made by mutual consent. Article 57.4, however, provides that, if an employer is unable (presumably for justifiable reasons) to provide an employee with a pre-agreed job, the employer must offer an alternative position matching the employee's professional qualifications. In these circumstances, an employee may only refuse to accept the new job if it does not pay the same average salary as was initially offered for the previous position. Therefore, it would seem that, if an employer is unable to pay the same average salary for the alternative position offered, the employment agreement could be terminated. There is at least one court case where the courts implemented the provision in this manner.

### **Notice Provisions / Consequences Of A Failure To Provide The Required Notice**

As emphasized above, strict adherence, not only to the grounds for termination but also to the termination procedures, is necessary for a termination to be valid. From this standpoint, any failure to comply with the notice requirements may render the termination void. The notice requirements applicable in case of downsizing and liquidation of an enterprise have been fully outlined above. The Labor Code does not provide for any prior notice in case of termination for cause, i.e., for failure to perform work duties, including gross violation of labor law or the employment agreement.

Finally, if a probationary period was set out in an employment agreement (which may not exceed three months), either party may terminate the agreement during the probationary period by serving at least three days' written notice.

## **Termination Indemnities**

In cases of termination due to a change in working conditions, loss of employability due to permanent disability or when an employee is summoned for military service, compensation of not less than two months' average salary must be paid by an employer.

When terminating the employment of managerial personnel due to a change in ownership of the enterprise, such managerial personnel must be paid at least three times their average monthly salary. Compensation in the same amount is payable to the heirs of a deceased employee.

When terminating for redundancy, severance pay and other payments are due as described above.

When terminating for cause, no compensation is due to the employee, other than for the time actually worked, if employment was terminated for a culpable or wrongful act or omission at work during working hours. An employer may under certain circumstances hold an employee materially (financially) liable for the unlawful act (or omission) that caused actual damage or loss to the employer.

## **Laws On Separation Agreements, Waivers And Releases**

As mentioned above, an agreement on termination of employment is only valid if such termination ground was provided in the employment agreement itself. In practice, the parties often fail to include such additional termination ground, i.e., termination based on mutual consent, in an employment agreement. This can be overcome by a subsequent amendment, which can be combined into a single amendment/termination document to reduce paperwork.

The minimum employment standards set out in the law (minimum salary, work hours, vacation entitlements, etc.) are mandatory statutory requirements that cannot be altered by the parties. This interpretation is based on a long history of labor law practice as well as a plain reading of various provisions of the Labor Code, specifically Article 43.3. Additionally, as stated above, unlike civil law, labor law does not give parties latitude in determining the terms and conditions of an employment agreement. Therefore, any waiver or release of claim, even if properly documented in written form, would be void. It appears, however, that this rule would not impact the parties' right to waive their claim in a civil law context (e.g., when dealing with compensation for actual monetary damage incurred in

the course of employment). Under the Civil Code, the waiver of a claim is only valid if and to the extent that such waiver does not impact the rights of an interested third party.

## **Litigation Considerations**

The vast majority of wrongful termination court claims involve violation of work duties. To ensure the fullest protection for an employer, the latter should retain proof of the violation (preferably in written form).

If a particular case involves a less serious violation of employment duties, the employer's burden of proof is more onerous. There is no clear guideline in the Labor Code as to what might constitute a (less serious) violation of employment duties. Based on a plain reading of the Labor Code as well as a review of court cases, an employer is advised to (i) keep employees informed of all pertinent rules and regulations; (ii) make such rules and regulations part of the employment agreement where possible; (iii) properly document the fact of the violation; (iv) keep track of all past violations; and (v) do all other things expected of a reasonable and prudent business person.

## **Employment Discrimination**

The Constitution of Azerbaijan provides in Article 25 that every person shall have equal rights and freedoms irrespective of race, nationality, religion, sex, origin, property status, social position, convictions, political party, trade union organization and social unity affiliation.

The Labor Code "categorically" prohibits in Article 16 any form of discrimination at any stage of employment. Apart from the traditional listing of specific grounds for discrimination (such as race, age, gender, etc.), the Labor Code expands the discrimination rules by excluding all forms of preference or privilege not connected with professional skills or the employee's performance. Strictly speaking, however, Article 16 is not applicable to job applicants who would, by definition, fall outside the scope of the Labor Code. Therefore, as to regulation of discrimination in hiring employees, one must additionally look at other laws of general application, such as the Constitution. The Labor Code further clarifies that certain benefits given to socially vulnerable employees (employees under the age of 18, women, etc.) are not to be considered as discrimination.

## **Sexual Harassment**

The Labor Code was amended, effective from November 27, 2007, to include new provisions relating to sexual harassment. In accordance with these revisions, an employer is obligated to take all necessary measures to ensure protection of employees from sexual harassment. Additional steps relating to enhancement of such measures and to the improvement of staff awareness in sexual harassment may also be included in collective contracts.

As a general rule, an employee is required to give 30 days' notice when terminating his or her employment agreement. The latest revisions to the Labor Code, however, provide an employee with the right to immediately terminate his or her employment agreement in the case of sexual harassment. Further, an employer is financially liable for damages resulting from sexual harassment.

Finally, the Criminal Code of Azerbaijan contains a rather broad provision relating to sexual harassment via blackmail or using other forms of influence, which can be interpreted as applying to manager-employee relationship. Such acts would be deemed a crime subject to up to three years of imprisonment.