BAKER & McKENZIE

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New Labor Code

Kazakhstan Adopts New Labor Code

Kazakhstan has adopted a New Labor Code,[1] which entered into force on 1 January 2016. While it generally follows the Old Labor Code,[2] which is now no longer in effect, the New Labor Code introduces a number of significant changes governing the relationship between employers and employees. The most noteworthy changes are summarized below.

Employer's obligation to negotiate and execute a collective agreement

The New Labor Code introduces a new employer obligation regarding collective agreements. It states that an employer must *"carry out collective negotiations under the procedure specified in this Code [and] enter into a collective agreement".*[3]

The procedure for starting negotiations and entering into a collective agreement is described in Article 156. It says among other things that: *"the party which receives notification from the other side with an offer to start negotiations has to consider it and enter into negotiations within 10 days…."* Thus, the New Labor Code does not oblige the employer to initiate such negotiations**.** Rather, the New Labor Code simply confirms the employer's obligation to enter into negotiations regarding a collective agreement if the employees initiate such negotiations**;** but it then goes on to make clear that now the employer actually must execute a collective agreement as a result of those negotiations.

Non-competition agreement now allowed

The New Labor Code allows an employer and an employee to execute a non-competition agreement. Such an agreement may obligate the employee not to take actions that could damage the interests of the employer and, possibly, to compensate the employer for any such damage.[4] While the scope of this provision is unclear, it appears that such an obligation may apply only during the

1 Labor Code of the Republic of Kazakhstan No. 414-V ЗРК dated 23 November 2015 (the "**New Labor Code**").

2 Labor Code of the Republic of Kazakhstan No. 251-III ЗРК dated 15 May 2007 (the "**Old Labor Code**").

3 Article 23.2.9.

4 Article 29.

employment relationship and that the employee may not be prevented from competing following termination of his/her employment. Prior to the New Labor Code, Kazakhstani legislation was interpreted as not permitting non-competition agreements at anytime.

Transfer of employee to an affiliated employer

The New Labor Code introduces the concept of a "transfer" of an employee to an affiliate of his employer.[5] However, it is not a true "transfer" since it requires termination of the employment relationship with the original employer, followed by commencement of a new employment relationship with the new employer.

This "transfer to an affiliated employer" provision merely simplifies the process otherwise in effect, by now allowing the employee to apply for termination by the original employer for the specific purpose of allowing him/her to work for the new employer. If the new employer then confirms to the original employer that it will employ the employee, the termination (by the original employer) and the new employment (by the new employer) can be coordinated to occur simultaneously. If the new employer does not confirm that it will hire the employee, then he/she will not be terminated by the original employer. This avoids any uncertainty over whether the employee will actually be employed by the new employer, as well as any gap in employment. Further, any obligation of the original employer to give prior notice to a trade union or the local labor authorities of its intent to terminate the employee will not be applicable because this process will be initiated upon the employee's application.

Fixed term agreements may be extended for 2 additional fixed terms

Under both the Old and the New Labor Codes, a fixed term employment agreement must be executed for a term of not less than 1 year (with certain exceptions). But under the Old Labor Code, any extension of a fixed term agreement following expiration of its term was required to be for an indefinite term. Under the New Labor Code,[6] it is possible to extend a fixed term agreement twice, with each extension being for a fixed term of not less than 1 year (for a total of 3 fixed terms). Following expiration of the final fixed term, any extension must be for an indefinite term.

Probationary period changes

Under both the Old and the New Labor Codes, an employee may be hired subject to a probationary period. Under the Old Labor Code, the maximum probationary period for any employee was 3 months. Under the New Labor Code, the probationary period may be up to 6

5 Article 55.

6 Article 30.

months for the head of a legal entity (and his/her deputies), the chief accountant (and his/her deputies) and the head of a branch or representative office.[7]

Under the Old Labor Code, it was impossible to terminate a probationary employee for unsatisfactory performance earlier than 7 days before the end of the probationary period. Under the New Labor Code,[8] a probationary employee whose performance is unsatisfactory may be terminated anytime during the probationary period.

Termination of employment upon payment of pre-agreed compensation

For many employers, one of the most significant changes of the new Labor Code may be its provision[9] allowing for immediate termination of employment for any reason, upon payment of a fixed amount of compensation specified in the employment agreement.[10] Subject to payment of that amount, the employer may unilaterally terminate an employee, without prior notice, for any reason. This provision applies to all categories of employees including "protected employees" (pregnant women, single parents, etc.). The New Labor Code does not specify a minimum amount of such agreed-upon compensation. However, we recommend setting the amount of compensation generally at not less than one month's salary.

Termination due to worsening of economic condition of the employer

Under the New Labor Code,[11] employment may be terminated due to "*a reduction in the volume of manufacturing, works or services that led to a worsening of economic condition of the employer."* [12] The following 3 conditions must be met:

(1) the relevant structural division should be closed;

(2) there must be no opportunity to transfer the employee to another job;

(3) notice should be given to the employee's representatives at least 1 month in advance.

7 Article 36.2.

8 Article 37.1.

9 Article 50.3.

10 The Old Labor Code allowed including an obligation to pay at least 12 months' salary in order to immediately terminate an employee without cause.

11 Article 52.1.3.

12 Reduction in the volume of manufacturing, works or services may also be a ground for changing of labor conditions of employees, and further termination if the employees refuse to such change (Article 46 of the New Labor Code).

An employee terminated on this ground must be paid 2 months' salary.

Termination due to absence from work for 1 month

In an effort to combat prolonged absenteeism, the New Labor Code permits an employee's absence from work for more than 1 month (without having given any reason to the employer) to be a ground for his/her termination.[13] The employer must send the employee a letter (via post) requesting an explanation for the absence. If no response is received within 10 calendar days, the employee may be terminated. No termination payment is due.

Termination of pension age employees

The New Labor Code allows an employer to terminate an employee after he/she reaches the pension age.[14] The employee must be notified at least 1 month in advance and must be paid compensation in an amount set forth in the employment agreement or the collective agreement or in the act of the employer. While the law does not specify a minimum amount of compensation, we suggest setting at least one month's salary compensation. This ground for termination may be applied retroactively to employees who reached the pension age before the New Labor Code came into effect on 1 January 2016.

Obligatory out-of-court dispute resolution procedure

All labor-related disputes are now subject to an obligatory out-of-court procedure (the "mediation committee procedure") before either party may file a claim to the court.[15] The parties must form a mediation committee consisting of representatives of both the employer and the employee(s). The committee should make a decision within 15 days working days. The limitation term for filing an application to a mediation committee is 1 month for disputes regarding reinstatement and 1 year for all other labor-related disputes. A party can file a court claim only after the committee's decision is issued.

The "mediation committee procedure" does not apply to disputes involving a small enterprise or the CEO of a legal entity.

Secondment

The New Labor Code introduces the regulation of secondment.[16]

13 Article 52.1.25.

14 Article 52.1.24.

15 Article 159.

16 Article 40.

Although the practice of seconding employees is not uncommon in Kazakhstan, the Old Labor Code was silent about it.[17]

The New Labor Code states that secondment is possible where an employee is seconded from a company which directly or indirectly owns shares of the receiving company and vice versa. (The Code does not specify a minimum percentage of shares which must be owned). Further, it requires that the terms and conditions of a secondment should be regulated by a 3-party agreement (between the employee, the seconding entity and the receiving entity).

Because the New Labor Code governs all labor relations within Kazakhstan, this provision applies to secondments by a foreign seconding entity to a receiving entity in Kazakhstan, as well as secondments between Kazakhstani parties.

By limiting secondments to entities having a direct or indirect ownership relationship, the New Labor Code appears to prohibit secondments among unrelated parties and secondments among affiliates within the same group of companies but where the affiliates do not have an ownership relationship (e.g., "sister" companies). Secondment arrangements which do not meet these tests can be invalidated by the court upon the application of an interested party (including the labor authorities). There is not yet any established practice on how local authorities will interpret this new secondment provision and how they will apply it to existing secondment arrangements.

Payment of Wages in Local Currency

The New Labor Code makes a slight change to the wording requiring payments of wages to be in local currency. This change has raised a lot of interest among employers, but upon close examination it does not appear to significantly change the prior situation. Specifically, the Old Labor Code[18] required salaries to be paid in local currency. The New Labor Code requires salaries to be set and paid in local currency.[19] Thus, salaries can no longer be set in foreign currency and then paid in local currency. They now must be set in local currency, but there is no prohibition on indexing a specified local currency salary to changes in the exchange rate between local currency and foreign currency.[20]

The above change made by the New Labor Code should not affect the practice of non-resident employers (branches or representative offices of foreign companies) of setting and paying salaries in

17 Kazakhstan's tax legislation, however, has specifically addressed secondments for a number of years.

18 Article 134 of the Old Labor Code.

19 Article 113.

20 Article 157.2.2 of the New Labor Code specifically mentions indexation in the context of collective agreements.

foreign currency for their employees (both local citizens and foreigners) or the practice of local employers of setting and paying salaries in foreign currency for their foreign employees. This practice is based on provisions of the Law on Currency permitting salary payment between a resident and a non-resident to be made in foreign currency, as well as a 2008 letter of the National Bank of Kazakhstan interpreting the Law on Currency.[21]

Deletion of Inflation Indexation Clause

The Old Labor Code contained a controversial clause[22] which dealt with the procedure for indexing salaries based on the level of inflation. But it did not obligate an employer to make an annual inflation adjustment to salaries (unless required under labor or collective agreements or an internal policy). Nevertheless, many employees claimed the right to an annual inflation adjustment based on this clause, which led to disputes. Apparently to make it clear that there is no obligation on the part of an employer to index salaries based on inflation, this clause has been deleted in the New Labor Code.

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21 Articles 14 and 15 of the Law "On Currency Regulation and Currency Supervision" dated 13 June 2005 (as amended) (the "**Law on Currency**").

22 Article 124 of the Old Labor Code.