

HR – SUPPORT Practice review



«GRATA International» Law Firm

HR – SUPPORT. Practice Review.

Dear Partners,

This offer is a new '**HR-SUPPORT. Practice Review**' section, where we will tell you about the most interesting and challenging cases that our clients encountered in the course of employment relations, as well as about some missteps of the employers.

We genuinely hope that learning about others' mistakes along with our comments and analysis will help you to understand the specific situations, make the right decisions, and thereby prevent potential negative consequences.

CASE No. 1

(Rotational-Based Work. Determining an hourly rate)

Background

In the course of the state labour inspection, it was found that the company applying the rotation-based work misdetermined the hourly rates and, thereby, underpaid salaries to the employees. Thus, the company was obliged to make a corresponding additional payment to the staff under rotational employment for the entire inspection period, as well as to pay penalties for delays. Given that, the company requested us to verify the legitimacy of the state inspector's order (calculation of the hourly rate used by the company).

Having analysed the relevant documents, we have found that:

1. The company used the following calculation to set the hourly rate:

$$\text{Hourly rate} = \text{Salary} : 180,$$

where 180 is the number of working hours per a rotational shift

$$180 = 15 \times 12,$$

where 15 is the duration of the rotation shift in calendar days, and 12 is the number of hours per one rotational shift

For example:

Employee's salary is 190,000 tenge

$$\text{Hourly rate} = 190,000 : 180 = 1,056 \text{ tenge}$$

2. The state inspector relied on the following calculation to define the hourly rate:

Hourly rate = Salary : X,

where X is the standard working hours as per the Balance¹ of Working Hours for a 5-day, 8-hour working week per the corresponding month

For example:

Employee's salary is 190,000 tenge

Given that:

- Hourly rate in **January 2020** = 190,000 : **160 = 1,188 tenge**,
where 160 is the number of working hours in January according to the Balance of Working Hours in 2020 for a 5-day, 8-hour working week;
- Hourly rate in **February 2020** = 190,000 : **160 = 1,188 tenge**,
where 160 is the number of working hours in February according to the Balance of Working Hours in 2020 for a 5-day, 8-hour working week;
- Hourly rate in **March 2020** = 190,000 : **144 = 1,319 tenge**,
where 144 is the number of working hours in March according to the Balance of Working Hours for a 5-day, 8-hour working week.

Having analysed the above calculations we have concluded that the **calculation of the hourly rate used by the company is incorrect for the following reasons:**

- 1) pursuant to Article 135.5 of the Labour Code of the Republic of Kazakhstan, a record of cumulative hours worked is established for the rotational-based work;
- 2) pursuant to Article 106.2 of the Labour Code of the Republic of Kazakhstan, when recording cumulative hours worked, salaries are calculated at the hourly rate **based on the tariff rate (official salary) and the monthly standard of working hours in accordance with the Balance of Working Hours for the corresponding calendar year.**

In other words, given the above, the company to calculate the hourly rate, should have **divided the amount of the employee's salary by the standard working hours stipulated by the Balance of Working Hours for a given month as prescribed by the state inspector, rather than by the planned number of working hours per a rotational shift.**

Considering the aforementioned, the state inspector's order was legitimate. In addition to the order execution, the company will also have to pay the corresponding taxes and a penalty for late tax payments.

Also we would like to clarify, that the method of calculating of the hourly rate provided for in Article 106.2 of the Labour Code of the Republic of Kazakhstan contemplates that the hourly rate cannot be constant for rotational employees; since the balance of working hours that appears in the calculation changes every month which causes a change in the number of the hourly rate. Accordingly, the employment agreement with rotational employees shall include the method for calculating the hourly rate rather than its fixed amount.

In this case, company's ignorance of working time standards stipulated by the Balance of Working Time may lead to another violation related to the incorrect determination of overtime hours followed by a recalculation of their initial payment.

¹ Balance of working time is a table showing the breakdown of the standard working time by months for the corresponding calendar year in view of working days (hours) given the 36-hour, 40-hour working weeks (five and six-days week respectively).

As a summary, we would like to note that **the rotational-based work is the most peculiar and complex working pattern, misapplication thereof will inevitably entail large financial losses for companies.** We therefore recommend our clients to be very attentive to the content of employment agreements with the rotational staff and the regulations on rotational-based work.

We would also recommend employers that apply the rotational-based work pattern to organize special training for HR managers, accountants, and lawyers covering all aspects of the rotational-based work (developing a schedule, calculating salaries, accounting for working hours, etc.).

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