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Kazakhstan: COVID-19. FAQ on Employment Issues

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1. If the employer plans to transfer employees to remote work, is it possible to do so only by issuing the relevant order?

In this case, an order or written instruction of the employer is not sufficient, since remote work entails changes to the terms of the employment contract. Such changes shall be only made in the form of an addendum to the employment contract signed by both parties.

The procedure for introducing changes to the employment contract is regulated by Article 33.2 of the Labour Code of the Republic of Kazakhstan (hereinafter – the “Labour Code”). Article 33 provides that along with the addendum, the employee should also receive a notice. The employee has the right to inform the employer of his/her consent or otherwise to the transfer within five (5) business days after the receipt of the notice.

Please note that, since the transfer to remote work is initiated by employers in view of the temporary emergency case, it is crucial to stipulate within the addendum that the employee is transferred to remote work for the period of the state of emergency (quarantine).

Recently, we analysed a situation where the employer had transferred employees to remote work based only on the instructions e-mailed to employees. However, having learned all the requirements for transferring to remote work, the employer realised that he would have had to invite all the employees to the office for them to sign the documents (the employees do not have the EDS), which may be unsafe for the employees’ wellbeing considering the raise in the number of coronavirus infection cases.

Upon examining all the circumstances and the surrounding risks, we advised the employer to send the notices and addenda to the employees via e-mail. We have also suggested emphasising that the employer finds it unsafe for the employees to actually signing the documents at the office, so they were kindly invited to mention the following in their replies:

- 1) Confirmation of the receipt of all the documents; and if the employee agrees to the proposed transfer
- 2) Confirmation that the employee agrees with all the conditions of the transfer specified in the addendum; and
- 3) Consent to signing the original addendum upon arrival at the office after the state of emergency (quarantine) ceases.

We understand that the proposed option does not exclude all the risks where, for example, an employee refuses to sign the addendum after quarantine. However, given the emergency and the employees’ personal interest in working remotely, as well as the appropriately drafted addendum, we assume the risk is minimal.

2. *Shall the employer make any additional payments to employees when transferring them to remote work? What other features the employer in case of remote work shall consider?*

Yes, additional payments might be required. Pursuant to Article 138.2 of the Labour Code, the employer shall reimburse the employees if they use their own means of communication while working remotely. The amount of the reimbursement shall be determined based on the agreement between parties and indicated in the addendum to the employment contract.

When transferring employees to remote work, the employer must clearly explain within the addendum how the employee's working hours will be recorded and supervised. For instance, the addendum may provide that the employee agree to be online during working hours, answer all the emails/phone calls of the manager and colleagues during the working day.

Please note that the current edition of the Labour Code does not provide for any mechanism allowing the employer to control the safety and labour protection during the remote work of an employee at his/her place of residence. This, however, does not mean that the employer shall not take any measures in this situation. The employer is advised to develop special safety and labour protection instructions that reflect the requirements to workplace, lighting, etc., as well as the requirement that the employee shall only perform work directly related to his/her job duties during the working day. This will eliminate or reduce the risk of the employer's guilt, if something happens to the employee his/her during working hours.

3. *If, due to the operation specifics, is it impossible for the employer to transfer all the employees to remote work to prevent the spreading of the coronavirus? Does this impose any additional obligations on the employer with respect to employees who continue working in the office?*

According to Article 90.2 of the Code of the Republic of Kazakhstan 'On Health of the People and Health Care System of the Republic of Kazakhstan', the employer must carry out sanitary-anti-epidemic and sanitary-preventive measures. However, Article 148 of this Code, which establishes the mechanism and elements of the obligation, obliges the employer to temporarily suspend from work only the employees with chronic infectious and parasitic diseases in the order specified by the Labour Code. Other obligations are regulated by the competent authorities for sanitary and epidemiological welfare of the population.

However, the aforementioned does not mean that employers shall ignore the risks of coronavirus infection. The Ministry of Health of the Republic of Kazakhstan, based on the recommendations of the World Health Organisation, has developed an appropriate coronavirus prevention checklist, which shall be followed by all citizens of the Republic of Kazakhstan. The checklist contains a requirement for a citizen to measure their body temperature twice a day, air the premises, perform daily wet cleaning, etc. Given this, employers shall introduce the checklist to the employees and comply with all the requirements specified in the checklist and related to their own competence. For example, the daily wet cleaning of office space.

4. *If kindergartens are closed in view of the quarantine, how will employed parents be able to take care of their children? Are they eligible for any benefits?*

Yes, in this case the law provides for the possibility of caring for children and compensation. In this case, one of the working parents may obtain the childcare sick leave for the entire quarantine period based on the recommendations of the epidemiologist of the territorial sanitation and epidemic control authority. This provision is provided in paragraph 69 of the Rules for the Examination and Temporary Disability, Issue of the Temporary Disability Certificate approved by the Order of the Minister of Health and Social Development of the Republic of Kazakhstan No. 183 dated 31 March 2015. In this case, the amount of sick leave payment shall be not less than 39 765 (thirty nine thousand seven hundred and sixty five) tenge per month.

5. *Can the employer reduce the salary and the working hours of employees in the view of the reduction in the volume of work?*

Yes, it is possible. The amount of salary and working hours represent working conditions of the employee. The grounds and procedure for changing working conditions are provided in Article 46 of the Labour Code. Pursuant to Article 46 of the Labour Code, the employer may change the working conditions of employees in certain cases only, in particular due to changes in the management associated with the reorganisation or changes in the economic, technological conditions, conditions of working arrangements and(or) a reduction in the scope of work.

Thereat, the employer must notify the employee in writing of a change in the working conditions not later than fifteen calendar days, until a longer notice period is provided by employment contract or collective agreement.

In the case of a written refusal of the employee to continue working due to the change in working conditions, the employment contract is terminated on the basis of Article 58.1.2 of the Labour Code of the Republic of Kazakhstan (*refusal to work under new working conditions*).

It is important to note that the employer, where required, will have to confirm the reduction in the volume of work by providing the relevant documents.

6. *How can an employer optimise staffing or payroll in the view of reduced workload?*

In this situation, the employer has several options.

The first option is to transfer employees to part-time jobs with a proportional reduction in the amount of the official salary performed under the procedure of change in working conditions as described above. This option allows the employer to keep the same number of staff, but at the same time significantly reduce the cost of the payroll fund. Refusal of an employee to work under new working conditions may result in his/her dismissal based on Article 58.1.2 of the Labour Code. The implementation period for this option is fifteen

calendar days, since this is the period for the employer to notify the employee about the change in working conditions. Payments due to the employee will include salary and compensation for unused vacation time.

The second option is the termination of employment contracts with employees due to the staff redundancy (downsizing). This option is the least desirable because staff redundancy may entail increase in the volume of work (as our practice shows), and then the employer will again have to hire staff, bear the costs of headhunting, training, etc.

If the employer cannot avoid downsizing, they must be prepared for the features of this process. First, it will require at least a month prior notice to the employment authorities and employees of the impending downsizing.

The feature of downsizing is that it cannot be applied to some categories of employees (the so-called 'socially protected' employees), for example, pregnant women, women with a three-year-old child, single mothers raising a child under the age of fourteen, etc. The legislation of the Republic of Kazakhstan also contains other restrictions on the downsizing procedure. The implementation period for this option is one month, since this is the period for the employer to notify the employment authorities (employees) of the intended staff downsizing. Payments due to the employee will include: salary, compensation for unused labour leave and compensation in the amount of one average salary related to the loss of employment.

The third option is the termination of the employment contract upon agreement between the parties on the basis of Article 50.3 of the Labour Code. This option can only be implemented if the employment contract provides that the employee by signing the employment contract agrees with the employer's right to terminate the employment contract (1) without giving a prior notice of termination, (2) without discussing with the employee the date of termination, but subject to payment of compensation to the employee in the amount specified in the employment contract.

If the above option is envisaged by the employment contract, the employer will have the right to terminate the employment contract with the employee on any day only by handing in the employee a termination notice and paying the salary, compensation for unused labour leave and compensation established by the employment contract. A feature of this option is that it can be applied to all employees without exception, including socially protected ones.

7. Can a company apply the downtime mode for cleaners because the company temporarily does not need to clean the office, since all office employees work remotely because of the state of emergency (quarantine)?

Yes, it is possible, as the downtime for cleaners is caused by the absence of office employees, who were transferred to remote work not at the employer's own initiative, but based on the recommendations of state authorities. In this case, the downtime is linked to reasons beyond the employer's and employee's will, and is paid in the amount of the minimum salary.