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Special Legal Alert

A message from Tax & Legal Team | Deloitte Touche Tohmatsu Limited

Kazakhstan Labour Code № 414-V dated 23 November 2015

Dear friends,

On 23 November 2015, President Nazarbayev signed a new Labour Code, which will enter into force from 1 January 2016, except for the provisions in point 2 of article 204.

The New Labour Code, which was developed in conjunction with step 83 of the Plan for the Nation — 100 Concrete Steps to realise Five Institutional Reforms and modernise the Employment System, liberalises employment relations.

For employers it simplifies procedures around hiring, transferring and dismissing employees, establishing working conditions and setting employee salaries. It also sets out basic employment guarantees and employee rights, the ability to expand them through individual and collective agreements, and provides tools for protecting rights and interests.

Even though the new document has not yet entered into force, employers should start to think about bringing their internal acts, employment and collective agreements into line with it.

Below you will find an overview of the main aspects of the New Labour Code we would like to bring to your attention:

1. The list of employer acts has been expanded, alongside *orders, instructions* and *regulations,* to include *rules, shift schedules, rotation schedules* and *vacation schedules*, which will be issued according to the procedure for issuing employer acts.

   Employers will now only have to issue acts taking into account the opinion of employee representatives if so stipulated in a social partnership or collective agreement. The New Labour Code has removed the possibility to have employees agree employer acts.

2. Relationships with **employee representatives** have changed, in that all new employees are entitled to delegate the right to represent their interests to trade unions or representatives elected based on an application. In doing so, the legislators have removed the loophole in the Labour Code around employees who did not participate in the election of representatives.

3. **Individual employment disputes** will now primarily be considered by conciliation commissions. Courts will now only be authorised to resolved those disputes that could not be resolved or in cases where conciliation commissions are not authorised to rule[1]. Previously, employees were able to choose whether a dispute was considered by a conciliation commission or court.

   With the New Labour Code, conciliation commissions will be recognised as permanently active and made up of equal number of employer and employee representatives. Conciliation commission parties will undergo annual training in Kazakhstan employment law, and how to hold discussion and reach a consensus in employment disputes. The new document also allows employees to engage lawyers to represent them in disputes.

4. The New Labour Code is clearer on which entities are governed by it, removing the loophole in the previous Labour Code allowing branches and representative offices to claim that it did not apply to them.

5. **A new term "non-competition" has been introduced**, enabling parties to enter into **a non-competition agreement** (adoption restrictions and conditions, compensation). At the same time, employers will be responsible for determining the list of positions and approving them with the relevant act themselves. Any breach of non-competition conditions may be considered as grounds for the employer's termination of an employment agreement.

   The New Labour Code does not mention the duration of non-competition conditions, from which we imply that the parties themselves will decide.

6. The conditions around the **period of validity of employment agreements** has changed, for example:

   - when an employment agreement expires, the parties will be entitled to extend it for an unfixed term or a fixed term of no less than one year. Previously, employment agreements could only be extended for an unfixed term;
   - if neither party has notified the other in writing of the termination of employment relations by the end of the day before an employment agreement is due to expire, the agreement in question will be treated as extended **for the same term as it had been originally concluded**. Previously, employment agreements could only be extended for an unfixed term. At the same time, an employment agreement concluded for a specific period of less than one year **may only be extended twice**. If employment relations are continued further, then the related employment agreement will be treated as concluded for an unfixed term;
   - if an employment agreement with a chief executive expires, a new agreement may be concluded with that same executive until legal entity founders or owners or the authorised body elect (appoint or approve) the chief executive or a new executive, unless a different extension period is stipulated, in a resolution;

[1] except for small businesses and company executives

- employment agreements with employees of retirement age may be extended annually without restriction.

7. **Probation periods** now extend to all employees, including those under 18 years of age, handicapped employees and recent graduates. The probation period for company executives and their deputies, chief accountants and their deputies, branch and representative office managers may be extended from the standard three months to six months.
8. The treatment of **employees seconded to other legal entities** within vertically integrated affiliates has been changed. An issue in this regard is that "horizontal" transfers (transfers among companies reporting to a single parent organisation) and employee postings from foreign companies to Kazakhstan branches or representative offices **will not be treated** as secondments.
9. **Employees may now be temporarily transferred to other work/jobs**
    - in the event of operational needs, without employee consent**, for up to 3 months** (from the previous 1 month);
    - in the event of idle time, without employee consent, **for the entire idle time period** (from the previous 1 month).
10. **Employers may now terminate employment agreements at their own initiative if:**
    - production, work and service levels fall resulting in a deterioration in the employer's economic status. Employers should notify employees of the same in writing 15 working days in advance, or pay a salary in proportion to any unworked period. Employment agreements may only be terminated for the above reasons if simultaneously: (1) a structural division (unit or site) closes; (2) employees cannot be transferred to other work; (3) written notification at least one month in advance has been provided, referring to the reasons for the termination of the employment agreement. Employers should pay average compensation of two months' salary;
    - work safety officers at production companies have not reconfirmed their work safety or industrial safety knowledge;
    - the internal audit and corporate secretary functions have been disbanded in line with a decision of an asset owner or authorised entity (body), or authorised body of the legal entity;
    - notification is provided to employees of retirement age at least one month before their employment agreement is due to be terminated and compensation as indicated in an employment, collective agreement or employer act is paid;
    - an employee has been absent from work for more than one month for unknown reasons, or if a response to notification has not been received within 10 calendar days from the date it was sent;
    - the agreement in question is a dual-employment agreement and if the job in question is the employee's main job.

Employment agreements with chief executives, their deputies or division managers (branches, representative offices and other divisions specific by an employer act) may also be terminated during periods of temporary disability or vacation: 1) if breaches of employment discipline have let to employer material losses, or 2) in line with a decision of the company owner, its authorised representative or the company's authorised body.

We believe that due to the time-consuming and costly process involved in terminating employment agreements due to declines in production, work or service levels resulting in a deterioration in the employer's economic status, it will be used rarely.

11. Employees will now be entitled to transfer to a **part-time work schedule** either when entering into an employment agreement or afterwards. Part-time work has always been an option, but, previously it was not permitted to transfer to a part-time work schedule once an employment was already in place. Thus, we believe it will be more beneficial for employers to transfer employees to part-time work schedule rather than terminate their employment agreements.
12. With the introduction of the New Labour Code, **annual leave schedules** for the year should include one vacation of at least two calendar weeks.

    Now it will be possible to grant paid annual leave with subsequent termination of an employment agreement due to expiry when the annual leave period exceeds the employment agreement's validity period. In this respect, the termination date for the employment agreement will be the last day of paid annual leave.

    A new term "study leave" has been introduced, whereby employers will provide employees with study leave for training or Bolashak overseas internship programmes and retain their job (position) for their return.
13. According to employment or collective agreement and (or) employer acts, **salaries for working overtime, on public holidays, non-working days and during the night** will be paid at no less than time and a half, based on the employee in question's daily (hourly) rate.

    Thus, employers are now able to manage employee salaries in employment or collective agreements, whereas previously, they were restricted to either double time or time and a half.
14. **The article dealing with salary indexation has been withdrawn**. Despite this, salary indexation clauses may be included in collective agreements.
15. **A new term "dual training" has been introduced** to cover a form of staff training combining obligatory in-house training and paid practical training for which the company, training establishment and trainee take joint responsibility. With this new concept, employers are required to provide internships to students. However, it is not yet clear which companies will be affected by this as no clear operating mechanism is in place.
16. **Representatives will now be held accountable for failing to participate in discussions to conclude, amend or supplement collective agreements;** not providing a justified reason for failing to enter into a collective agreement; missing discussion deadlines and not supporting the relevant commission; failing to provide information required to hold discussions and comply with collective agreements, and equally breaching or not executing collective agreements.

    In other words, if an employee initiates a process to enter into a collective agreement with their employer, and the employer refuses, that employer will face the possibility of liability. However, it is not clear what they liability will be (probably administrative).
17. The concept of **technical employment inspectorates** has been introduced to improve public control. They will be made up of employees proposed by trade unions or general meetings of employees, and will be authorised within the framework of the company's work health and safety council.

    The work health and safety council is responsible for managing joint employer and employee measures to ensure work safety; preventing industrial injury and professional illness, and managing technical employment inspectorates work health and safety inspections. Work health and safety council initiatives will be binding for employers and employees.
18. **Employers will now be required to declare their activities** to local employment inspectors, regional employer and trade union associations. The purpose of this is to ensure employer activities comply with Kazakhstan labour law. Compliant employers will be issued with the corresponding three-year certificate of compliance, which will be taken into consideration during audits and other forms of employment-related controls.

    The mechanisms and procedures for employers to declare their activities have still not been detailed.

19. **A new term "foreign state body employee"** has been introduced to mean a foreign national hired to work for the state authorities under an employment agreement. Employment agreements with foreign nationals working for the state authorities are concluded for the period determined by the manager of the state authority in question. At the same time, the foreign national is not required to receive a work permit to enter into this type of employment agreement.

Please remember that this review does not cover all changes to the Labour Code. If you wish to receive more detailed advice on any of the above issues, please contact the Deloitte TCF Tax & Legal Department on tel.: +7 (727) 258 13 40 (Almaty). This document was prepared by Deloitte TCF experts for information purposes only, and any use of the information contained in it in specific situations should be defined by the relevant circumstances.

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Best regards,
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