

SPECIFICS OF REMOTE LABOR LEGISLATION AND APPLICATION PRACTICE IN KAZAKHSTAN AND RUSSIA

Remote work has already got popular with lawyers, translators, IT specialists, etc. It brings a host of advantages to both employees and employers. Employees can enjoy a more flexible work regime, combining labor and personal duties, and employers, in turn, can cut expenses associated with the lease of premises and organization of workplaces.

Still, due to deficient legislative regulation and lack of remote labor's access to cross-border level, employees and employers choosing this form of labor relations encounter difficulties. We would like to dwell on some legal issues of remote labor, based on the examples of legislation and court practice in Russia and Kazakhstan.

Remote Work Conditions in Kazakhstan

Pursuant to the RK Labor Code, *"remote work is a special form of labor process implementation outside the employer's location, using in the process of work the information-and-communication technologies."*

The employer must provide to the employee the means of communication and bear the costs of their installation and maintenance, or pay compensation to the employee, if the employee is using his/her own means of communication on a permanent basis. Such compensation amount and payment procedure are to be set out in the remote employment agreement. Upon agreement of the parties, the employee may also be compensated for other costs associated with the performance of work for the employer (e. g., electric power and water supply costs, etc.).

Remote employees are put on the company payroll on equal terms with regular employees. They are established a fixed work time recording, the peculiarities of work time monitoring also being determined by the employment agreement.

Remote work agreements fall within all statutory provisions applying to classic employment agreements. Accordingly, a remote employment agreement must contain all mandatory terms and conditions of a standard employment agreement. If so agreed upon by the parties, the remote employment agreement can also include other conditions not contradicting the RK legislation.

Specifics of Remote Work in Russia

In Russia, remote work is regulated much more extensively than in Kazakhstan. The RF Labor Code expressly sets out that the parties to remote employment agreement interact via exchange of electronic documents using secured qualified electronic signatures. The following actions can be performed in the form of electronic documents exchange:

- Review of internal labor regulations, other local regulatory acts, employer's acts and the collective agreement by the employee;
- Provision of documents required to enter into the employment agreement by the employee coming to work (on employer's request, the employee must provide the notarized hardcopies of such documents); and
- Provision of explanations or other information by the employee.

The legislation requires provision of the original hardcopies of documents in the following instances:

- Execution of the employment agreement in hardcopy within three (3) calendar days of entering into the employment agreement via exchange of e-documents;
- Provision of sick list in cases of temporary disability to work or in connection with maternity; and

- Posting of the duly executed employer's order on employment agreement termination to the remote employee by registered mail with notification of delivery (the employee may preliminarily review the employer's order on employment agreement termination in the form of an e-document).

The RK Labor Code provides for an exhaustive list of grounds for employment relations termination. The Russian legislation's important advantage for employers is the possibility to include in the employment agreement additional grounds for dismissal, other than those specified in the RF Labor Code. The additional grounds are to be secured in the employment agreement with the remote employee, such grounds not to be of a discriminatory nature.

Taking into account the specifics of remote work, it is extremely difficult to fire an employee for absenteeism or absence at workplace; accordingly, employers need to carefully specify the additional grounds for remote employee's dismissal, which may include, for instance, as follows:

- Absence of communication with the employee over the entire working day, and absence of communication with the employee for more than three (3) consecutive hours over a working day;
- Repeated delay in the submission of reporting for more than three (3) days over one calendar month, etc.

As compared to the employment agreement in a classical sense, the parties to remote employment agreement are granted broader options to define its terms and conditions. For instance, pursuant to the legislation, the agreement is to define the following:

- The amount and the procedure and timeframes for paying compensation to the remote employee for using own or leased equipment, software and hardware, information protection and other means;
- The procedure and timeframes for the remote employees to submit reports on work performed; and
- The procedure and timeframes for providing to the remote employee the necessary equipment, software and hardware, information protection and other means.

Beside the above, it is recommended to additionally include in the employment agreements the following provisions:

- Work time and rest regime (it is possible to establish a flexible work time);
- Employee's duties (it is recommended to develop a detailed employee's job description, execute full material responsibility agreement and non-competition agreement, and define the procedure for using the property provided to the employee);
- Occupational safety (special instructions in occupational safety are recommended for remote employees subject to the workplace specifics); and
- Work time monitoring procedure (daily/weekly reports, communication at established times, use of the technical means of communication, etc.).

In case the employer needs to transfer several employees to remote work, it is recommended to adopt Regulations on Remote Employee Labor Regulation Peculiarities. This would enable promptly adjusting the work conditions, and it will not be required to enter into an amendment agreement with each employee.

Judicial Practice

Analysis of judicial practice allows for a conclusion that disputes relating to remote work in Russia (same as in Kazakhstan) mainly arise in connection with disciplinary liability and dismissal of

remote employees¹. In Russia, though, the number of remote work related labor disputes is much larger.

The RF Labor Code says that remote employees are persons that have entered into a remote employment agreement. Accordingly, it is important to expressly stipulate in the employment agreement that work is to be performed on a remote basis. Proceeding from judicial practice, if the provision that work is to be performed remotely is not included into the employment agreement, the employee must perform his/her duties at the employer's office, and in case the employee is absent at the workplace, he/she may be fired for absenteeism².

A remote employee may be subjected to disciplinary liability on general grounds provided for by the RF Labor Code. The employer must request written explanations from the employee prior to disciplining the employee. The employee may give explanations in the form of an e-document; however, failure to provide the explanation does not preclude imposition of the disciplinary sanction.

In one of the court cases, the labor inspection fined an employer for admitting a remote employee to work without occupational safety training, but the court declared the fine unlawful³, because the employer is not obligated to train remote employees in occupational safety. Pursuant to legislation, no special evaluation of labor conditions is made in respect of remote employees⁴.

The following case may serve as an example of scarce Kazakhstan judicial practice⁵: the court declared unlawful an employer's order to terminate labor relations with a remote employee in connection with the latter's committing a corrupt offence preventing, pursuant to an effective court act, the possibility of further work, and adjudged to restore the employee in job, paying a compensation for forced absenteeism. In the course of judicial proceedings on the case it was established that the claimant's work had not been connected with the performance of managerial functions, no employees had been subordinated to him and he had not been involved in the placement and selection of personnel. Thus, the court declared unlawful the dismissal on the above ground.

Cross-Border Remote Employment Agreement

As a conclusion, we would like to address the issue recently going topical (including in view of the EAEU common labor market formation). It has to do with defining the law applicable to employment agreements entered into with foreign remote employees performing labor activities outside the country of employer's location.

Analysis of the labor legislations of Kazakhstan and Russia shows that, as a general rule, both countries operate the principle of "lex loci laboris" (law of the place of work).

The Russian Federation has entered into bilateral treaties with Mongolia, Poland and Vietnam whereunder "the parties may themselves choose the legislation to govern their labor relations, unless prohibited by the legislation of the contracting party in whose territory those labor relations are being implemented"; i. e., in some cases it is possible to apply the principle of "lex voluntatis" – contract law chosen by the parties. However, in the case where the legislation has not been chosen, the "lex loci laboris" principle applies as well.

Kazakhstan has no such special regulations of international nature; however, pursuant to the RK Labor Code, the *"Code shall apply to employees and employers located in the RK territory, including branches and/or representative offices of foreign legal entities that have passed record*

¹ Decision of Kirovsky District Court of Yekaterinburg, dated 21 July 2015, in Case No.2-4409/40, <http://sudact.ru/regular/doc/m3XbUfkzmkdw/>.

² Appellate Ruling of Moscow City Court, dated 16 November 2015, in Case No. 33-42412.

³ Resolution No. 4A-565/2016 of the Supreme Court of the Republic of Bashkortostan, dated 23 May 2016, <http://sudact.ru/regular/doc/nsGzF9mPr2Ue/>.

⁴ Paragraph 3 of Article 3 of the Federal Law No. 426 "On Special Evaluation of Labor Conditions" dated 28 December 2013.

⁵ Resolution of Atyrauskaya Oblast Court, dated 18 January 2017, in Case No. 2399-17-070-2a/7.

registration, unless otherwise provided for by the laws and international treaties ratified by the RK." In this connection, according to the RK Ministry of Labor and Social Development, the provisions of the RK Labor Code do not apply to a remote employment agreement entered into between a Kazakh legal entity and a foreign remote employee performing labor activities outside Kazakhstan.

Taking into account the above, employers should treat with especial care employment agreements with foreign remote employees, as these labor relations will most likely be governed by the legislation of the country in whose territory the remote employees will be performing their labor functions.