

INSIGHTS

Kazakhstan – A guide to transferring foreign employees

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Summary

This article discusses the issues for organisations posting employees to Kazakhstan. Because of a lack of legal clarity, both the host and home organisation risk ending up in disputes with transferring employees and government agencies. To avoid this, the employment agreement needs to be as detailed as possible, with explicit provisions relating to working time, rest and occupational safety, amongst others.

Kazakhstan joined the World Trade Organization ('WTO') in 2015. Acceding to the WTO Treaty paved the way for foreign employees to work in Kazakhstan using

What is an intra-corporate transfer ('ICT')?

An ICT is the temporary transfer of an employee where:

- the transferred person (the 'transferring employee') is a foreign citizen or stateless person;
- the transferring employee is an executive, manager or specialist in a foreign employer that is a legal entity (the 'sending organisation');
- the sending organisation is established, located and operating in the territory of a WTO member state other than Kazakhstan;
- the transfer is for a temporary term specified in the employment agreement, but not more than 3 years (extendable by 1 year);
- the transfer involves the transferring employee performing their duties in a branch, subsidiary or representative office of the sending organisation in Kazakhstan (the 'host organisation').

This definition is used in the 2016 Kazakhstan Employment Law and 2011 Migration Law. It is also used in regulations relating to foreign labour permits and foreign labour quotas (the 'Permit Issuance Rules' and the 'Foreign Labour Quota Rules' respectively).

International basis for intra-corporate transfer

Provision is made for ICT in Kazakhstan under the terms of its WTO accession arrangements through GATS the 'GATS Schedule' and under treaties with the European Union in 2015 and the Republic of Korea in 2014.

Kazakhstan's WTO treaty obligations were implemented into Kazakh law in October 2015, but the country's new Labour Code was adopted one month later with no provisions regarding ICT. The adoption of a new Employment Law in 2016 did not rectify this. Though Kazakh law now provides for ICT, there is no consistent legislative framework. This gives rise to multiple difficult issues on which complex interpretation of existing law is required.



Sending organisation (foreign employer)	A legal entity organised in the territory of a WTO member state located and operating outside Kazakhstan.	Legal entities registered in Kazakhstan; Branches and representative offices of the sending organisation registered in Kazakhstan; Legal entities organised outside a WTO member state.
Host organisation in Kazakhstan	A branch, representative office or subsidiary of the sending organisation in Kazakhstan.	Another person, including members of the sending organisation's group of companies, but not a branch, representative office or subsidiary.
Transferring employee's citizenship	Foreign citizen or stateless person.	A Kazakhstan citizen permanently residing outside Kazakhstan.
Transferring employee's position in the sending organisation	An executive, manager or specialist (as defined in the Permit Issuance Rules).	A foreigner who does not have an employment relationship with the sending organisation (e.g. working under a civil law contract or seconded to the sending organisation from another company).
Work experience	The transferring employee must possess at least 1 year's employment experience at a legal entity in a WTO member state located and operating outside Kazakhstan.	Work experience at other legal entities organised and operating outside the WTO member states.
Sector of economy	A sector mentioned in Annex 1 to the Foreign Labour Quota Rules.	A sector not mentioned in Annex 1 to the Foreign Labour Quota Rules.
Term of ICT	Temporary, for not more than 3 years extendable by 1 year. The term is determined by the employment agreement.	ICT for an indefinite term (for permanent work).

What are the main advantages of intra-corporate transfers?

Although ICT requires the host organisation to obtain a work permit, it can be obtained free of charge and without triggering foreign labor quota limits.

Moreover, in an ICT context, the minimum threshold of local staff for host organisations is less (50% for all categories of employee) than in non-ICT scenarios (commonly 70% or 90% depending on the employee category). Where the ICT is for executives, no conditions apply.

The GATS Schedule and Permit Issuance Rules do however impose a transitional economic needs test where the ICT is for managers and specialists (in force until 1 January 2021) and a special obligation to develop a local labour force.

What law governs the employment relationship?

interpretation.

The 2015 Labour Code (the 'Labour Code') governs employment relationships in Kazakhstan. Confusingly, the Labour Code is silent on whether, in an ICT context, the employer is the sending organisation, the host organisation, or both. The best interpretation of the law is that the Labour Code applies in its entirety, and that the host organisation is the employer for Labour Code purposes.

The status of host organisations that are branches or representative offices and those that are subsidiaries differs under the local law, but the Labour Code applies to both categories. A subsidiary is a legal entity based in Kazakhstan, so the Labour Code applies automatically. For branches and representative offices, the Labour Code expressly extends its application to branches and representative offices of foreign legal entities which have completed the necessary registration process.

Provisions of the Labour Code relating to the start of employment also support the 'labour relations' concept between the host organisation and transferring employees.

Further, the Migration Law and Employment Law expressly state that transferring employees carry out labour activities in Kazakhstan and the host organization is called an 'employer'. The GATS Schedule also appears to support the application of the Labour Code. Whilst the definition of ICT differs from that under domestic law, the effect is that transferring employees become the host organisation's employees and are subject to all entry, stay and work requirements under Kazakh law.

Confusion arises under the Permit Issuance Rules, which imply that no 'labour relations' arise under Kazakh law, and that the Labour Code only applies to a limited extent. However, as a matter of statutory interpretation, the Labour Code prevails over the Permit Issuance Rules.

Practical issues relating to the employment agreement with the transferring employee

and the sending organisation.

Based on this, the Ministry of Labour and Social Protection (the 'Ministry of Labour') declares that there is no need for a new Kazakh employment agreement with the host organisation. This contradicts the analysis in the previous section suggesting that the employer is actually the host organisation.

Moreover, the Permit Issuance Rules allow the employment relationship to be governed by the employment agreement or by another other document. This contradicts the Employment Law and Migration Law where the term of ICT is determined by the employment agreement only.

Do Kazakh legal requirements about working time, rest and occupational safety apply?

Under the Permit Issuance Rules, the host organisation's working time, rest regime and occupational safety requirements apply to the transferring employee falls for the period of ICT. This means that the transferring employee will be covered by benefits and requirements in these areas (e.g. limitations on overtime, days on rotation, holidays and days off).

Do other aspects of Kazakh labour law apply to ICT?

According to the Ministry of Labour, Kazakh labour law applies to any aspect of labour law not governed by the employment agreement (or other document). This is at odds with the Ministry's opinion that a new Kazakh employment agreement is not required, because Kazakh labour law requires that an employment agreement conforming to Kazakh labour law is in place.

The authors recommend that the employment agreement between the transferring employee and the sending organisation be as detailed as possible to avoid dispute, with explicit provisions relating to working time, rest, occupational safety and other applicable benefits and obligations (which conform to Kazakh labour law).



For what period can the transferring employee be sent on business trips?	90 calendar days, in aggregate, over one calendar year (for business trips within Kazakhstan). Business trips outside Kazakhstan are not limited by any period.
Where can the transferring employee be sent to on a business trip?	To any enterprise, organisation located in Kazakhstan outside the territory for which a transferring employee's work permit has been issued. Business trips outside Kazakhstan are not limited.
By whom can the transferring employee be sent on a business trip?	By an employer, though this is one situation in which there might be difficulties of interpretation if it is not clear whether the employer is the sending organisation or the host organisation.

Specific issues relating to the Korea Treaty

The Korea Treaty provides for ICT to affiliates as well as subsidiaries, branches and representative offices. Under the Korea Treaty 'temporary labour activities of the citizens of the sending country in the territory of the host country shall be governed by the relevant national legislation'. The Treaty does not specify to which national legislation (Kazakhstan's or Korea's) this refers.

However, the Korea Treaty states that if the transferring employee breaches a law of the host country, the employment agreement is terminated and the transferring employee is returned to the sending country. This obviously implies that the transferring employee enters into an employment agreement with the host organisation.

Despite this, the Ministry of Labour's official clarifications states that if the sending organisation is a Korean company, Korean law governs the relationship and no employment agreement is required for Kazakhstan.

What are the risks of ICT?

There are risks for each of the parties involved in an ICT.

For the sending organisation:

- Because its transferring employees are performing labour activities in Kazakhstan, the sending organisation risks being found to have formed a permanent establishment for tax purposes, exposing it to tax liabilities in Kazakhstan.

For the host organization (which is a subsidiary):

- If transferring employees are sent on a free-of-charge basis, the host organisation risks becoming liable for tax because the free-of-charge services may be found to be income.
- The absence of direct legal control over the transferring employee creates a risk the transferring employee may not be obliged to fulfill the host organisation's instructions. It might not be possible to subject the transferring employee to disciplinary action and it may be difficult to recover compensation for any damages that the transferring employee causes.
- Transferring employees do not count towards the fulfillment of statutory requirements relating to business permits and notifications, public procurement, contractual obligations, corporate legislation and other situations involving specific legal requirements.
- There are civil law risks associated with any confidential information the transferring employee may see. This might affect consents to disclosure.

The ambiguous legal status of transferring employees and the lack of clarity regarding the applicable law for different employment issues means both sending and host organisations run the risk of disputes with the transferring employees and government agencies.

For transferring employees, it is not clear what effect this will have on their relationship with the sending organisation and their entitlements in their home and host countries may be affected.

Conclusion

The best interpretation of the legislative situation overall is that Kazakh labour law applies to ICT and that the parties to the employment relationship are the host organisation and the transferring employee, but that the existing



However, based on the Permit Issuance Rules, government agencies consider that there are no 'labour relations' between the host organisation and the transferring employee. The Kazakhstani courts are not bound by this opinion. Potentially, this exposes host organisations to disputes if things go wrong during the ICT, for example, personal injury, disciplinary matters or dismissal. There are also risks for the sending organisation and the transferring employee.

The Permit Issuance Rules attempt to regulate some of these matters, but they contradict the primary legislation. This contradiction can only be resolved by new legislation. While ICT may be an appealing option for attracting talent to Kazakh organisations, there are risks that require careful handling by all the parties involved. The law requires further clarification and host organisations would be well-placed to encourage government action to achieve this.

WRITTEN BY

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