

Secondment in Kazakhstan: Has the New Labor Code Legalized It?

Легализовал ли новый Трудовой кодекс прикомандирование в Казахстане?

Yulia Chumachenko, Partner, AEQUITAS Law Firm
Юлия Чумаченко, партнер, юридическая фирма
«AEQUITAS»

As business globalizes and Kazakhstan joins the WTO, secondment and other forms of leased labor¹ are going increasingly popular.

Leased labor gives companies a number of notable advantages. Using leased labor, the host (receiving) company can cut its staff number, payroll taxes and the costs of opening offices in the regions and focus resources on its core business, outsourcing certain operations that are non-core for the company. By seconding its employees to another organization, the seconding company can preserve its payroll staff number during idle times. Actually, the leased labor enables both parties to organize the exchange of experience and advanced training for the employees.

Still, however attractive the leased labor may seem, practice shows that given the poor statutory regulation it is fraught with legal risks, because, whilst not disapproving of secondment in principle, Kazakhstan's labor law, unfortunately, does not always flexibly respond to messages from economy. Risks are particularly topical in cases of foreign employee secondment, which is in most popular demand in today's Kazakhstan labor market and, accordingly, often practiced, for example, in the oil and gas sector. We will try to look into how the mechanism of secondment works in Kazakhstan and how the local experience correlates with the global practice in this area.

¹ In Russian «zayomnyi trud» also translated as «outsourced employment» or «agency employment.»

GLOBAL EXPERIENCE

Until recently, leased labor has been actually outside the legal framework in many jurisdictions worldwide. First attempts to legalize and regulate the leased labor were made in the 1990s. For instance, a 1994 Luxembourg law contained a special section describing the procedure for temporary secondment of employees to other enterprises.

The International Labor Organization recognized the leased labor in 1997 by adopting Convention No. 181 on private employment agencies, which acquired the right to recruit employees with a view to making them available to a third party.

South Korea is one of the countries supporting leased labor to the maximum: in 2007, Korean recruiting agencies were actively advocating the effectiveness of the relevant mechanism, leading to the enactment of the law on temporary worker rights protection. As a result, South Korea is a world leader in leased labor with some 35% Koreans out of the 15 million able-bodied population working under civil law contracts.

In North America the leased labor mechanism served to mitigate unemployment during crisis, increasing in 2008 practically twofold the number of Americans working without «direct» employment agreement (i. e., under a secondment contract). In Canada the province of Ontario took the lead to support the leased labor by adopting the Bill 139 establishing guarantees for temporary employees and providing for agency fees in case of direct employment of a temporary employee.

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The Russian legislation was added, starting from 2016, with special regulations relevant to leased labor, legalizing only two of its forms – outsourcing and outstaffing (under a staff leasing contract); the latter option being available only with participation of a duly accredited recruiting agency.

SECONDMENT IN KAZAKHSTAN: LOCAL BACKGROUND

Secondment was first mentioned in the Kazakh legislation in 1993 in the context of the state apparatus activities. Later in 2001, the term «secondment» also appeared in commercial legislation governing foreign labor engagement issues. It signified importation of foreign labor into Kazakhstan without obtaining a special work permit and on condition of concurrently sending local personnel abroad to complete advanced training. In 2012, this legal concept was substituted by a new one – «corporate transfer» – adding, starting November 2015 due to Kazakhstan's accession to WTO, the «intra-corporate transfer.»

The term «secondment» reappeared in the 2015 Labor Code, other forms of leased labor (for instance, outsourcing, outstaffing, personnel leasing, etc.) still remaining without legal regulation, hence, non-legalized.

CONDITIONS OF SECONDMENT IN KAZAKHSTAN

Pursuant to the current Kazakh labor legislation, secondment means employee's performance of work for

another employer in the employee's own or another specialty (position, labor function, or qualification).

Secondment is formalized by executing a number of documents, including as follows: 1) agreement between the seconding company and the host company; 2) trilateral agreement among the said companies and the secondee; and 3) a supplementary agreement to the secondee's employment agreement.

Written Agreement between the Seconding and Host Companies

The agreement must set forth:

- the objective of secondment (ensuring fulfillment of certain tasks);
- the number of secondees and the list of their positions; and
- the specific tasks (functions) of the secondees.
- It is recommended that the agreement:
 - confirm the corporate relationship (affiliation, as mentioned below) between the seconding and host organizations;
 - define the list of documents to be provided by the host organization;
 - specify the procedure to follow in case the secondee breaches the discipline at work (in which case the host organization is to notify the seconding organization within 3 business days, providing the supporting documents, for a decision to bring the secondee to disciplinary liability);
 - define the procedure to follow in case of an accident with the secondee (investigation of accidents with the secondee in connection with the latter's labor activities is to be organized by the host organization with participation of the seconding organization's representative); and
 - define the procedure for secondment coordination with the trade union or elected employee representatives of the host organization (if it has no trade union), if the number of secondees is expected to exceed 10% of the host organization's average payroll count.

One should also bear in mind the provisions of civil legislation (Article 921 of the RK Civil Code) envisaging a legal entity's liability for harm caused by its employee in the course of the latter's discharging his/her labor (official, position) duties. For these purposes, employees mean individuals performing work based on an employment agreement or a civil contract, if they acted or were to act on assignment and under control of the relevant legal entity responsible for the work safety.

Trilateral Agreement among the Seconding and Host Organizations and the Secondee

The agreement must set forth:

- 1) the employee's status for the time of secondment (also stating that the employee is not becoming an employee of the host organization);
- 2) the term of secondment;
- 3) the conditions of secondment (position, host organization, changes in the work regime, etc.); and
- 4) the secondment procedure, which may include:
 - work regime (stating that for the term of secondment the employee falls within the labor and rest regime in effect at the host organization, except for the annual paid leave whose duration and granting procedure are defined by the secondee's employment agreement and the acts of seconding organization, etc.);
 - the labor remuneration procedure;
 - the working time recording procedure;
 - the procedure for reimbursement of costs to travel to the host organization and back;
 - the secondment termination procedure;
 - the procedure for reimbursement of employee's accommodation costs in another town;
 - the issues of sending the employee on business trips on instructions of the host organization;
 - the procedure for granting a leave to the employee and actions in case of the employee's temporary incapacity to work;
 - the issues of occupational safety compliance (including the required instruction briefings and training, provision of protective means and appropriate labor conditions); and
 - other issues of labor relations administration.

Supplementary Agreement to the Employment Agreement between the Employee and the Seconding Organization

The supplementary agreement sets forth the place of work performance and the employee's position for the period of secondment, and

the employee's obligation to comply with the trilateral agreement (as mentioned above) and confirms the seconding organization's obligation to provide to the employee, upon expiration of the secondment period, the place of work and position he/she was occupying before secondment.

RESTRICTIONS ON SECONDMENT IN KAZAKHSTAN

It should be mentioned that the Kazakh legislation establishes certain restrictions on secondment application.

Firstly, secondment is not to be used for employees whose positions are mandatory for the host organization's staff schedule, in order to avoid violations of regulatory and permit-related requirements of the legislation.

Secondly, secondment of employees is permitted only within a group of companies, i.e. in complying with the vertical affiliation rule:

- the host organization's shares (participation interests) must be held, directly or indirectly, by the seconding organization; or
- the seconding organization's voting shares (participation interests) must be held, directly or indirectly, by the host organization.

In other instances (for example, horizontal affiliation between sister companies) secondment is unlawful.

Thirdly, secondment covers employees who are Kazakhstan and foreign nationals, except for foreign employees whose labor activities are carried out based on work permits.

The above means that the previously often practiced secondment of foreign employees to Kazakh companies is now, strictly legally, unallowable, even if both companies – foreign and Kazakh – meet the above affiliation requirements. In this case the legislation offers the only legitimate option: to enter into an employment agreement with



the Kazakh employer, previously obtaining the work permit (foreign labor engagement permit) in the framework of a corporate or intra-corporate transfer.

Corporate transfer is a temporary transfer of a foreign national or stateless person under a letter and/or agreement on corporate transfer from a foreign legal entity, in order to perform work or render services, to a branch, subsidiary, representative office or affiliate of that foreign legal entity established in the RK territory. An affiliate of a foreign legal entity means a legal entity registered in the RK territory, a part of whose shares or a participation interest is directly or indirectly owned by such foreign legal entity.

Intra-corporate transfer means a temporary (for the term specified in the employment agreement, but not more than 3 years, extendable for 1 year) transfer of a foreign national or stateless person performing labor activities in the position of a head, manager or specialist in a legal entity (established in the territory of a WTO member state and located and operating outside the RK territory) to branches, subsidiaries or representative offices of such legal entity established in the RK territory, in accordance with the Kazakhstan legislation.

The corporate and intra-corporate transfer procedures are established by the Rules and Conditions for Issuing Job Placement Permits to Foreign Employees and Foreign Labor Engagement Permits to Employers².

RISKS ASSOCIATED WITH SECONDMENT IN KAZAKHSTAN

Although the current legislation defines the concept and conditions of secondment, however, as mentioned above, this legal institute is restricted in application to foreign nationals, the most sought for category of employees.

It is worth mentioning that the legal profession has no common view of the foreign employee secondment legitimacy. According to explanations by the RK Ministry

of Healthcare and Social Development, secondment of foreign employees based on Article 40 of the Labor Code is impossible, due to regulations contained in the Law on Population Employment and Law on Migration, as well as due to the necessity to: 1) obtain a foreign labor engagement permit for the host organization employees (which entails the need to enter into the employment agreement), and 2) comply with the migration legislation (visa regime, registration, etc.)³. The same view is supported by the drafters of the Labor Code and by most local practitioners (including lawyers contributing to legal forum⁴ and our firm's labor practice team). At the same time, there is a different opinion on the foreign employee secondment legitimacy, mostly shared by consulting (auditing) companies.

Subject to the above, when seconding foreign employees, it is necessary to bear in mind the possible legal implications, including, among other things, the tax risks associated with the recognition of foreign company as a permanent establishment in Kazakhstan, which gives rise to the corporate income tax liability.

No less significant is the risk in case the relations between the seconded personnel and the host company are recognized as labor relations. Practice shows that the competent authorities would rather assess the essence of relationships than their form. The implications of such recognition are most serious: imposition on the host company of all employer's seconded-related obligations to retrospectively cover the entire period of the seconded work for that company (including

insurance, occupational safety, taxation, and other issues). The company may potentially be made liable for breaches of the Kazakh labor or other legislation in respect of the seconded (failure to enter into the employment agreement, pay salary, grant a leave, etc.).

If using seconded foreign labor for more than 120 days per year, one should also bear in mind that in such cases, in order to register foreign nationals, local migration police authorities require to present employment agreements and work permits for the effective term of which the registration is normally being issued. Lack of such documents executed in the name of the host company may entail the guilty persons' administrative or criminal liability for the breach of foreign labor engagement rules or migration legislation, and other adverse implications.

The seconding company, legally being the secondees' employer, may also face legal problems: the employment agreements concluded with the employees seconded to other companies may be qualified as fictitious. Since the subject of a secondment contract is, as a rule, a certain type of work or services (for instance, expert services or repair work, etc.), the secondees may be performing in Kazakhstan the types of work subject to licensing. In case the seconding company has no such license, governmental agencies may regard the secondment contract as a sham agreement covering up a contract for licensable work/services to be performed without appropriate license, entailing the relevant consequences for those responsible.

Thus, when deciding to enter into secondment relationships, one should not underestimate the existing legal risks, and it might make sense to look for alternative solutions that fall within the Kazakh legislation's general approaches to this matter. ■

³ *The Labor Code of the Republic of Kazakhstan. Article-by-Article Practical Comments – Almaty: MCFR-Kazakhstan LLP, 2016 – p. 638.*

⁴ <http://forum.zakon.kz/index.php?showtopic=119985>.

² *Decree No. 45 of the RK Government «On Approval of the Rules for Establishing Quota for Foreign Labor Engagement in the Republic of Kazakhstan and Rules and Conditions for Issuing Job Placement Permits to Foreign Employees and Work Permits to Employers for the Engagement of Foreign Labor and Foreign Employees Transferred Under an Intra-Corporate Transfer, and on Introduction of Amendments into the Decree No. 836 of the Government of the Republic of Kazakhstan of 19 June 2001 «On Measures for Implementation of the Law of the Republic of Kazakhstan 'On Population Employment' of 23 January 2001» dated 13 January 2012.*

