THE NEW LABOR CODE: NOTES ON THE MARGINS

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What is the New Labor Code Needed For?

100 Concrete Steps, A Modern State for All - President Nazarbayev's program envisions the liberalization of labor relations and adoption of a new Labor Code.

Kazakhstan has embarked firmly on the path toward developing a market economy, which also inevitably shifts priorities toward the protection of production interests. Kazakhstan has joined the WTO (its membership is at the final stage of approval) and has assumed obligations under the Eurasian Economic Union (EAEU), which requires Kazakhstan to harmonize its domestic legislation with the norms and standards applied by the international community.

As legal practitioners, we know that improvement of the country's main labor law is long overdue for reasons beyond political and economic pressures. From our perspective, the current Labor Code, in a number of its key points, meets neither employee nor business interests. In practice, situations regularly occur that are impossible to resolve due to gaps in legislation, conflicting laws, or because a resolution is too time-and resource-consuming. Mechanisms that would more effectively allocate human resources are missing.

We stand for good faith in labor relations, both on the part of the employer and the employees, and for both parties to possess a full-fledged set of instruments to protect their rights. It is from this standpoint that AEQUITAS lawyers have developed their proposals and framework for a new Labor Code based on their significant experience and systemic understanding of Kazakh legislation.

What Has Been Done and What Has Yet to Be Done?

Undoubtedly, the Government's working group that prepared the draft law has accomplished much over a very short period. The draft Labor Code has improved regulation on a number of issues, bridged certain legislative gaps, and introduced new legal concepts. In several, the Code's structure has become much more convenient to use by both lawyers and laymen.

However, there are still some contradictory or vague provisions that could be corrected by further revisions to the draft.

Employee Representatives

The concept of employee representatives remains poorly elaborated and needs a clear definition. The current version is unclear as to whether the elective employee representatives will represent the interests of the entire collective, including those who voted 'against' at the general meeting of employees, or will represent only those employees who voted 'for' the position of the representatives.

Due to the ambiguity in the conceptual framework, the issue remains whether third parties may act as employee representatives by proxy. In cases where the participation of employee representatives is mandatory (for instance, in the work of an attestation commission), should only the representatives of specific (in particular, those being attested) employees participate in the statutory procedure, or are any other employee representatives allowed to participate? And what is to be done if a specific employee subject to attestation has no representative and is not willing to elect one? In this case, the employer's rights to conduct attestation may be paralyzed.

We believe that the new Draft Labor Code must resolve the problem of employee representation. This is all the more important because the draft law contains a larger issue – dispute resolution.

Dispute Resolution

A person (employee or employer) may go to court only if the dispute has not been resolved by a grievance committee or if a decision has not been made. In this light, it is impossible for the parties to go to court without formation of a grievance committee, which we anticipate would occur in an overwhelming majority of the cases. Thus, the employee's constitutional right to judicial protection is violated.

A person possesses no legal mechanism to form such a committee if none exists, or if no employee representatives have been elected, or there has been no general meeting to appoint representatives on the committee, or no agreement has been reached between the representatives and the employer. Furthermore, there may be disputes regarding the procedure for holding the general meeting.

Moreover, if there is a dispute between a CEO and employer (ie participants/shareholders, etc.) the grievance committee is handicapped because representatives of the legal entity's supreme management bodies (who hired the CEO) are barred from participating in the committee, leaving the CEO severely disadvantaged. This approach represents a serious violation of participant/ shareholder rights.

Executives

The need to regulate issues related to functioning executive bodies is long overdue.

Employers should be entitled to independently regulate employment agreements, labor remuneration procedures and conditions, imposition of disciplinary liability, resolution of individual labor disputes, granting of leaves, exercise of executives' rights and performance of their duties. The founders (participants or other management bodies of the legal entity) should also be empowered to determine who will issue orders on the above issues.

The ban on terminating employment agreements while the employee is on sick leave should not apply to executives to avoid material damages to the employer due to corporate procedures for general meetings of shareholders or participants. If such ban is in effect, executives may knowingly prevent termination of their employment contracts by going on extended sick leave. Unfortunately, this has too often been the case with executive disputes over labor contracts. However, courts are currently refusing their employment reinstatement. We hope that the new Labor Code will include a provision preventing this ban from applying to this category of employees, thereby eliminating grounds for further disputes.

Practice shows that regulation of executive contracts should also apply to the heads of branches and representative offices, as well as to other elective bodies.

Secondment

We would also like to focus on the issue of secondment (provision of personnel). These cases have increased, especially bringing foreign staff from abroad, which is facilitated by Tax Code provisions exempting the foreign organization providing personnel from the obligation to form the so-called 'permanent establishment' for tax purposes. In practice, however, many organizations forget that fulfilling Tax Code provisions is impossible without applying the Labor Code, as the person being seconded and the inviting organization are forming an employment relationship that requires an employment contract, a salary, and an administrative framework that contradicts the concept of agency labor.

The new Draft Labor Code dedicates a separate article to secondment, albeit covering only the provision of personnel within the framework of a vertical structure of affiliates, not applying to the horizontal relationship that is more often the norm (transfer of personnel between legal entities that are dependents of the same parent organization).

Moreover, the subjects of a secondment relationship, according to the draft Law, may only be legal entities with shares (participation interests), that is, essentially joint stock companies and partnerships, thus making secondment impossible for other legal entities, including foreign entities. The status of an employee from a foreign legal entity to its local branch or representative office is also unclear. We deem that such restrictions within the same group of affiliate legal entities are unjustified.

In addition, the law to govern labor relations with foreign employees seconded to Kazakhstan remains open.

Qualification Requirements and Names of Positions

The new Labor Code's main goal is to liberalize labor relations. But how does this goal correlate with the Government's intention to bring qualification descriptions, names of positions and labor conditions in line with professional standards, salaries and qualifications?

The names of positions established by the *Qualification Reference Book (QRB)* and the *Unified Salary and Qualifications Reference Book (UQRB)* lag far behind the labor market and sought-after occupations and positions. Almost all employers encounter problems when they cannot find the necessary positions in the *QRB* and *UQRB* occupational standards reference books.

The current occupational standards are far from ideal. Moreover, the normative legal acts themselves contain contradictions. For example, special legislation envisages positions that are not in the reference books. Employers do not understand why they cannot introduce positions they need if employees agree to the work and corresponding position. Demand is growing for 'multifunctional' positions in which employees perform different functions under the same job description. It is unclear why employers must hire employees of a specific specialty and qualification for a particular position if another employee who lacks certain qualifications is better suited for the job.

The transfer of approval functions for occupational standards to the National Chamber of Entrepreneurs (NCE) is detrimental to a flexible approach to this issue. First, not all employers are NCE members, in particular, branches and representative offices of foreign organizations, not-for-profit organizations and individual employers. Furthermore, not all employers have the resources and possibilities to participate in development of industrial occupational standards. It is simply not possible to create standards that cover all employers' interests.

The Draft Labor Code establishes that an occupational standard must define the requirements for the level of qualification, competence, content, quality and conditions of employment (which include, *inter alia*, working hours, breaks, and salaries) in a particular profession. Occupational standards will be based on national and industry frameworks.

In other words, employment and labor conditions will be standardize for all types of employment, contradicting normal competition in the marketplace. This will impede organizational development (especially small and medium businesses) and the country's development on the whole.

We are of opinion that the private sphere should be allowed to create the titles and functions for positions, rather than having labor conditions dictated by reference books or standards remote from employers' actual needs. These reference sources may be useful as recommendations, but no more. Private employers should be granted freedom, subject to statutory labor guarantees.

Social Partnership

The idea of social partnership serves the primary objective of protecting worker interests, resolving conflict situations, and consolidating efforts of all participants to resolve employment problems through voluntary dialogue between the social partners or with government participation. Unfortunately, the concept of the Labor Code has, in fact, turned the idea of voluntary social partnership into a 'social imposition,' as a result of most employers having no practical mechanisms to influence social partnership agreements.

We believe the Labor Code should provide a voluntary, rather than mandatory accession of employers to social partnership agreements, because only such an approach is consistent with the nature of these agreements and ensures protection of all parties.

Another alternative to employee protection with government participation is a collective enterprises agreement concluded with employee representatives. Again we revert to the idea that the concept of 'employee representation' should be substantially revised, taking into account the full range of practical issues.