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Remote work in Kazakhstan (including remote work of foreign workers)

“Can remote work completely replace the office for everyone?

No. But it definitely creates an alternative, forcing offices to evolve and transform.” A. Mezin

Against the backdrop of the COVID-19 pandemic and prolonged quarantine restrictions, the issues of teleworking in Kazakhstan have acquired particular relevance. According to the publication of the MK-Kazakhstan newspaper, in Kazakhstan in 2020 the number of employees working remotely increased 100 times – from 60,000 to 6,000,000. Another source, Forbes Kazakhstan, reports that as of May 2020, 70% of civil servants were using telecommuting.

At the same time, teleworking was reflected in Kazakhstan’s labour legislation long before the coronavirus crisis, back in 2012, but before the pandemic, the method of work in question was not widely used.

At this time, telecommuting is regulated by Article 138 of the Labour Code of the Republic of Kazakhstan No. 414-V ZPK dated November 23, 2015 (hereinafter referred to as the “Labour Code”).

According to this article, telecommuting is a special form of the work process outside the employer’s location using information and communication technologies in the process.

Also, in the context of telecommuting, the Labour Code provides for the following obligations for the parties to an employment relationship:

The employer is obliged to:

- ▶ provide the employee with means of communication (means of communication) and bear the costs of their installation and maintenance;
- ▶ pay compensation to the employee if the employee uses his own means of communication on an ongoing basis. In this case, the amount and procedure for payment of compensation are established by agreement with the employee. By agreement of the parties, the employee may be reimbursed for other expenses related to the performance of work (the cost of electricity, water and other expenses);
- ▶ develop an act defining the procedure for compliance with labour safety and health requirements, as well as ensuring the safe performance of labour duties.

The duties of an employee include:

- ▶ performance of work taking into account the fixed accounting of working hours;
- ▶ compliance with labour safety and health requirements in accordance with the act developed by the employer.

As noted above, for workers engaged in telecommuting, a fixed record of working time is established, the specifics of control over which are determined in the employment contract. At the same time, the Labour Code does not specify which particular features of control over working time can be used in this case.

In this connection, in practice, employers independently determine various methods of monitoring the working time of remote workers, including:

- ▶ holding regular videoconferences with employees;
- ▶ the requirement for the employee to be "online" during the working day in order to timely respond to all messages received by e-mail, as well as calls from colleagues, management;
- ▶ use of special software that records the time spent by an employee in the employer's corporate information system.

Taking into account the above, we can confidently say that the regulation of teleworking in the Labour Code allows the parties' labour relations, when concluding an employment contract, to reflect the main specifics of teleworking, as well as the obligations of the parties arising from it.

At the same time, the transfer of workers during their working life from the standard mode of work (office work) to telecommuting causes certain difficulties for companies, especially when this transfer is initiated by employers on the recommendation of government agencies, as in the case of the COVID-19 pandemic.

In particular, the transition to a remote work format implies a change in the place of work of the employee specified in the employment contract, as well as the need to include additional obligations of the parties in the employment contract, which, in turn, obliges the parties to amend the employment contract. In this case, changes must be carried out in the manner prescribed by Article 33 of the Labour Code, through the following actions:

1. the employer sends the employee a notification with a proposal to work remotely (at the place of residence or in another location), as well as an additional agreement reflecting all relevant changes to the employment contract;
2. the employee reviews the notification and informs the employer of his decision within 5 working days from the date of receipt of the notification. In case of a positive decision, the employee signs an additional agreement to the employment contract, and in case of refusal, he informs the employer about this separately.

Considering the above, the employee has the right to refuse the telecommuting offered to him, which is acceptable under standard conditions (not all employees are comfortable with teleworking due to housing, family circumstances), but not in a pandemic, when continuing to work in the office, moving around the city may pose a threat to the life and health of the employee. However, in practice, employers have faced similar refusals from workers.

That is, the Labour Code does not take into account force majeure situations when the transfer of employees to a remote mode of work is inevitable due to exceptional circumstances and should not depend on the opinion of employees. We believe that for the type of transfer under consideration, the order of the employer with the appropriate justification for the transfer, the procedure for reimbursing workers' costs caused by teleworking, as well as indicating the methods of fixed recording of working hours instead of drawing up the documents provided for in Article 33 of the Labour Code is quite sufficient.

Also, the existing procedure for transferring to teleworking involves personal interaction between the employee and the employer when signing an additional agreement, which, as practice has shown, is impossible with an urgent transfer of employees to teleworking due to quarantine restrictions.

The study of the international practice of introducing remote work made it possible to identify another disadvantage in the mechanism of remote work in Kazakhstan's current legislation. In particular, the Labour Code does not provide for the possibility of combined teleworking, when an employee can alternate work from home with office work. In our opinion, the presence of

combined work is quite reasonable, since a sharp transition to remote work can affect the psychological state of the employee, cause the risk of loss of social, communication, and professional skills. In this regard, it is worth citing as an example the definition of teleworking, contained in the European Framework Agreement on Telework (Framework Agreement on Telework) of July 16, 2002 (hereinafter - the "European Agreement"), according to which "telework" is - "the form of organisation and / or performing work using information technology in the context of an employment contract / relationship, where work, which may also be performed on the employer's premises, is carried out outside these premises on a regular basis".

In order to eliminate the existing shortcomings in the mechanism for regulating remote work, legislative bodies have developed a draft Law of the Republic of Kazakhstan "On Amendments and Additions to the Labour Code of the Republic of Kazakhstan on Improving the Legal Regulation of Remote Work" (hereinafter - the "Draft Law"), which is currently at consideration of the Mazhilis of the Parliament of the Republic of Kazakhstan. The bill is aimed at detailing the existing mechanism for regulating remote work, including its differentiation by type, clarifying the procedure for interaction between an employee and an employer, etc. For example, the Draft Law provides for the following:

1. Availability of three types of remote work:

- ▶ remote (permanent) work - a special form of the implementation of the labour process outside the employer's location using information and communication technologies in the process of work;
- ▶ temporary teleworking is the implementation of a labour process that provides for the temporary performance of the labour function of an employee working on the basis of an employment contract outside the location of the employer;
- ▶ combined teleworking - implementation of the labour process by combining work duties both at the employer's location and through teleworking.

In accordance with the Draft Law, all specified types of remote work can be established only by agreement of the parties. Thus, for temporary teleworking, even in connection with emergencies, the written consent of the employee will be required, which, unfortunately, does not solve the above problem of transferring employees to teleworking without their consent in exceptional cases (emergency situations, pandemic, etc.) .

2. The use of an electronic digital signature when submitting notifications, familiarising the employee with the collective agreement and acts of the employer, providing the employee with explanations on the fact of the committed disciplinary offense.

The introduction of the above amendments will facilitate the procedure for personnel workflow, which is especially important in remote work and quarantine measures, when the parties to labour relations do not have the opportunity for personal interaction.

3. Establishing a flexible working time for the employee in addition to the fixed working time (during which the employee must be available for communication with the employer within working hours, observing the limitations of the daily working hours), flexible working hours using the summarised accounting of working hours.

Establishing flexible working hours is the best option for many teleworkers who need to combine work with household duties and childcare. In this regard, the International Labour Organisation (hereinafter referred to as "ILO"), in its practical guide "Remote work during and after the COVID-19 pandemic" (hereinafter referred to as the "Guide") provides an example from the practice of a financial services company in Poland, in which the employer allowed one of the employees to work from 6 a.m. to 2 p.m. for one week and from 2 p.m. to 8 p.m. the next week, thus giving her the opportunity to take turns caring for the baby with her husband.

4. Conclusion with a remote worker of an agreement on the preservation of confidential information in order to protect

the confidential information of the employer.

In addition to the new provisions contained in the Draft Law, and aimed at honing the existing mechanism of remote work, in our opinion, it would be advisable to include the following norms in the Labour Code:

2. Obligation of the employer to periodically conduct trainings (training) for workers engaged in remote work, as, being isolated from the team, the usual working atmosphere, employees risk reducing their professional skills (such an obligation is reflected in the European Agreement).

The ILO also recommends employers to conduct courses focusing on "the effectiveness and behavioral aspects of teleworking" that will help reduce potential stress, the risk of emotional and professional decline, and blurring the boundaries of work and personal life. "Adequate exercise, proper nutrition and good sleep, and turning off digital devices are just as important, if not more, in the context of telecommuting during a pandemic," says the ILO.

2. Regulations on the possibility (impossibility) of foreign workers employed by Kazakhstani companies to work remotely at their place of residence (country of permanent residence).

This measure is due to the fact that now, during a pandemic, when the entry of foreign labour is difficult due to quarantine restrictions, the issue of remote work by foreign specialists is extremely relevant, but at the same time, lawyers, employers, and a number of state bodies do not have a consensus on this issue, so as:

On the one hand, the Ministry of Labour and Social Protection of the Population of the Republic of Kazakhstan gives written explanations that remote work in the situation under consideration is possible and the legislation of the Republic of Kazakhstan will be applicable legislation (however, the explanations of the ministries are not normative legal acts and, accordingly, are not mandatory).

On the other hand, in accordance with paragraph 2 of Article 8 of the Labour Code, the Labour Code applies to employees and employers who are located on the territory of the Republic of Kazakhstan, including branches and (or) representative offices of foreign legal entities. At the same time, foreign workers in this case do not carry out their activities on the territory of Kazakhstan, but on the territory of a foreign state. The lack of settlement of this issue raises controversy as to whether employers in this case need to obtain work permits for foreign workers or not.

To sum up, we can conclude that the main aspects of telecommuting are regulated by the Labour Code. Moreover, at this stage, measures are being taken to improve the mechanism of remote work in Kazakhstani legislation. However, in our opinion, introducing innovations related to remote work, the legislator should place greater emphasis on measures to prevent desocialisation, professional burnout of workers, taking into account the experience and practice of countries where remote work is already an established mechanism in labour relations.

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