Labour & Employment 2021

Contributing editors
Matthew Howse, K Lesli Ligorner, Walter Ahrens, Michael D Schlemmer and Sabine Smith-Vidal

LEXOLOGY®
Getting The Deal Through

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Morgan, Lewis & Bockius LLP

Lexology Getting The Deal Through is delighted to publish the sixteenth edition of *Labour & Employment*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Austria, Hong Kong, Hungary, Mauritius, Romania, Singapore and Taiwan.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Matthew Howse, K Lesli Ligorner, Walter Ahrens, Michael D Schlemmer and Sabine Smith-Vidal of Morgan, Lewis & Bockius LLP, for their continued assistance with this volume.

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Getting The Deal Through

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LEGISLATION AND AGENCIES

Primary and secondary legislation

1 What are the main statutes and regulations relating to employment?

The main statutes relating to employment are:

- the Kazakhstan Constitution, which sets out the basic rights relating to employment;
- the Labour Code, which regulates employment and related matters, social partnerships, safety and protection of labour; and
- the Normative Resolution of the Supreme Court of the Republic of Kazakhstan No. 9 'On Certain Matters of Application of the Legislation while Considering Labour Disputes by the Courts', dated 6 October 2017.

There are various other laws and normative acts that regulate specific labour-related matters. For example, the Rules on Migration regulates aspects of foreign labour, and Government Regulation No. 559 of 27 June 2016 regulates work permits issued to foreign nationals.

A special employment regime is set out for the citizens of the member states of the Eurasian Economic Union following the International Treaty between Kazakhstan, Belarus and Russia on the Eurasian Economic Union, dated 29 May 2014 (acceded to by Armenia in January 2015 and Kyrgyzstan in August 2015). Also, a special employment regime is applied in the Astana International Financial Centre.

Protected employee categories

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

The Kazakhstan Constitution generally prohibits discrimination based on descent, social, occupational and financial status, gender, race, nationality, language, religion, opinion, place of residence and any other grounds. Discrimination in employment is specifically prohibited by the Labour Code, which guarantees:

- an equal opportunity to enjoy labour rights and freedoms;
- non-discrimination in labour rights on the grounds of gender, age, physical shortcomings, race, nationality, language, social, occupational and financial status, place of residence, religion, political opinion, clanship or social class, or public associations; and
- the right to sue for discrimination.

Enforcement agencies

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The Ministry of Labour and Social Protection (including its regional divisions) is responsible for the enforcement of employment statutes and regulations. Certain labour matters, such as those related to the employment of foreign nationals, may be enforced by the Ministry of Internal Affairs.

WORKER REPRESENTATION

Legal basis

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

The Labour Code allows employees to establish the following types of commission in the workplace:

- A collective bargaining agreement commission, comprising an equal number of employer and employees' representatives and established to negotiate and draft collective bargaining agreements. Collective bargaining agreements may be initiated in local companies, as well as in branches and representative offices of foreign legal entities.
- A conciliation commission, comprising an equal number of employer and employees' representatives and established to resolve individual labour disputes if employees cannot resolve the disputes directly with the employer. If the decision of the conciliation commission is not implemented within the period set out in the commission's resolution, the employees or employer, as the case may be, may apply to a court for resolution of the disputes. Subject to certain exceptions, application to the conciliation commission is mandatory before an individual labour dispute may be considered and resolved by a court.
- A mediation commission, which is an ad hoc body comprising an equal number of employer and employees' representatives and established to resolve collective labour disputes (eg, an employer's compliance with labour law or a collective bargaining agreement).
- A labour arbitration, which is an ad hoc body comprising the representatives of an employer, employees of a single organisation and competent authority, and is established if the parties do not reach a consensus through the mediation commission.
- A safety and labour-protection work council, which may be established by the initiative of the employer or employees (or both).
- A labour union, which is a public association created for representing and protecting labour and socio-economic rights and interests of its members (employees).

All of the foregoing commissions and arbitration procedures should be established on a parity basis; the number of representatives and the order and terms of operations of each of the commissions are established on a case-by-case basis subject to minimal thresholds, if applicable.

Powers of representatives

5 | What are their powers?

Collective bargaining agreement commission

Employees are obliged to consider and discuss the draft collective bargaining agreement prepared by the commission. The commission should revise the draft collective bargaining agreement subject to the employees' comments.

Conciliation commission

A general rule is that the conciliation commission is a mandatory pre-trial primary body for the consideration of individual labour disputes between employees and employers. Certain categories of employees are not subject to this general rule.

Mediation commission

A duly taken resolution of the mediation commission is binding on the parties. If the mediation commission fails to reach an agreement on a collective labour dispute, the dispute may be conveyed to labour arbitrage – an ad hoc commission that includes representatives of the employer, employees and state authorities.

Labour arbitration

Labour arbitration considers collective labour disputes that were not resolved through the mediation commission. The decision of the labour arbitration is binding on the parties of a collective labour dispute. If a labour arbitration award is not performed within the stated term, an underlying dispute may be resolved through court procedures.

Safety and labour protection work council

The council includes, on a parity basis, representatives of the employer and employees, including technical labour inspectors. The council's decision is binding on the employer and employees. The council's purposes are to:

- arrange joint actions of the employer and employees to ensure compliance with labour safety rules;
- prevent workplace injuries and occupational illness; and
- arrange for workplace inspections.

Status, rights and obligations of the technical labour inspectors, as well as their supervision procedures, are to be determined by the council's decision.

Labour union

A labour union is authorised to:

- file claims in the interests of its members;
- participate in mediation or court proceedings, labour arbitration and meetings with state authorities;
- conduct negotiations; and
- execute agreements and collective bargaining agreements.

BACKGROUND INFORMATION ON APPLICANTS

Background checks

6 | Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

Employers are entitled to obtain the relevant information directly from employees, but cannot obtain an applicant's criminal or credit record directly from publicly available sources. Security checks may be conducted if the position is security-sensitive (eg, national security officers). Hiring a third party to conduct background checks is not regulated and does not appear to be prohibited, provided the third party conducts its activities under the law.

Medical examinations

7 | Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

There are no prohibitions on requiring a medical examination as a condition of employment. Medical examination as a condition of employment is expressly required for certain occupations where the physical ability and condition of an applicant are essential to the work to be performed (eg, heavy lifting or dangerous work, work under harmful or hazardous conditions, etc), and for certain categories of applicants (eg, employees of public food courts or children's healthcare organisations). Moreover, under the Health and Healthcare System Code, employers may not employ persons who have not undergone medical examinations for certain activities. Therefore, an employer may, in some cases, refuse to hire an applicant who does not undergo a medical examination and submit the results to the employer or may terminate an employment agreement if an employee refuses to undergo a medical examination to establish the fact that he or she uses substances that cause alcoholic, narcotic or inhalant intoxication.

Drug and alcohol testing

8 | Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

There are no restrictions or prohibitions on the drug and alcohol testing of applicants. Moreover, certain normative acts even require such tests before employment (eg, for those who wish to be employed in the national security forces).

HIRING OF EMPLOYEES

Preference and discrimination

9 | Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

No, there are no such legal requirements. The Labour Code permits an employer to provide exceptions, preferences and benefits to citizens requiring social and legal protection, and such exceptions, preferences and benefits are not considered discrimination.

10 | Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

Yes, a written employment contract is mandatory. Employment contracts must contain the following:

- the parties' details:
  - for an employer (individual):

- last name, name and patronymic (if specified in the document certifying the identity);
- address of the permanent place of residence and information on the registered address;
- title, number and date of issue of the document certifying the identity; and
- individual identification number;

- for an employer (legal entity):
  - full name and address of the employer;
  - number and date of the state registration;
  - business identification number; and
- for an employee:
  - last name, name and patronymic (if specified in the identification document) of the employee;
  - address of the permanent place of residence and information on the registered address;
  - title, number and date of issue of the identification document; and
  - individual identification number; and
- a job description under the specific profession or qualification;
- the workplace location;
- the employment contract term;
- the starting date;
- work hours and rest time;
- remuneration terms;
- a description of work conditions, guarantees and privileges where the work is recognised as heavy or is performed under harmful or hazardous conditions;
- the rights and obligations of the employee;
- the rights and obligations of the employer;
- the procedure for the amendment and termination of the employment contract;
- liabilities of the parties;
- the date of the employment contract and its serial number;
- the terms and conditions on equipping the workplace, in the case of a contract with a disabled person; and
- other provisions (that do not contradict the laws of Kazakhstan), which may be included in the employment contract upon mutual agreement of parties.

11 To what extent are fixed-term employment contracts permissible?

The general rule is that employment contracts should be valid for at least one year. A fixed-term employment contract for less than one year is permissible only:

- when there is a need for substitution of a temporarily absent employee;
- for the duration of a specific project or the performance of seasonal works; or
- within the term of a work permit or permission of a foreign employee or foreign labour immigrant.

One year fixed-term rules do not apply to small business enterprises.

An expired employment contract may be extended for an undefined period or a period of not less than one year (such a one-year extension may happen only twice, except for small business enterprises that are not limited in the number of extensions). An employment contract with an employee of retirement age may be extended every year without the above-mentioned limitation. An employment contract with the executive body of a legal entity (eg, a CEO or president) must be concluded for a fixed term established by a company's constitutional documents or as agreed between an employee and employer in the employment contract within the permitted maximum term.

Probationary period

12 What is the maximum probationary period permitted by law?

The maximum probationary period is three months. However, such a term may be extended to six months for the CEO and his or her deputies, the chief accountant and his or her deputies, and heads of branches or representative offices.

Classification as contractor or employee

13 What are the primary factors that distinguish an independent contractor from an employee?

An independent contractor's work is governed by civil law contract rules (eg, a service agreement). An independent contractor is free to determine and agree on the terms and conditions of his or her work. Employees, on the other hand:

- are hired based on employment contracts governed by the Labour Code;
- are part of an employer's operational organisation;
- perform work personally and specific to their roles within the organisation;
- are paid monthly regardless of the results of their work; and
- must comply with internal labour policies.

Independent contractors may be subject to, depending on the terms and conditions of the relevant service agreement, material (commercial) liabilities for undue provision of services. Independent contractors are not entitled to compensation payments or minimal paid vacation. The agreement termination process is also different.

Temporary agency staffing

14 Is there any legislation governing temporary staffing through recruitment agencies?

No, there are no such specific regulations. Recruitment agencies may provide their services based on regular commercial service agreements.

FOREIGN WORKERS

Visas

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

Business visas are issued to foreign nationals travelling to Kazakhstan for short-term business purposes. There are three categories of business visas depending on the purpose of entry. Within each category, single-entry and multiple-entry visas may be issued (a business visa for a conference or concert performance may be given for a single entry only). A single-entry visa is issued for 90 calendar days. Multiple-entry business visas may be issued for the maximum period of 180 calendar days or one year depending on the category. Depending on the category, the duration of a foreign national's visit to Kazakhstan should not exceed 30 to 90 days.

Work visas are issued to foreign nationals travelling to Kazakhstan for a term of up to three years. There are four categories of work visas depending on the purpose of entry. Work visas similar to business visas can be issued for a single entry or multiple entries depending on the category. A single-entry work visa is issued for 90 calendar days. Multiple-entry work visas may be issued for a maximum period of one to three years depending on the category (five years for participants or bodies of the Astana International Financial Centre, and employees or

employees of shareholders of the Astana Hub International Technopark of IT Start-ups).

An employee transferring from a foreign corporate entity to work for a related entity in Kazakhstan must obtain a work visa. A work visa is issued based on a work permit, and in some cases based on the certificate of qualification for self-recruitment, and for a term up to three years or the term of the work permit.

Spouses

16 | Are spouses of authorised workers entitled to work?

No, spouses of authorised workers (ie, workers holding a valid work permit) are not entitled to work.

General rules

17 | What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

A Kazakhstan employer may employ foreign nationals based on a validly issued work permit. The number of issued work permits may not exceed the yearly quota for foreign labour set annually by the Kazakhstan government. The issuance of work permits is subject to detailed statutory requirements. Certain foreign nationals and categories of employees are exempt from work permit requirements. Obtaining work permits is a time-consuming and document-intensive process.

Employing a foreign national who is not entitled to work in Kazakhstan constitutes an administrative offence. The maximum fine is approximately US$7,000 for the employer, and foreign nationals illegally residing in Kazakhstan and engaged in labour activity without a required work permit may be fined up to approximately US$176, held under arrest for 10 days or deported from Kazakhstan.

An employee may also be hired for certain economic priority sectors (eg, education, operations with immovable property, transport and communication, etc) based on a certificate of qualification for self-recruitment. To receive such a certificate, a foreign employee must submit a set of required documents to an authorised body and meet the standards related to the level of education and work experience.

Resident labour market test

18 | Is a labour market test required as a precursor to a short or long-term visa?

Labour market tests are not required for short- or long-term business visas, or most work permits. A labour market test is, however, a prerequisite to receiving a certain type of work permit (inter-corporate transfer) and subsequent work visa. The authorities will consider a work permit application if there are no local employees qualified for the vacancy. The employer is required to notify a state authority about the open position. If, within 15 days, no local candidates with sufficient qualifications have been found, the employer may apply for an inter-corporate transfer, provided that the relevant candidate meets certain requirements.

TERMS OF EMPLOYMENT

Working hours

19 | Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

Under the Labour Code, the number of normal working hours should not exceed 40 hours per week.

The following limited working hours per week have been established for those younger than 18 years old:

- from 14 to 16 years old: not more than 24 hours; and
- from 16 to 18 years old: not more than 36 hours.

For employees involved in dangerous work or work under harmful or hazardous conditions, and for certain disabled people, the maximum number of hours is 36 hours per week.

The maximum daily working hours in a regular working week (Monday to Friday) or extended working week (Monday to Saturday) is eight hours. Alternative daily working-hour arrangements may be established for certain categories of employees (eg, sportspeople or journalists).

The following categories of employees are not allowed to work at night (from 10pm until 6am):

- employees under 18 years old; and
- pregnant women who have provided proof of pregnancy.

Overtime work should not exceed two hours a day for each employee or one hour for employees engaged in dangerous work or working under harmful or hazardous conditions. The total amount of overtime work for all employees should not exceed 12 hours a month and 120 hours a year.

Also, the Labour Code permits shift work and cumulative hour schemes for work that, owing to its nature, cannot follow regular working-hour requirements.

Overtime pay

20 | What categories of workers are entitled to overtime pay and how is it calculated?

All workers are entitled to overtime pay if they are engaged in overtime work. Pregnant women who have provided proof of pregnancy, disabled employees and employees younger than 18 years old cannot engage in overtime work. The Labour Code sets minimum rates for overtime pay, which may be increased by employment contract or collective bargaining agreements. The calculation of overtime pay depends on the payroll system established by the employer; however, overtime pay must be no less than 50 per cent (for piecework) or one-and-a-half times (for other work) the daily (hourly) rate of the employee.

21 | Can employees contractually waive the right to overtime pay?

As a matter of practice, yes. However, the state labour authorities do not support such practice, and this type of contractual waiver may result in the administrative liability of an employer in the amount of up to US$1,000.

Vacation and holidays

22 | Is there any legislation establishing the right to annual vacation and holidays?

Annual paid vacation is mandatory. The minimum annual paid vacation is 24 calendar days, unless a greater number of days are provided by some other regulatory legal act, employment contract, collective bargaining agreement or the employer. Additional paid vacation must be provided to the following employees:

- persons engaged in dangerous work or working under harmful or hazardous conditions: at least six additional calendar days per year; and
- disabled persons of the first and second categories: at least six calendar days per year.

Additional paid vacation may be provided under applicable legislation for other categories of employees (eg, donors and professional members of the emergency services, etc).

Annual paid vacation accrues at a rate of one-twelfth of the annual paid vacation per completed month. The amount of annual paid vacation is calculated in calendar days without counting holidays that fall on vacation days, regardless of applicable work regimes and work schedules. When calculating the total amount of an annual paid vacation, additional paid vacation must be added to the main annual paid vacation.

There are 12 public holidays per year.

Sick leave and sick pay

23 | Is there any legislation establishing the right to sick leave or sick pay?

Employees have the right to sick leave and sick pay. Sick leave must be supported by a medical certificate issued by a licensed doctor. Sick leave cannot be longer than two months. The level of sick pay is determined based on the employee's average daily income multiplied by the number of working days during which the employee was on sick leave.

Leave of absence

24 | In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

The Labour Code sets out the following types of leave of absence (in addition to annual vacation):

- leave without pay;
- study leave;
- maternity leave or leave for adopting a newborn child; and
- leave without pay for taking care of a child under three years old.

Employers are obliged to grant employees leave without pay for up to five calendar days for marriage registration, the birth of a child, the death of close relatives and as provided in employment contracts and collective bargaining agreements. In other cases, employees are allowed to take leave without pay with the employer's prior consent.

Study leave is granted to employees enrolled in educational institutions to prepare for and take tests or exams, participate in training or research projects, prepare and defend theses (projects), or participate in military training programmes. Paid study leave is determined by an employment contract, collective bargaining agreement or training contract. An employer must secure a job for an employee who has received the Bolashak International Scholarship (a scholarship awarded to high-performing students in Kazakhstan to study overseas with all expenses paid (subject to returning to work in Kazakhstan for at least five years after graduation) during his or her study abroad.

Generally, maternity leave commences 70 calendar days before the expected childbirth and ends 56 calendar days after childbirth (70 days before and after childbirth in the case of multiple births or post-birth complications). Depending on the residence conditions of a woman, delivery date and weight of the child, the terms of the maternity leave may be increased (to 91 calendar days before childbirth and 93 calendar days after childbirth). Leave for the adoption of a newborn child is provided to one of the parents on the day of adoption and for 56 days after childbirth. During maternity leave or leave for adopting a newborn child, a woman (parent) receives social parental pay from the government, and the employer is required to make up the difference between maternity pay and the employee's average net compensation if such obligation is provided in the employment contract or collective bargaining agreement.

Leave for taking care of children under three years old is provided to one of the child's parents and is not paid by the employer. An employee may use parental leave, in full or in parts, until a child reaches the age of three years.

Mandatory employee benefits

25 | What employee benefits are prescribed by law?

There are several types of social benefits and compensation packages, such as:

- mandatory pension deductions;
- social security benefits (comprises contingencies such as disability, survivorship, job loss, pregnancy and childbirth, adoption of newborn children, taking care of a child under one year of age);
- occupational accidents insurance (borne by the employer);
- employees' temporary disability benefits (borne by the employer);
- compensation to workers employed in areas of environmental disaster and radiation risk;
- compensation to employees whose employment duties are associated with extensive travelling or away from their place of domicile; and
- compensation to employees concerning dismissal from office owing to:
  - downsizing or liquidation of the employer;
  - non-compliance of the employer with the terms and conditions of the employment contract; or
  - decreased production output, works or services that resulted in the worsening of the employer's economic conditions.

Part-time and fixed-term employees

26 | Are there any special rules relating to part-time or fixed-term employees?

In general, no. The key difference is in the number of working hours only.

Public disclosures

27 | Must employers publish information on pay or other details about employees or the general workforce?

Every employer must disclose certain information about every labour agreement (eg, the date of signing, change, cancellation, duration and registration number of the agreement, employer and employee ID numbers and the employee's job position) through the electronic system supported by the government. Disclosure of such information is subject to personal data transfer restrictions (eg, the employee's written consent).

POST-EMPLOYMENT RESTRICTIVE COVENANTS

Validity and enforceability

28 | To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

The Labour Code supports and provides for a non-compete and non-solicitation agreement between employers and employees. The practice of enforcement of these agreements is yet to be developed. Following the available court precedents, the mere fact an employee is being employed by another employer or a competitor does not mean that the employee breached a non-compete agreement with the former employer. To prove the breach of the non-compete agreement, the court requires submission of proof of actual damages (eg, owing to the disclosure of a commercial secret) caused by the former employer as a result of the employee's new employment arrangements.

Post-employment payments

29 | Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

No, there is no such obligation under the law. The parties may agree on such terms in a non-compete and non-solicitation agreement.

LIABILITY FOR ACTS OF EMPLOYEES

Extent of liability

30 | In which circumstances may an employer be held liable for the acts or conduct of its employees?

Generally, an employer is liable for damages caused by the acts of its employees if those employees were performing employment duties or acted on the instructions, and under the supervision of, the employer.

An employer is not liable for damages caused by the acts of its employees if an employee commits an offence that does not fall under the employee's employment duties. Under certain circumstances, an employer may seek restitution from the employee for incurred damages.

TAXATION OF EMPLOYEES

Applicable taxes

31 | What employment-related taxes are prescribed by law?

Employee remuneration is subject to income tax, mandatory pension fund contributions, social tax and social insurance contributions. Income tax and pension fund contributions are deducted from the employees' gross wages and withheld and paid to the state budget by the employer. Social tax and social insurance contributions are the responsibility of the employer. The remuneration of foreign national employees is also subject to taxation in Kazakhstan, but such employees are not required to make mandatory pension fund contributions.

EMPLOYEE-CREATED IP

Ownership rights

32 | Is there any legislation addressing the parties' rights with respect to employee inventions?

Employer and employee IP relations are primarily governed by the Civil Code and the Law on Copyright and Related Rights. Generally, IP created by employees as a result of performing employment duties becomes the employer's property.

Trade secrets and confidential information

33 | Is there any legislation protecting trade secrets and other confidential business information?

The Labour Code provides for an employee's obligation not to disclose commercial and other protected secrets that he or she learned while or as a result of performing employment duties. Under the Civil Code, an employee who breaches his or her non-disclosure obligations under the employment contract should compensate the employer for any damages caused.

DATA PROTECTION

Rules and obligations

34 | Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

The Labour Code and the Law on Personal Data Protection protect an employee's personal information. An employer (as the owner or operator of a database with personal data) must, inter alia:

- approve a list of personal data necessary and sufficient for the performance of such employer's activity;
- take and comply with necessary measures, including legal, organisational and technical, to protect personal data under the law;
- comply with the law on personal data and its protection;
- take measures to destroy personal data once the purpose of collecting and processing of such data has been met;
- collect and keep evidence confirming receipt of the employee's consent to collect and process his or her personal data; and
- provide information related to the employee within three business days of such employee's (or his or her representative's) request.

35 | Do employers need to provide privacy notices or similar information notices to employees and candidates?

Under the Law on Personal Data Protection, an employer must receive proper consent from employees or candidates for employment to collect and process their personal data. The consent must specify the purpose and cover the necessary and sufficient information to achieve the objective. The purpose of the data processing and the list of necessary data are determined by the employer as the data owner (controller) or operator.

36 | What data privacy rights can employees exercise against employers?

An employee has the right to, inter alia:

- be aware that the employer, as well as any third party, has his or her personal data;
- demand the employer to amend his or her personal data, if required and confirmed by relevant documents;
- withdraw his or her consent for the collection and processing of his or her personal data, except for certain cases; and
- protect his or her rights and interests, including demanding compensation for moral and material damages.

BUSINESS TRANSFERS

Employee protections

37 | Is there any legislation to protect employees in the event of a business transfer?

The change of an employer's name, departmental affiliation (for state authorities), change of owner or reorganisation should not affect employment relations with its employees.

TERMINATION OF EMPLOYMENT

Grounds for termination

38 | May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

There must be a cause for the dismissal of an employee upon the employer's initiative. The Labour Code provides the following exhaustive grounds (causes) for the dismissal of employees at an employer's initiative, including:

- the employer undergoing liquidation or ceases entrepreneurial activity (for individuals);
- the employer downsizing its personnel;
- the decrease of production output, works or services that resulted in the worsening of the employer's economic conditions;
- the employee not being qualified to perform his or her duties as confirmed by the results of the relevant performance test;
- the employee does not comply with requirements for professional activity (ie, the position of a security guard in a private security company);
- the employee repeatedly failing to pass the health and safety test if he or she is responsible for health and safety matters in a production organisation;
- the employee's certificate of 'appraiser' qualification being terminated;
- the employee not being fit to perform duties for health reasons;
- the employee displaying poor work performance during a probationary period;
- the employee is absent from work without a valid excuse for three or more consecutive hours during one workday;
- the employee is intoxicated or uses substances that cause alcoholic, drug or psychoactive intoxication (or an analogous substance) during the workday;
- the employee refuses to undergo drug testing;
- the employee violated health or safety rules that caused or could have had grave consequences, such as injuries or accidents;
- the employee stealing or intentionally destroying or damaging other people's property and such actions being confirmed by a legally binding court decision;
- an action or omission by an employee who is responsible for valuables, or an employee who uses his or her position in his or her own interests or in the interest of a third party contrary to the interests of the employer in return for obtaining material or other benefits, which results in a loss of trust;
- immoral misconduct by an employee serving in an educational role resulting in such employee no longer being fit to serve in such a role;
- the employee disclosing information that was acquired during the performance of his or her job duties that constitutes a state secret or other legally protected information;
- the employee repeatedly failing to perform or repeatedly improperly performing work duties without a valid reason, if he or she has previously been disciplined;
- the employee's access to state secrets being terminated under the grounds established by law;
- the employee knowingly submitting false documents or information to the employer when concluding the employment contract or for the transfer to another job, provided that, in the case of the submission of true documents, such employment and transfer would have been impossible;
- the head of the executive body of the employer, his or her deputy, or the head of the department or branch (representative office) violating labour responsibilities, which caused material damage to the employer;
- the employee is absent from work for more than two consecutive months owing to a temporary disability, except when the employee is on maternity leave or if the disease is on the list of diseases for which a longer period of disability is provided as approved by the competent state authority (the employee is entitled to his or her job (position) until his or her recovery is established);
- the employee committing a corrupt offence making him or her no longer fit to serve in such role;
- the employee continues his or her participation in a strike after a court decision declaring the strike illegal has been issued or the employee knew the strike had been suspended;
- the termination of the authority of a CEO, board member, internal auditor or corporate secretary under the law;
- the employee reaches retirement age;
- the employee is absent from work for more than one month for unknown reasons;
- the conversion of a part-time contract to a fixed-term contract;
- the CEO, his or her deputy or member of the executive body of the quasi-public entity having foreign citizenship; or
- the employee of a quasi-public entity committing a corrupt offence.

Notice

39 | Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

An employer must give at least one month's notice before termination in the case of dismissal owing to the employer's liquidation and downsizing of personnel unless a longer notification period is stipulated in the employment contract or collective bargaining agreement. Dismissal may occur earlier with the employee's written consent.

An employer must give 15 business days prior notice of termination in the case of dismissal owing to a decrease in production output, works or services that resulted in the worsening of the employer's economic conditions unless a longer notification period is stipulated in the employment contract or collective bargaining agreement. With the parties' mutual agreement, the notification period may be shortened or replaced by paying salary in proportion to the notice period.

An employer must give at least one month's notice before termination in the case of dismissal owing to the employee reaching the retirement age. Compensation may be paid if there is a provision in the employment contract or collective bargaining agreement.

In the case of mutual agreement on termination of employment, the relevant party (either employee or employer) must notify another party. The notified party must return with a response in writing within three business days.

40 | In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

Employees may be dismissed without notice in the following cases:

- the employee is not fit to perform duties owing to health reasons based on a certified medical report;
- the employee is not qualified to perform his or her duties based on a decision of an attestation commission;
- the employee repeatedly fails to pass the health and safety test if he or she is responsible for health and safety matters in a production organisation based on the decision of an examining commission;
- the employee displays poor work performance during the probationary period;
- the employee is intoxicated or uses substances that cause alcoholic, drug or psychoactive intoxication (or an analogous

substance) during the workday, in which case, such termination must be carried out in compliance with the procedure for applying disciplinary sanction and based on the medical findings;
- the employee refuses to undergo drug testing, in which case, such termination must be carried out in compliance with the procedure for applying disciplinary sanction and confirmed by the act of the employee's refusal to undergo drug testing;
- the employee repeatedly failing to perform or repeatedly performing work duties improperly without a valid reason, if he or she has been previously disciplined in which case such termination must be carried out in compliance with the procedure for applying disciplinary sanction;
- the employee is absent from his or her workplace without a valid excuse for three hours or more in one workday, in which case, such termination must be carried out in compliance with the procedure for applying disciplinary sanction;
- the employee violating health or safety rules that caused or could have caused grave consequences, such as injuries or accidents, in which case, such termination must be carried out in compliance with the procedure for applying disciplinary sanction;
- the employee stealing or intentionally destroying or damaging other people's property and such actions being confirmed by a legally binding court decision, in which case, such termination must be carried out in compliance with the procedure for applying disciplinary sanction;
- an action or omission of an employee who is responsible for valuables or employee who uses his or her position in his or her own interests or in the interest of a third party contrary to the interests of the employer in return for obtaining material or another benefit, which results in a loss of trust and must be based on an internal investigation;
- immoral misconduct by an employee serving in an educational role resulting in him or her no longer being fit to serve in such role, in which case, such termination must be carried out in compliance with the procedure for applying disciplinary sanction;
- the employee disclosing information that was acquired during the performance of his or her duties and that constitutes a state secret or other legally protected information, in which case, such termination must be carried out in compliance with the procedure for applying disciplinary sanction;
- the employee's access to state secrets being terminated under the grounds established by law;
- the employee knowingly submitting false documents or information to the employer when concluding the employment contract or for the transfer to another job, provided that, in the case of the submission of true documents, such employment and transfer would have been impossible in which case such termination must be carried out in compliance with the procedure for applying disciplinary sanction;
- the head of the executive body of the employer, his or her deputy, or the head of the department or branch (representative office) violating labour responsibilities, which caused material damage to the employer, in which case, such termination must be carried out in compliance with the procedure for applying disciplinary sanction;
- the employee is absent from work for more than two consecutive months owing to a temporary disability, except when the employee is on maternity leave or if the disease is on the list of diseases for which a longer period of disability is provided as approved by the competent authority (such employee is entitled to retain his or her role until his or her recovery is established) based on a certificate of temporary incapacity to work;
- the employee commits a corrupt offence, making him or her no longer fit to serve in his or her role;
- the employee continues his or her participation in a strike after a court decision declaring the strike illegal is issued or the employee knows the strike has been suspended;
- the termination of the authority of a CEO, board member, internal auditor or corporate secretary under the law; or
- the employee is absent from work for more than one month for unknown reasons provided that the employee fails to provide information concerning the reasons for the absence within 10 calendar days from the date the employer sends to the employee an act on his or her absence.

Severance pay

41 | Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

An employee's right to severance pay is limited to several circumstances. An employee who is being dismissed on the ground of liquidation of the employer or downsizing of personnel or owing to the employer's non-compliance with the terms and conditions of the employment contract is entitled to compensation in the amount of one average monthly salary. An employee who is being dismissed on the ground of the decrease of production output, works or services that resulted in the worsening of the employer's economic conditions is entitled to compensation in the amount of two average monthly salaries. An employment contract or collective bargaining agreement may provide for larger amounts of compensation payable for termination of employment.

Procedure

42 | Are there any procedural requirements for dismissing an employee?

Generally, dismissing an employee is an internal matter and not reported to the authorities, except for cases when the dismissal takes place owing to the employer's liquidation, ceasing of entrepreneurial activity, downsizing of personnel or a decrease of production output, works or services that resulted in the worsening of the employer's economic conditions. In those cases, a month's prior notification to job centres is required. When dismissing an employee who is a member of a trade union, a well-grounded opinion of the trade union should be taken into account, except for cases when the dismissal was caused by the liquidation of the employer.

Employee protections

43 | In what circumstances are employees protected from dismissal?

Generally, employees may only be dismissed on grounds provided in the Labour Code. However, an employer may not dismiss an employee on temporary sick leave or during his or her annual paid holidays, except where:
- the employer is undergoing liquidation;
- the CEO, his or her deputy, or the head of the department or branch (representative office) violated labour responsibilities, which caused material damage to the employer;
- the employee was absent from work for more than two consecutive months owing to temporary disability; or
- the termination of the authority of a CEO, board member, internal auditor or corporate secretary under the law.

It is also forbidden to dismiss pregnant women, women with children under three years old, single mothers with children under 14 years old (disabled children under 18 years old) or any persons who raise

orphaned children owing to staff reduction or decrease of production output, works or services that resulted in the worsening of the employer's economic conditions.

Mass terminations and collective dismissals

44 Are there special rules for mass terminations or collective dismissals?

An employer is obliged to report to the employment centre the upcoming dismissal of employees in connection with its liquidation (termination of the entrepreneurial activity, if by an individual), downsizing of personnel (namely, reporting the number and types of employee and whom it may concern, and indicating the positions and professions, specialisations, skills, and salaries or wages of employees, and the terms under which they will be released) or decreasing of production output, works or services that resulted in the worsening of the employer's economic conditions, at least one month before the contemplated dismissal.

Class and collective actions

45 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Collective actions are allowed. Collective and individual claims may be resolved through a conciliation commission, mediation commission, labour arbitration or court hearing, as the case may be.

Mandatory retirement age

46 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

While a mandatory retirement age may not be imposed by an employer, an employer's policies may provide for material incentives for employees to retire earlier. As of 2021, pension benefits are paid by the government to women from the age of 60 (this threshold is being gradually increased up to the age of 63 by 2027) and to men from the age of 63.

DISPUTE RESOLUTION

Arbitration

47 May the parties agree to private arbitration of employment disputes?

Parties may agree to the private arbitration of employment disputes, provided that the employment contract or collective bargaining agreement contains an arbitration clause. In practice, almost all labour disputes are resolved in the courts.

Employee waiver of rights

48 May an employee agree to waive statutory and contractual rights to potential employment claims?

An employee cannot waive statutory rights in full or in part. It may be possible to waive contractual rights, but the enforcement of such waivers is not well developed.

Limitation period

49 What are the limitation periods for bringing employment claims?

The Labour Code states that an employee may bring a job reinstatement claim to the conciliation commission within one month of receipt of an employer's notice of termination, and the court within two months of receipt of the decision of the conciliation commission. All other labour claims must be made within one year after the employee knew or should have known of the breach of his or her labour rights.

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UPDATE AND TRENDS

Key developments of the past year

50 Are there any emerging trends or hot topics in labour and employment regulation in your jurisdiction? Are there current proposals to change the legislation?

In May 2020, the Labour Code was supplemented with provisions concerning a unified registration system of labour agreements and the employer's obligation to submit information to the unified registration system of labour agreements. In September 2020, the Ministry of Labour and Public Social Protection issued rules on the submission and receipt of the information on labour agreements from a unified registration system of labour agreements that sets out the following key rules:

- the employer is obliged to submit information electronically through the staffing information system or via jobcentre websites;
- the 'information' means details of the employee or employer (eg, the ID number and business ID number), details on labour function, location of employment, term of employment, date of execution of labour agreement and ground for employment termination;
- any employee or employer may request information provided from this unified system in compliance with the law on data protection; and
- the employer must receive prior consent from an applicant or employee to receive and process relevant information concerning personal data.

In December 2020, the Labour Code was supplemented with detailed rules concerning secondment arrangements (staffing). The Labour Code provides an exhaustive list of services for which an employee may be seconded:

- to perform services in a household of an individual;
- for the duration of certain work;
- for the period of replacement of a temporarily absent employee; and
- for the duration of seasonal work.

As a result of the amendments to the law on data protection in 2020, every employer as an owner of a database containing personal data (or an operator of a database containing personal data) must appoint a responsible person for processing personal data (the person can be an employee of the employer or any third party working under a services agreement).

From 1 January 2023, an employer will have to pay an additional mandatory pension contribution at the employer's expense in the amount of 5 per cent (currently, it is 10 per cent paid at the expense of an employee) of every employee's monthly salary.

Coronavirus

51 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

A state of emergency owing to the covid-19 pandemic existed in Kazakhstan from 16 March until 11 May 2020. During such period, certain benefits (eg, tax, currency control, customs and release from liability under commercial contracts) were granted to businesses and certain restrictions were levied on the free movement of individuals (eg, prohibitions on working in offices for most business organisations and prohibitions on travel). The majority of employers had to establish a 'distance work' (work from home) regime for their employees because of the state of emergency and such regimes continue in most business organisations as of the date of this writing, despite the cancellation of the state of emergency. The distance work regime is established through employer's internal acts that are based on article 138 of the Labour Code (which is expected to be revised and elaborated by parliament soon) and mostly on employer's internal rules (that cannot contradict a few mandatory rules under article 138 of the Labour Code).

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