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.