

Alexandr Chumachenko

Senior Associate
AEQUITAS Law Firm

10 QUESTIONS TO A LAWYER ABOUT INDEPENDENT WORKERS IN KAZAKHSTAN

Removal of employees from the company's (individual entrepreneur's) staff with their further performance of work (provision of services) or initial engagement of specialists without execution of labor relations with them may significantly reduce the staff-related costs. Furthermore, there are fewer company's (individual entrepreneur's) obligations with respect to independent workers than in case of presence of labor relations between them. Therefore, the search for the most efficient option of engagement of independent workers is very topical for business. Please see below 10 answers to the questions about the allowed forms of using independent workers.

1. Are companies in Kazakhstan allowed to receive services from individuals without an employment contract?

Citizens and, in some cases, foreigners may perform work (provide services) for a company under a civil contract without entering into labor relations. In this case, the company will not acquire the status of an employer and related obligations and restrictions established by the labor legislation (with certain exceptions) will not apply to the company and/or independent worker.

The allowed and most often applied forms of using independent workers in Kazakhstan are:

- 1) performance of work (provision of services) by an independent worker on the basis of a contract agreement or a fee-paid services agreement entered into with this independent worker personally or with an employer (company or individual entrepreneur) of the independent worker (instead of executing labor relations with the independent worker, a contractor (provider) may engage the independent worker as a subcontractor);
- 2) provision of outstaffing services;
- 3) secondment; and
- 4) intra-corporate transfer of a foreign employee to a Kazakhstan subsidiary of a foreign company.

Each of the above forms of legal relations has its designation, specifics and restrictions. Therefore, when selecting an appropriate option, it is necessary to base on own objectives and purposes, as well as factual circumstances.

2. What is worth paying attention when engaging an independent worker under a contract agreement (fee-paid services agreement)?

First, please keep in mind that the performance of work (provision of services) by a citizen

to a customer (company or individual entrepreneur) on the basis of a contract agreement (fee-paid services agreement) entered into between them is entrepreneurial activities.

According to the general rule, citizens must register with the state revenue authority as individual entrepreneurs in case they constantly use the labor of hired employees and/or their income from entrepreneurial activities exceeds 12 minimum salaries (in 2024, this threshold is KZT 1,020,000) in a year. Registered individual entrepreneurs pay taxes and other mandatory deductions themselves.

However, when performing the work (providing the services) to a company, a citizen, regardless of the amount of his/her income, may not register as an individual entrepreneur, unless he/she uses the labor of hired employees. In this case, taxes and other mandatory deductions from the citizen's income must be paid by the company as his/her tax agent.

Second, according to the general rule, foreigners may not carry out individual (i.e. without establishing a legal entity) entrepreneurial activities in Kazakhstan. However, this restriction does not apply to the citizens of Belarus, Russia and Kyrgyzstan permanently residing in Kazakhstan, i.e. those who received a Kazakhstan residence permit. Accordingly, a host company may enter into contract agreements (fee-paid services agreements) only with those independent workers who are the Kazakhstan citizens or the citizens of the above countries permanently residing in Kazakhstan.

Third, according to the general rule, a customer must not provide an independent worker as a contractor (provider) with equipment or other means required for the performance of work (provision of services). Unless otherwise agreed upon by the parties in a contract agreement (fee-paid services agreement), an independent worker must perform the work (provide services) by own efforts and at own expense.

Fourth, in light of the fact that an independent worker as a contractor (provider) is not an employee of a customer, he/she does not fall under the work time and rest time restrictions established by the labor legislation of Kazakhstan, i.e. the independent worker may actually work without days off any number of hours a day. However, an independent worker as a contractor (provider) must himself/herself determine the methods of fulfilment of the customer's assignment within the timeline agreed upon by the parties.

Fifth, in the course of performance of work (provision of services) a customer should not treat an independent worker as its on-staff employee, for example, establish and demand for official subordination, pay bonuses, impose disciplinary liability, etc. Otherwise, the relations between the customer and the independent worker may be recognized as labor relations with imposition of the employer's obligations established by the labor legislation of Kazakhstan on the customer.

There are some other nuances pertaining to this form of legal relations of the parties, which depend on various factual circumstances, including the purposes and objectives of engaging an independent worker, types of instructed work, residency of the parties, etc.

3. What are the specifics of engaging an independent worker under a contract agreement (fee-paid services agreement) with a company?

To use labor of a specific specialist (independent worker) a contract agreement (fee-paid services agreement) may be entered into not only with the independent worker personally, but also with a company (individual entrepreneur), with which such independent worker maintains civil (in this case, it will be subcontract) or labor relations. Such option of legal relations has its own specifics, including as follows.

First, in this case a contractor (provider) is a company (individual entrepreneur), but not a specific independent worker. The very contractor (provider) determines the efforts (which its employees or subcontractors) to perform (provide) the instructed work (services). Therefore, a specific specialist (independent worker) of interest for the customer may actually not be involved in the performance of work (provision of services). Furthermore, if a relevant independent worker is involved, the customer cannot directly give instructions to such worker. All comments and preferences regarding the composition and quality of the work performed (services provided) must be addressed to the contractor (provider).

Second, if an independent worker is in labor relations with the customer (provider), the independent worker falls under the requirements established by the labor legislation of Kazakhstan, specifically, on norms of working hours.

Third, all obligations on calculations with an independent worker are borne by the contractor (provider) only. If there are labor relations between the contractor (provider) and an independent worker or the contractor (provider) is a company and the independent worker is not registered as an individual entrepreneur, the contractor (provider) must also pay taxes and other mandatory deductions from the independent worker's income as a tax agent.

Fourth, a contract agreement (fee-paid services agreement) may be entered into with a foreign company as well, in which case it is necessary to consider the migration requirements and restrictions, including the permitted term and procedure for the stay of foreign employees in Kazakhstan. Furthermore, in this case, a permanent establishment of the foreign company may originate in Kazakhstan.

Fifth, for the period of stay of an independent worker at the facilities of a customer, the latter must ensure safety of the independent worker and, as a host party – compliance by the independent worker with the migration requirements in case he/she is a foreigner.

4. What shall we know about the outstaffing services?

In 2021, outstaffing widely spread in other countries got legislative support in Kazakhstan (previously such services actually existed in Kazakhstan but were not regulated by legislation).

Outstaffing services are the hiring of workers by one person (sending party) for their performance of labor activities in the interests, under management and control of another person (host party). The labor duties and conditions of performing the work by a "leased" worker with the host party are determined by an employment contract entered into between such worker and the sending party, and an outstaffing agreement entered into between the sending party and the host party. As regards the key specifics of this option of legal relations, it is worth mentioning as follows.

First, the Kazakhstan legislation provides for a number of restrictions on application of outstaffing, including as follows:

- 1) sending party may only be a Kazakhstan company (foreign company in the person of its Kazakhstan branch), the charter activities of which include the provision of such services;
- 2) outstaffing is only allowed:
 - for the performance of household work for individuals;
 - for the period of performing certain work;
 - for the period of substitution of a temporarily absent employee; and
 - for the period of performing seasonal work;

- 3) it is prohibited to use the provided personnel:
 - to substitute the employees participating in a strike in accordance with the procedure established by the Kazakhstan legislation;
 - to substitute the employees who refused to perform work in cases and in accordance with the procedure established by the labor legislation of Kazakhstan, except for the cases of worsening of the employee's health condition; and
 - in case of idle time, bankruptcy procedure, introduction of the part-time regime to preserve workplaces in case of a threat of dismissal of employees;
- 4) outstaffing does not apply to the employees who fall under the restrictions established by the labor legislation of Kazakhstan on employment to a host party (e.g. in case performance of the instructed work is contraindicated to a worker for health reasons).

Second, employer's obligations (including payment of salary, taxes and other mandatory deductions from the independent worker's income, etc.) with respect to an independent worker must be performed by the sending party. Meanwhile, despite the fact that no labor relations originate between the host party and the independent worker, the labor legislation of Kazakhstan imposes certain obligations on the host party, which are similar to the obligations of an employer, including, among other things, familiarization with the employer's acts approved by the host party, suspension from work in cases established by legislation, provision of adequate production and housing conditions, work time accounting, etc.

Third, amount of the main salary (i.e. without one-time incentive payments) of the outstaffed personnel must be not lower than those of the employees of the host party working in similar positions. It is prohibited to allow for labor remuneration discrimination with respect to both the outstaffed personnel and on-staff employees. Therefore, in fact, labor conditions must be equal.

5. Who may be seconded and where?

Understood as secondment is sending of an employee to another company or a separate structural subdivision of the same company for the performance of work in a position (labor function) according to his/her employment contract or in another position (labor function). Once secondment ends, the employee returns back to the former workplace, unless the employment contract is terminated.

The conditions, procedure, secondment term, list of positions and number of seconded workers are determined by an agreement between the companies in accordance with the civil legislation of Kazakhstan depending on the secondment purposes. Secondment takes place with a written consent of a respective employee, which must be executed by a supplementary agreement to the employee's employment contract. Thus, secondment is executed and regulated by these two documents.

Secondment is allowed only between a parent company and its subsidiary, and between the sister companies (i.e. companies whose shares or participatory interests belong to the same person).

Although the Kazakhstan legislation does not contain any express prohibitions against secondment of foreigners or secondment from a foreign company, according to the clarifications of the authorized agency available in public sources, secondment of the Kazakhstan citizens and foreigners is allowed in case they do not fall under the requirement on obtainment of the foreign labor engagement permit, and foreign companies may send

their employees to Kazakhstan only in case they have a structural subdivision registered in Kazakhstan.

Secondment of employees is prohibited if effected for the purposes of:

- substitution of employees of the host party who refused to perform the work in cases and under the procedure established by the labor legislation of Kazakhstan;
- performance of work in case of idle time (temporary suspension of work), bankruptcy procedure effected by the host party, part-time work regime introduced by the host party to preserve workplaces in case of a threat of dismissal of employees.

If the number of employees concurrently seconded to the host party is more than 10% of the annual average number of employees of such host party, the secondment must be agreed upon with the employees' representatives of the host party.

6. What is intra-corporate transfer?

Intra-corporate transfer is a special procedure stipulated by the Kazakhstan legislation for the foreign companies to temporarily send their employees to Kazakhstan to perform work in subsidiaries and structural subdivisions. This procedure represents obtainment of a special foreign labor engagement permit by the host party and carrying out of labor activities in Kazakhstan by a foreign employee on the basis of such permit. In such situation the foreign employee preserves labor relations with a company sending him/her to Kazakhstan (in case of intra-corporate transfer to a Kazakhstan structural subdivision, the host party and the sending party is the same company). The key specifics of this option of legal relations are as follows.

First, we mentioned above that the sending party may only be a foreign company. Such company must be set up in the territory of a member state of the World Trade Organization. In turn, the host party may only be a structural subdivision or a subsidiary of the foreign company in Kazakhstan (accordingly, a foreign specialist will be an independent worker only in the framework of intra-corporate transfer to a subsidiary).

Second, the procedure is applied only with respect to the qualified foreign employees at the level of a head, manager or specialist. They must possess at least 1-year work experience gained when working for the sending party in the relevant positions, and their qualification and instructed work must comply with requirements of the qualification reference books and jobs classifier approved in Kazakhstan.

Third, a work permit in the framework of intra-corporate transfer is issued and extended on a free-of-charge basis (unlike the common foreign labor engagement procedure), and the engaged foreign employees do not fall under the requirement on compliance with the foreign employee quota. However, when obtaining a permit, the host party must select and fulfil special conditions (advanced training, vocational training, re-training of local personnel and creation of new workplaces for such personnel), and the number of engaged foreign employees (except for the heads) must not exceed 50% of all employees of the host party of a relevant category.

Fourth, a work permit in the framework of intra-corporate transfer is issued and remains to be valid in the territory of a specific administrative and territorial unit (when applying for a work permit, the host party may request to expand the coverage area to include other administrative and territorial units). A foreign employee may carry out labor activities only within the boundaries of a relevant territory, but may go on business trips to other regions for the term of up to 90 calendar days in total within a calendar year.

Please note that, starting 30 June 2024, employers obtaining work permits must ensure mentoring (share experience, knowledge and skills) by the engaged foreign employees with respect to the Kazakhstan employees. A foreign employee must carry out mentoring during a period from 6 to 12 months. The Kazakhstan employees for whom a foreign employee will act as a mentor must be appointed (assigned) by an employer not later than 5 business days of the moment the foreign employee starts working.

7. When an independent worker may state that he/she has labor relations with a customer (host party)?

The Labor Code provides for the following features distinguishing an employment contract from other types of contracts:

- 1) performance of work (labor function) by an employee in a specific qualification, specialty, profession or position;
- 2) performance of obligations personally with subordination to the labor regulations; and
- 3) receipt of salary by an employee for labor.

It follows from this rule that, in case a civil contract meets these features, it will be considered as an employment contract, factual relations of the parties are considered as labor relations, and they must fall under the requirements of the labor legislation, but not civil legislation of Kazakhstan. Recognition of factual relations of the parties as labor relations and re-qualification of a contract into an employment contract is carried out in court.

The features of an employment contract are set out by the law-maker in an unclear manner, which gives rise to many questions regarding their proper interpretation. For example, it is unclear which specific conditions of paying remuneration to a person performing work (providing services) evidence the receipt of salary, and what is meant by subordination to the customer's (host party's) labor regulations, and which specific types of work (services) are considered as the performance of labor duties, and whether the authorized agency will consider any features of an employment contract other than those outlined above or confirmations (including indirect) of carrying out the very labor activities by a person when qualifying legal relations.

Payment of salary may be potentially evidenced by the periodic and regular nature of payments (monthly), and their dependence not on the final result, but on the process of performing the work and inclusion of any additional payments in remuneration (e.g. bonuses or compensatory payments established by the customer's (host party's) internal documents with respect to its employees), which are not stipulated by a contract.

Performance of work (labor function) by an independent worker in a specific qualification, specialty, profession or position may be confirmed by instructing specific duties in accordance with a job description approved (actually used) by a customer (host party) (this circumstance will also confirm subordination to the customer's (host party's) labor regulations) or the performance of a scope of work by an independent worker, which is similar in its composition to the positions existing within the customer (host party).

As regards subordination to the labor regulations, this may be evidenced by establishment of specific working hours and time of rest (days off, breaks in the work performance (services provision) process), subordination and accountability to any employees of the customer (host party), and issuance by the customer (host party) of internal directive and regulatory documents (orders) with respect to an independent worker, including application of disciplinary sanctions (e.g. in the form of a reprimand).

It is also unclear whether a contract must concurrently meet all listed features to be recognized as an employment contract or it is sufficient to meet only one of them. Based on literal interpretation of the relevant rule of the Labor Code, one may come to conclusion that all 3 features must be in place. Meanwhile, there is no uniform law-application and judicial practice with respect to this issue.

Thus, in case of engaging an independent worker under a contract agreement (fee-paid services agreement) directly or through another company (individual entrepreneur), under an outstaffing agreement, in the framework of secondment or intra-corporate transfer to a subsidiary, there is a risk that the independent worker may subsequently apply to court for re-qualification of the concluded agreement into an employment contract and/or recognition of factual relations of the parties as labor relations (e.g. to get additional payments or benefits, which are granted only to the employees of the customer (host party), but not to contractors or providers under civil contracts).

8. May an independent worker become an on-staff employee after some time or may a definite-term contract become a termless contract?

The duration of work performed (services provided) by an independent worker for a customer (host party) is not considered by the Kazakhstan labor legislation as a qualifying feature of labor relations. Therefore, it does not affect the probability of recognizing the relations between the parties as labor relations.

The term of a civil contract (specifically, a contract agreement, fee-paid services agreement, outstaffing agreement, secondment agreement, intra-corporate agreement) may not be automatically changed from a definite-term to an indefinite term agreement. According to the civil legislation of Kazakhstan, in case legislation or agreement provides for the effective term of an agreement, termination of such term entails termination of the parties' obligations under the agreement.

In turn, according to the general rule, an employment contract entered into for a definite term of less than one year may be automatically extended for a new term, but no more than twice. If the term expires after two extensions, but the parties' relations actually continue, such employment contract is deemed as to have been entered into for an indefinite term.

9. What are the consequences of recognizing relations with an independent worker as labor relations?

In case a court re-qualifies a contract agreement (fee-paid services agreement) between a customer (company or individual entrepreneur) and an independent worker into an employment contract, the customer will be imposed with all obligations of an employer, which are established by the labor legislation of Kazakhstan, and the date of commencement of such labor relations and origination of the employer's obligations will be the date when the independent worker was actually admitted to work for the customer under the agreement. It will be necessary to adjust the very agreement and add the provisions, which are mandatory for an employment contract according to the labor legislation of Kazakhstan. In case of engaging an independent worker under a contract agreement (fee-paid services agreement) with another company, outstaffing, secondment or intra-corporate transfer to a subsidiary, there will be no contract or agreement between the host party and the independent worker (established procedures do not require this); therefore, if the court recognizes the fact of presence of labor relations between the parties, the host party will have to enter into an employment contract with the independent worker.

Imposing the employer's obligations and restrictions on the use of the independent worker's

labor on the customer (host party) will entail the following unfavorable consequences for the customer (host party).

- 1) The customer (host party) may incur a debt for salary to the independent worker, specifically, in case the remuneration is less than the minimum salary established by the National Budget Law for a relevant period and/or amount of salary (salary attached to position and constant incentive, compensatory payments) of other employees of the customer (host party) with a similar set of labor duties, or the remuneration has not been paid by the customer (host party) personally. Difference between the remuneration under an agreement and salary attached to a respective position may be considered by the independent worker and/or authorized agencies as the customer's (host party's) discrimination in the labor remuneration sphere and violation of the principle of equal pay for equal labor. In addition to the debt, the customer (host party) will have to pay penalty for late payment to the independent worker.
- 2) In case of presence of debt for salary to the independent worker, the customer (host party) will also incur a debt for mandatory deductions from such income of the independent worker. The customer (host party) will have to calculate and transfer the amounts of taxes and other deductions, and penalty for late payment to the relevant organizations.
- 3) Relevant administrative liability measures may be applied to the customer (host party) for violating the labor and other legislation of Kazakhstan, which were committed in connection with a failure to perform or improper performance of the employer's obligations to the independent worker during a period preceding the recognition of the parties' relations as labor relations, starting from the date of actual admission of the independent worker to work.
- 4) Failure to perform obligations on tax, social and pension deductions may entail suspension of the customer's (host party's) debit operations with respect to the bank accounts and pay-office.
- 5) The independent worker may initiate an inspection of the customer (host party) by the authorized agencies as to compliance with requirements of the labor and other legislation of Kazakhstan.
- 6) When filing a claim for recognition of the parties' relations as labor relations, the independent worker may additionally claim from the customer (host party) for compensation for the caused moral damages.

10. How can we mitigate the risk of recognizing relations with an independent worker as labor relations?

This risk primarily relates to the entering into a subcontract agreement (fee-paid services agreement) by a customer with an independent worker personally. In other cases (entering into a contract agreement or a fee-paid services agreement with another company, receipt of outstaffing services, secondment and intra-corporate transfer to a subsidiary) the probability of unfavorable consequences for the customer (host party) is minimum in case of complying with the established procedures.

It is possible to mitigate the risk of re-qualification of a contract agreement (fee-paid services agreement) with the independent worker into an employment contract and probability of occurrence of unfavorable consequences for the customer in case of complying with the following recommendations.

- 1) Contract agreements (fee-paid services agreements) must be set out in a manner allowing to exclude any their identification as employment contracts, at least with respect to the scope and composition of the work performed (services provided), conditions (procedure) of performing the work (providing the services) and paid remuneration. Specifically, when drafting an agreement, it is necessary to:
 - determine specific scope (composition) of work (services);
 - avoid general, vague wordings relating to the process of performing the work (providing the services), but not to the final result, and mentioning of functions by an independent worker in any position;
 - make the payment of remuneration dependent only upon completion of a specific scope of work (services), but not the process of performing the work (providing the services) by an independent worker;
 - not to provide for the payment of any incentive or compensatory payments, or any other benefits normally provided only to the employees as part of remuneration to the independent worker;
 - not to include any provisions establishing the work regime for the independent worker or referring to the customer's labor regulations.
- 2) It is necessary not to allow for actual attitude to the independent worker during the period of performing work (providing services) as to a person carrying out labor activities for the customer. For example, the customer may not impose disciplinary liability on the independent worker, establish and demand for official subordination, work time regime and rest regime effective with the customer for its employees, or issue any employer's acts with respect to the independent worker. The independent worker must himself/herself determine his/her work process. The fact of performing certain work (providing certain services) must be fixed by relevant acts, and remuneration must be paid on the basis of such acts.
- 3) Prior to entering into the contract agreements (fee-paid services agreements) it is necessary to explain to the independent worker the legal implications of this action, specifically, the difference of his/her status of a contractor (provider) from an employee under an employment contract.

• • •