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Guide to Restructuring a Cross-Border Workforce

Kazakhstan

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A.Reduction in Workforce

1. Is there a concept of redundancy - based on a shortage of work or other economic reasons - as a justified reason to dismiss employees in your jurisdiction? If so, how is it defined?

Yes. The Labour Code[1] states that redundancy and worsening of the economy are grounds for termination of an employment agreement.

An employer can terminate an employment agreement (EA) if there is a need for a reduction in the number or staff of employees (Redundancy).

An employer can also terminate an EA with an employee if there is an unfavourable variance or decline in the volume of services or work, which results in a worsening of the employer's economic position (Worsening Economy).

Termination of an EA on the above basis is only possible if the following conditions are met simultaneously:

- closure of a structural unit (workshop, site);
- the inability to transfer an employee to another job; and
- advanced notice for employee representatives indicating the reasons that served as the basis for terminating the EA.

[1] Labor Code of the Republic of Kazakhstan No. 414-V dated 23 November 2015 (as amended) (the Labour Code).

2. In brief, what is the required process for making someone redundant?

There is no prescribed process for making someone redundant in the event of a redundancy, but the overall process should include the following steps:

- an employer adopts a specific decision regarding redundancy;
- an employer notifies a career centre (labour mobility centre) in writing or electronically about the redundancy at least one month before the proposed redundancy;
- an employer notifies an employee in writing about the termination of an EA at least one month before the proposed termination (unless the collective labour agreements provide for a longer notice period);
- an employer issues an order to terminate the EA in connection with the redundancy after the one-month notice period ends (or earlier, if the employee consents);
- an employer pays wages, if any, and other compensation to an employee; and
- an employer makes relevant changes about the termination of an employee's EA into a unified system for recording employment agreements.

There is no prescribed process for making someone redundant in the event of a worsening economy, but the overall process should include the following steps:

- an employer adopts a specific decision in respect of the worsening economy ;
- an employer notifies employees' representatives in writing at least one month before the proposed termination (unless collective agreements or other agreements concluded by an employer provide for a longer notice period);
- an employer notifies a career centre (labour mobility centre) in writing or electronically about the worsening economy at least one month before the proposed reduction in connection with the economy;
- an employer notifies an employee in writing about the termination of an EA at least 15 business days before the proposed termination (unless the labour or collective agreements provide for a longer notice period);
- an employer issues an order on termination of the EA in connection with the worsening economy after expiration of the one-month notice period (or earlier, if the employee consents);
- an employer pays wages, if any, and other compensation to an employee; and
- an employer makes relevant changes about the termination of an employee's EA into a unified system for recording employment contracts.

3. Does this process change where there is a "collective redundancy"? If so, what is the employee number threshold that triggers a collective redundancy?

No. The process does not change in the events of a redundancy or worsening economy.

4. Do employers need to consult with unions or employee representatives at any stage of the redundancy process? If there is a requirement to consult, does agreement need to be reached with the union/employee representatives at the end of the consultation?

No, there is no requirement to consult with unions or employee representatives during a redundancy, unless the labour and collective agreement provides for such a requirement.

In the event of a worsening economy, an employer should notify employee representatives at least one month before the proposed termination of an EA with an employee (ie, redundancy). Such notice should indicate the reasons that served as the basis for the termination. A direct connection between an employer's economic changes and the need to terminate an EA should be clear.

There is no requirement to reach a certain agreement with employee representatives, unless otherwise established under collective employment agreements.

Under the Labour Code, trade unions and their associations are viewed as employee representatives and, in their absence, such representatives should be elected and authorised at a general meeting (conference) of employees.

5. If agreement is not reached, can the restructure be delayed or prevented? If so, by whom?

This is not applicable.

6. What does any required consultation process involve (ie, when should it commence, how long should it last, what needs to be covered)? If an employer fails to comply with its consultation obligations, what remedies are available?

This is not applicable. The Labour Code does not provide for a special consultation process, except for notification requirements (see question 2).

7. Do employers need to present an economic business rationale as part of the consultation with unions/employee representatives? If so, can this be challenged and how would such a challenge normally be made?

There is no such requirement for a redundancy.

As noted above, in the event of worsening economy an employer should notify employee representatives and this notification should indicate the reasons that served as the basis for termination of an EA. It should contain a direct connection between an employer's economic changes and the need to terminate an EA.

Employee representatives may challenge the employer's redundancy if they deem that the redundancy process is not justified or not conducted under the law or the obligations taken by the employer under a collective agreement or any other agreement concluded by the employer.

Depending on the circumstances, such a challenge may be resolved either by a special commission established by the employer under the Labour Code or by the courts.

8. Is there a requirement or is it best practice to consult employees individually (whether or not the employer is also legally required to collectively consult employees)?

No, there is no such requirement or best practice in the circumstances.

9. Are there rules on the selection of individual employees for redundancy?

There are no such rules.

10. Are there any specific categories of employees who an employer is prohibited from making redundant?

Yes. It is prohibited to make the following persons redundant:

- employees that have less than two years left before reaching the retirement age established by law (unless there is a positive decision from a commission created from an equal number of employer representatives and employee representatives);
- an employee with a temporary disability;
- an employee on his or her annual vacation;
- pregnant women;
- women with children under three years of age;
- single mothers raising a child under 14 years of age or a child with a disability under 18 years of age;
- other persons raising the above category of children without a mother.

11. Are there categories of employees with enhanced protection (eg, union officials, employees on sick leave or maternity/parental leave, etc)?

Please see question 10.

12. What payments are employees entitled to when made redundant? Do these payments need to be made within a specified period? Are there any other requirements, such as giving contractual notice, payments into a central fund, etc.

For a redundancy, an employer should pay an employee a compensation payment equal to the average salary for one month (unless the labour or collective agreements provide for a higher amount).

For a worsening economy redundancy, an employer should pay an employee a compensation payment equal to the average salary for two months (unless the labour or collective agreements provide for a higher amount).

13. If employees are entitled to redundancy/severance payments, are there eligibility criteria and how is the payment calculated? If this is formula based, please set out the formula.

There are no specific eligibility criteria, all employees are allowed to receive compensation payments in the event of a redundancy or due to the worsening economy.

Average salary should be calculated per the Unified Rules for Calculating Average Salary approved by the Order of the Minister of Health and Social Development of the Republic of Kazakhstan No. 908, dated 30 November 2015 (as amended) (the Average Salary Rules).

As a general rule under the Average Salary Rules, the average salary of an employee is calculated by multiplying the average daily (hourly) earnings by the number of working days (working hours) during that period.

14. Do employers need to notify local/regional/national government and/or regulators before making redundancies? If so, by when and what information needs to be provided?

Yes. As noted in question 2, an employer should notify a career centre (labour mobility centre) in writing or electronically about the redundancy or the worsening economy at least one month before the proposed reduction of employment in connection with the relevant event.

Such a notification should include:

- The number and categories of employees affected;
- The positions and professions, specialities, qualifications and wages of employees that will be made redundant; and
- The period during which employees will be made redundant.

15. Is there any obligation on employers to consider alternatives to redundancy, including suitable alternative employment?

There is no such obligation for a redundancy.

An employer is allowed to proceed with a redundancy due to the worsening economy only when, among other things, an employer can't transfer a redundant employee to another job.

Thus, there is an indirect obligation on an employer to consider alternatives to redundancy in the event of the worsening economy by finding alternative employment for a redundant employee.

16. Do employers need to notify local/regional/national government and/or regulators after making redundancies, eg, immigration department, labour department, pension authority, inland revenue, social security department? If so, by when and what information needs to be provided?

Yes. If foreign employees have been made redundant in the event of either a redundancy or the worsening economy, an employer should procure an annulment of their work permits and visas by filing respective notices with relevant state authorities.

17. If an employee is not satisfied with the decision to make them redundant, do they have any potential claims against the employer? If so, what are they and in what forum should they be brought, eg, tribunal, arbitration, court? Could a union or employee representative bring a claim on behalf of an employee/employees and if so, what claim/s and where should they be brought?

Both employees and employee representatives may file potential claims against the employer in the event of a redundancy or the worsening economy. Depending on the circumstances, their claims may be resolved either by a special commission established by the employer under the Labour Code, or the courts.

18. Is it common to use settlement agreements when making employees redundant?

Once a redundancy procedure commences, employers may

propose to terminate employment agreements based on the agreement of the parties. This proposal may include a larger amount of severance pay.

19. In your experience, how long does it normally take to complete an individual or collective redundancy process?

There are no prescribed timelines that should be followed, except for notification periods, as already noted. In practice, the redundancy process, whether individual or collective, generally takes up to two months.

20. Are there any limitations on operating a business for a period following a redundancy, like a prohibition on hiring or priority for re-hire being given to previous employees?

There are no prescribed prohibitions on hiring or priority for re-hire being given to previous employees, but it is the general practice of businesses to postpone hiring for nine to twelve months following redundancy in any circumstances. Otherwise, employees may claim reinstatement.

Restructuring/Re-organisation of the business

21. Is employee consultation or consent required for major transactions (such as business transfer, mergers, acquisitions, disposals or joint ventures)?

No consultation or consent is required.

22. What are the remedies that are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

This is not applicable.

23. Is there any statutory protection of employees on a business transfer? Are employees automatically transferred with the business? Are employees protected against dismissal (before or after the transfer of employment)?

Under the Labour Code, employment relations with employees continue without changes in cases of, inter alia, a change of owner of shares in an employer (if it is a legal entity), or a reorganisation of an employer (eg, by way of a merger or acquisition). Thus, in these cases, employees may be deemed to be transferred automatically; however, an employer will still have to amend employment agreements with these employees if there is a change of employer's name, etc.

If a business transfer involves a mere transfer of assets, then employees are not automatically transferred. Employment relations with employees may be terminated only on the general grounds provided under the Labour Code.

24. What is the procedure for a transfer of employment (upon a business transfer or within group companies)?

There are no specific provisions for a transfer of employment upon a business transfer.

25. Are there any statutory rules on harmonising the transferring employees' terms of employment with the existing employees' terms of employment?

No, there are no such statutory rules.

Changing Terms and Conditions

26. Can an employer reduce the hours, pay and/or benefits of an employee?

Yes. An employer can reduce the hours, pay or benefits of an employee provided that the employee continues to work under his or her speciality or profession that corresponds to his or her qualifications and agrees to such changes.

Such a reduction is allowed only if there are changes in an employer's work organisation associated with a reorganisation or the worsening economy.

An employer should notify an employee at least 15 calendar days before changes to his or her working conditions to enforce the above reduction.

27. Can an employer rely on an express contractual provision to vary an employment term?

No. An employment term cannot be varied by relying on express contractual provisions.

28. Can an employment term be varied by implied conduct?

Yes, but only in the below case.

As a general rule under the Labour Code, if, upon the expiry of an EA, neither party notifies the respective termination of the employment relationship during the last working day (shift), the employment term is considered extended for the same period for which it was previously concluded.

29. If agreement is required to vary an employment term, what are the company's options if employees refuse to agree to the proposed change?

Such a proposed change will not come into force and be obligatory for an employee unless an employee agrees with the proposed change by signing an amendment to their EA.

30. What are the potential legal consequences if an employer varies an employment term unilaterally?

Such action will not be enforceable or obligatory for the employee. An employee may dispute such a unilateral change of employment terms.

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Kuanysh Kanlybayev is a Managing Associate in the Almaty office, having broad experience in M&A and corporate, competition, real estate, as well as labour law. His experience includes representation of companies in cross-border transactions, corporate acquisitions, equity and loan investments, the establishment and liquidation of legal entities and all potential employment law aspects inherent to these processes.

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