

NEW APPROACHES TO STRUCTURING FOREIGN AND LOCAL STAFF RESOURCES

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A modern, innovative economy cannot be developed in conditions of total isolation. Advanced technology and new techniques in the fields of trade, money, human resources and modern financial instrument management are all necessary components of competitiveness in the global economy – in both the private and public sectors – and are all in constant need of foreign investment and qualified staff, which is sometimes difficult to find locally. For this reason, the ability to attract foreigners to work in Kazakhstan and, accordingly, structure their employment relations is becoming increasingly important.

Balanced state regulation of the influx of foreign manpower is essential in order to curb growing social tension and protect the interests of Kazakhstan citizens. On 14 December 2012 the President released the *Kazakhstan-2050 Strategy: a new policy direction for an established state*, in which he instructed Kazakhstan employers to take advantage of international labour resources, particularly in terms of achieving the country's objectives by either outsourcing programmes or hiring the best foreign specialists on the open market to work in Kazakhstan. The employment of managerial staff with extensive international experience and knowledge will have a dual effect: as well as modernising the management of operations in Kazakhstan, they will be in a position to improve the professional education of local staff. Kazakhstan's Government has also been instructed to "take measures to develop new approaches to salary payments and reduce disparities". In this regard, the General Prosecutor and Ministry of Labour and Social Welfare have formed working groups to analyse the situation throughout the country with respect to disparities in salaries between locals and foreign nationals.

In this article, we reflect on what we view to be the most significant legislative changes dealing with new ways of structuring employment relations with foreign employees.

1. Self-employment for foreign nationals in Kazakhstan

The Rules and Conditions for issuing Work Permits to Foreign Nationals and Employers to hire Foreign Nationals ("the Rules"), which were approved by Government Resolution No. 45 on 13 January 2012, came into effect on 10 March 2012 and have since become a milestone in the structuring of employment relations with foreign nationals.

The Rules allow foreign nationals interested in specific positions (such as astronomers, anthropologists, ballet dancers, museologists and others) to be self-employed in Kazakhstan. Importantly, anyone obtaining a work permit in Kazakhstan for the above would not have to commit to providing professional training, re-training or vocational training or creating additional jobs for Kazakhstan nationals.

2. Local content

New rules were introduced on 10 March 2012 for calculating local content with respect to applying for work permits for foreign nationals:

• For category 1 and 2 employees:

- From 1 January 2012, Kazakhstan nationals should make up at least 70% of category 1 and 2 staff

• For category 3 and 4 employees:

- From 1 January 2012, Kazakhstan nationals should make up at least 90% of category 3 and 4 staff

These requirements will remain in effect until Kazakhstan accedes to the World Trade Organisation. For the time being, they do not apply to several groups, including Karachaganak, North Caspian and Tengiz project subsoil users, their operators, contractors and subcontractors (excluding organisations hired by subcontractors) until 1 January 2015, provided that proof is available of their participation in the projects in question. Small businesses are also exempt from the requirements.

Concessions for subsoil users

The exemption of subsoil users (and their operators, contractors and subcontractors) working on the above projects from the local content requirements improves the possibility of hiring foreign professionals with the experience and qualifications to meet their business needs.

Accordingly, the new rules, insofar as they simplify the procedure and conditions for hiring foreign nationals in Kazakhstan, limit the ability of qualified Kazakhstan nationals to find employment. When expanding opportunities to hire foreign nationals, the interests of the local population also need to be considered and protected. However, the above subsoil companies involved in projects of national significance need to be able to hire qualified foreign nationals to ensure the rapid implementation and development of those projects. The Rules are aimed at providing further impetus to the development of important projects to significantly increase Kazakhstan's export potential and bring in additional revenue to the state budget. The companies that operate those projects will, therefore, have sufficient time to train local specialists to ensure that they will be able to replace foreign ones by 2015.

Concessions for small businesses

Small businesses, which are also exempt from the local content requirements, also have a competitive advantage in the recruitment of qualified staff. This gives existing and newly-created small businesses the opportunity to develop in the future, leading to more jobs becoming available, and ultimately a spurt to the country's economic development.

Concessions for Customs Union member-states

In addition to the above, on 1 January 2012, to further international cooperation and attract qualified people from abroad, Kazakhstan ratified the *Treaty on the Legal Status of Migrant Workers and their Family Members* ("the Treaty").

According to the Treaty, nationals of Russia and Belarus may now be hired by Kazakhstan employers to work in Kazakhstan without the above restrictions, and do not require work permits to do so. Importantly, even though the Treaty takes precedence over Kazakhstan legislation, in practice, the state authorities require that Customs Union country nationals be included in local content calculations.

Additionally, in accordance with the Treaty *On the Trading of Services and Investments in Member Countries of the Common Economic Space* from 9 December 2010, nationals of Russia and Belarus registered in their home countries as individual entrepreneurs are given most favoured nation treatment in Kazakhstan, which means they are able to perform their business activities in Kazakhstan without officially establishing a presence in the country.

Since the requirement to protect the national employment market was lifted, the number of Russian and Belarusian nationals working in Kazakhstan has grown significantly, which of course has had a negative impact on Kazakhstan employers' local content figures.

3. Corporate transfers

We firmly believe that attention needs to be paid to the legislative possibility provided by the Rules to bring in foreign nationals within a corporate transfer concept, i.e. the temporary transfer of foreign nationals in accordance with a letter and/or agreement from a foreign company to work or provide services to a branch, subsidiary, representative or affiliate of that foreign company in Kazakhstan.

Importantly the authorities seem to understand a corporate transfer as a foreign national's ability to work or provide services to a foreign company branch, subsidiary, affiliate or representative office set up in Kazakhstan.

In our view, structuring employment relations with foreign employees within the corporate transfer structure provides several important advantages to Kazakhstan employers, most significantly:

- *Percentage of Kazakhstan national employees or local content*

A Kazakhstan employer (foreign company branch, subsidiary, affiliate or representative office set up in Kazakhstan) hiring a foreign national under the corporate transfer structure does not have to enter into an employment agreement with that individual, since the latter is entitled to work in Kazakhstan based on an employment agreement entered into with the foreign company sending him/her to the foreign company branch, subsidiary, representative or affiliate in Kazakhstan ("offshore employment agreement").

Furthermore, by working under an offshore employment agreement, foreign nationals are not included in a Kazakhstan employer's staff lists, receiving their salary from the foreign company that sent them to Kazakhstan.

Precisely because they are not included in local staff lists, foreign nationals working in Kazakhstan under the corporate transfer structure have no impact on local content numbers.

- *Settling the disparity in salaries between local and foreign employees*

The issue that has arisen recently with respect to disparity between the salaries of foreign and Kazakhstan nationals will not affect anyone hired under the corporate transfer structure, as their salaries will be paid by the foreign company that sent them to Kazakhstan.

- *Simplifying the procedure of issuing work permits for foreign nationals*

According to the Rules, companies receiving the benefit of work and services are responsible for obtaining work permits for foreign nationals hired within the corporate transfer structure. They are issued for the period referred to in a corporate transfer letter and/or agreement, provided that period does not exceed three years. In addition, documents guaranteeing the departure of a foreign national from Kazakhstan do not have to be provided to the authorities when hiring a foreign national under the corporate transfer structure.

Conclusions

Having analysed current legislation, we can conclude that:

- 1) The measures adopted to improve legislation dealing with the hiring of foreign nationals greatly ease the development of business, ultimately contributing to heightening the investment attractiveness of the country
- 2) Structuring employment relations with foreign nationals using a corporate transfer structure significantly reduces the number of issues foreign company branches, subsidiaries, representatives or affiliates in Kazakhstan face, such as local content and salary disparity, while the procedure for issuing work permits for foreign nationals is simplified

In light of the above amendments, and the opportunities they create for companies to develop their business, we understand that employers will be eager to restructure employment relations with their foreign employees. In addition, as government agencies have started to actively inspect companies' compliance with employment legislation, particularly any disparities in salary payments between local and foreign employees, we recommend that you be prepared for an inspection by ensuring that the relevant documentation conforms to employment legislation.

In this regard, Deloitte, with its extensive professional experience in providing advice or support on the many employment issues that can arise, such as HR audits and state inspections, or drafting employment documentation, will be happy to assist you with the issues mentioned in this article or in any way you may see fit.