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COVID-19: Employment Law Guide

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i. Intro

Due to SARS-CoV-2 ("COVID-19") outbreak in mid-March of 2020 the Armenian Government declared state of emergency to prevent further increase of COVID-19 cases. The Commandant appointed by the Government adopted several decisions that resulted in imposition of restrictions in relation to, *inter alia*, the activities of local entities and introduction of temporary rules to be followed by local employers.

Caring of well-being of our clients, Ameria team has prepared this Employment Law alert to cover some ambiguous issues facing the Armenian employers these days. This alert may be of use to local businesses to have an overall understanding of the present situation; however, it should not be considered as legal advice and it is not recommended that one's decision-making is based exclusively on the information mentioned herein. Neither Ameria cjsc, nor the authors of this review bear any liability for the consequences of any decisions made in reliance upon the information provided herein, as it may become obsolete or be incomplete. If you are looking for proper legal advice, please reach out to us at ***legal@ameria.am***.

ii. Transition to a Home-Based Working Model

On-site work by the employees of the companies involved in specific types of activities was expressly restricted by the decisions of the Commandant Tigran Avinyan. The majority of companies and sole proprietors were instructed to introduce mechanisms enabling employees to work from home, ensure payment of salaries for work done remotely, take steps necessary to reduce the number of employees at workplace as well as arrange flexible work conditions for certain categories of employees (including but not limited to mothers of large families, employees over the age of 60 and suffering from chronic diseases). Consequently, the employers had to move to a home-based model of working to comply with the requirements in force at the time of emergency.

Nevertheless, existing legislative gaps and lack of relevant contractual provisions enabling employees to work remotely have caused practical problems when switching to home-based model of working, since the change of workplace is considered as a change of material conditions of work, which requires employers to deal with delivery of prior notices to employees.

iii. Changing existing employment contracts

The simplest and safest solution to this situation is to sign amending agreements to employment contracts with each employee in order to enable them to work from home. This way of handling the situation allows the employer to avoid providing notices before the commencement of home-based work and agree on other conditions of such work with the employee. Whilst we understand that it could be problematic for some companies with large staff list to arrange incorporation of changes to all employment contracts in a time efficient manner, the law currently in force does not provide local employers with a better alternative. It also needs to be taken into consideration that under certain circumstances employer may have to provide an employee with a laptop, software and other equipment necessary for the performance of labour functions (depending on the wording of relevant employment contract).

iv. Change of workplace without delivery of prior notice by the employer

Some employment contracts contain clauses that allow employees to perform their labour functions by attending workplace directly identified in employment contract or in other places as per employer's instruction (without reference to work from home). In our opinion, such situations do not require delivery of notice regarding the change employment conditions by the employer and, consequently, transition to home-based work may happen based on the written instruction of the employer without observing the statutory notice periods.

There is an alternative perspective, according to which mere reference to 'other place' without exactly identifying such workplace in the employment contract is not sufficient to release the employer from its obligation to notify the employee of the change of working conditions in the manner prescribed by the Employment Code.

v. Delivery of notice on change of material conditions of work due to the change of workplace

As the worst-case scenario, the employer may notify the employee of the planned change of workplace and receive employee consent in writing in accordance with the provisions of the Employment Code.

Article 105 of the Employment Code defines that workplace of the employee is considered as a material condition of work; while Article 115 of the Employment Code requires that employees must be notified of the upcoming change of material conditions of work in advance. Prior notice period varies between 14 and 60 days depending on the duration of employment, unless longer notice period is stipulated by the employment contract. The main advantage of this option is that employer has an opportunity to terminate employment contract, if employee rejects working under new conditions (e.g. from home) and change of material conditions of work is reasonably justified, *inter alia*, by the change of organizational conditions of work (Articles 105(1), 105(6) and 109(1)(9) of the Employment Code).

In the event the change of organizational conditions of work is reasonably justified by the employer, Armenian courts interpret the above provisions in a way, where the only legal remedy available to the employee dismissed in breach of notification periods is a penalty amounting to his/her average daily salary payable by the employer for each day of late notification. In other words, such employee will be entitled to claim for penalties, but not reinstatement.

It is not quite clear how the employer should deal with payment of penalties, if employee agrees to the change of material conditions of work and notification periods are not met. Article 115 of the Employment Code mandatorily says that employer shall pay the penalty for each day of late notification, regardless of whether or not such penalty is requested by the employee. For risk mitigation purposes, the employer needs to incorporate the wording in the consent given by the employee that expressly releases the employer from obligation to pay penalties caused by the breach of notification periods (though this is not a guarantee that courts find such release from obligations lawful).

In consideration of the foregoing, it is recommended that employers avoid proceeding with application of this scenario due to certain difficulties in practical application of the Article 105 of the Employment Code.

vi. Reduction of salary

Salaries payable to employees continuing due performance of work cannot be reduced merely due to a short-term and/or inconsiderable negative financial impact caused by the emergency.

The procedural requirements as to the change of workplace (as described in the previous section) are applicable to reduction of salary, which also qualifies as change of material conditions of work. Employment terminates, unless employee agrees to continue work under the new conditions.

It is significant that employers understand that any change of material conditions of work (including but not limited to reduction of salary) can only happen if either condition mentioned below is satisfied:

1) Change of production volume;
2) Change of economical and/or technologic conditions;
3) Change of organizational conditions of work.

vii. Idleness

Under Armenian law, the employer does not bear an obligation to pay salary if idleness is a consequence of force majeure event or is caused by employee. Armenian law does not specify the list of events constituting force majeure, which is simply defined as events that are extraordinary and unforeseeable under the given circumstances.

In our opinion, the employer may invoke force majeure and, consequently, not pay the salary for idle hours, only where the employer engages in activities expressly restricted by the decision of the Commandant and the employee's work cannot be done anywhere else but at workplace (i.e. there is a causal link between force majeure event and employer's inability to provide work). It is important to understand that declaration of emergency itself does not constitute force majeure, if employer is in fact able to operate and provide employees with work. Circumstances that employer can overcome by utilizing best of its efforts at the time of emergency (such as absence of necessary equipment, technical or software problems and/or deterioration of financial state) cannot be treated as sufficient bases for non-payment of salary.

If idleness is not caused by the employee and such employee is not offered a new job that meets professional qualifications of such employee and could have been done without causing harm to health, 2/3 of average hourly salary is payable by the employer for each idle hour.

If during the idleness not caused by the employee, the latter agrees to be temporarily transferred to another job with a lower salary that meets professional qualifications of such employee, hourly salary rate preceding the month of idleness is payable by the employer for each hour of work.

Where the employee rejects the offered temporary job that meets professional qualifications of such employee and could have been done without causing harm to health, the employer pays at least 30 percent of minimum hourly rate for each idle hour.

viii. Termination of employment due to force majeure or emergency

There are no specific legal grounds under the Employment Code of Armenia enabling employers to terminate employment contracts due to force majeure or emergency. In all cases, employment needs to be terminated based on one of the legal grounds available to employers under the law.

ix. Expected changes of the Employment Code

In light of COVID-19 outbreak and the identified problems of employment legislation, the Ministry of Labour and Social Affairs of Armenia prepared the package of legislative amendments, which is expected to be submitted to the National Assembly in the near future. Unfortunately, the legislative package in question has not been published in publicly available sources so far and it is unknown whether the proposed legislative initiative would be put into operation.

According to the preliminary statements made by the Ministry of Labour and Social Affairs, the proposed legislative package defines that:

1) If switching to remote work is possible, idleness related provisions shall not apply and employee retains full salary;
2) Changes of working and rest hours at the time of switching to remote work shall not be considered as the change of material conditions of work;
3) If an employer of the private sector is unable to operate (including by way of remote work) due to emergency, a salary payable to an employee is equal to minimum hourly salary rate stipulated by the law;
4) An employer must provide unused leave days at the request of employee, if operation of employer is impossible due to emergency.
5) It is planned that these amendments will have retroactive effect from March 16, 2020.

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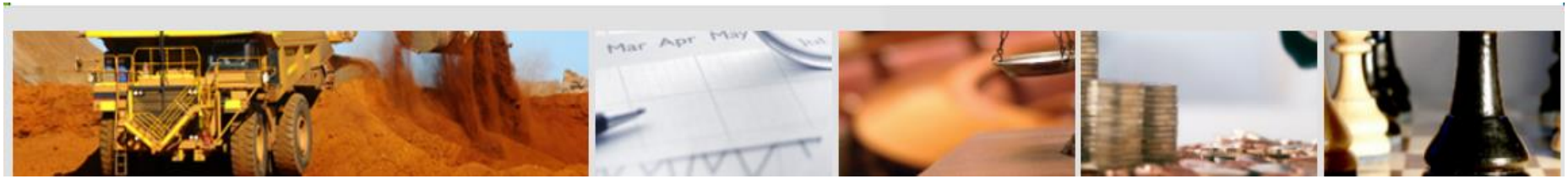

AMERIA
LEGAL AND TAX ADVISORS

Contact details

Armenia
2 Vazgen Sargsyan Street, Yerevan
0010
Tel: +374 10 561111
Fax: + 374 10 513133
E-mail: legal@ameria.am