COVID-19: CURRENT LEGAL ISSUES CONCERNING BUSINESS IN RUSSIA

BEITEN BURKHARDT

CONTENTS

Employment relations

WHICH OBLIGATIONS DO EMPLOYERS HAVE DUE TO THE PANDEMIC OF THE CORONAVIRUS?

The federal and regional authorities have issued a number of regulatory documents which mostly contain recommendations for employers regarding measures to prevent the spread of the virus, in particular, disinfection, non-admission to work of persons having symptoms of the disease, etc., which, however, are not mandatory. Moreover, large companies may be affected by the ban to hold mass events (with participation of more than 50 people).

Most of the measures undertaken by employers are based on recommendations of the Russian authorities and the World Health Organization which recommend, where possible, to encourage employees to work from home, not to travel on business or cancel face-to-face encounters. These recommendations are not mandatory yet.

CAN AN EMPLOYER SEND HIS OR HER EMPLOYEES HOME OR OBLIGATE THEM TO WORK FROM HOME?

An employer may not announce down time, as in case of down time employees must stay at their workplaces. If employees can work from home, they may be instructed to do so, however, only with the employees‘ consent and on the basis of an additional agreement to the employment agreement.

AN EMPLOYEE HAS COME TO WORK WITH SYMPTOMS OF THE DISEASE. CAN THE EMPLOYER PROHIBIT ADMISSION OF THIS EMPLOYEE TO WORK?

The formal grounds for non-admission to work of employees for medical indications are established only for some professions and positions, the list of which is to be approved by the Ministry of Health of Russia. However, these grounds do not apply to most office employees that are not subject to daily medical examination.

Employers are not expressly allowed by legislation to obligate office employees to undergo medical examinations at the employer’s initiative. At the same time, currently legal acts are being adopted at a regional level aimed at the prevention of the spread of coronavirus (e. g. Decree of the Mayor of Moscow No. 12-UM dated March 05, 2020, Regulation of the Government of St. Petersburg No. 121 dated March 13, 2020) which give recommendations not to admit employees with symptoms of the disease to work.

In order to minimize the risk that suspension from work may be recognized unlawful, it is recommended that internal policies should be adopted regulating the procedure for employees’ actions during an epidemiological situation and stipulating, in particular, taking temperatures, the employees’ obligation to inform the employer if any signs of the disease appear and to visit a doctor. If an employee refuses to visit a doctor, such an employee may be suspended from work. If the employee shows a medical certificate confirming that he/she is healthy, there will be no grounds for suspension of such an employee from work.

A SCHOOL IS CLOSED FOR QUARANTINE / SCHOOL ATTENDANCE HAS BEEN MADE OPTIONAL, CAN AN EMPLOYEE DEMAND LEAVE OR SICK LEAVE?

The schoolchildren's parents do not have a possibility to get a sick leave in this case – a sick leave is granted only in case of quarantine in pre-school institutions. Upon consent of the employer, an employee may be granted leave or work remotely.

HOW IS AN EMPLOYEE'S ABSENCE IN CASE OF A QUARANTINE DOCUMENTED?

As in the case of an illness, if an employee is quarantined, he/she is given a sick leave certificate. As part of the measures against the spread of coronavirus infection, people who returned from certain territories may receive sick leave certificates without attending a medical organization.

In other cases, an employee's absence is documented by mutual agreement of the parties (e. g. by granting a leave).

WHAT MEASURES CAN AN EMPLOYER ITSELF UNDERTAKE TO PREVENT THE SPREAD OF THE VIRUS?

All recommendations are available on the website of the World Health Organization. They can be incorporated in the internal code of conduct, including provisions regulating the conduct of visitors (e. g. frequent wet cleaning, use of sanitizers, a ban to have food in the workplace). If an employer wants to take the employees' and visitors' temperature, no information on the measurement results should be stored to avoid the formalities established by legislation on personal data protection.

THE REGIONAL CHIEF PUBLIC HEALTH OFFICER HAS ISSUED AN ORDER TO SUSPEND OPERATION OF THE PREMISES, PRODUCTION FACILITIES OR BUILDINGS OF A LEGAL ENTITY. WHAT ARE THE NEXT ACTIONS?

In accordance with Federal Law No. 52-FZ dated March 30, 1999 "On the Sanitary and Epidemiological Welfare of the Population", legal entities must comply with the orders of the chief public health officers and their deputies, therefore it will be necessary to suspend operation even if one does not agree with the order and intends to appeal against it.

As for employment relations, the suspension of operation of the premises where employees' workplaces are situated is the basis for their suspension from work with payment of their average salary. Where possible, such employees can be temporarily transferred to another job with the same employer with payment for the work performed, but at least their average salary in the previous position. Depending on specific circumstances, it is possible to temporarily transfer an employee to another job for up to one month without his/her consent, however, a transfer to another job for a longer time, as a general rule, can be made only upon the employee's consent.

The possibility of announcing downtime in case of suspension of activity depends on the specific situation, as during downtime employees must stay at their workplaces, which is not possible in some cases.

In any case, the employer has the right to consider reducing the company's staff or offer employees remote work, part-time employment, or other compromise ways to reduce business expenses.

CAN AN EMPLOYER RESTRICT TRAVELS ABROAD?

As an employee is sent on business trips on the basis of the employer's order, the employer has the right to cancel all planned business trips. However, there are no formal grounds for prohibiting personal personal trips of an employee abroad. In this case, the employer may agree with employees that they should not travel abroad during the pandemic.

A FOREIGN EMPLOYEE CANNOT ENTER RUSSIA DUE TO CLOSED BORDERS. HOW WILL IT AFFECT THE EMPLOYMENT RELATIONS?

A foreign employee's absence from his/her workplace due to the temporary closure of the border of the Russian Federation cannot be considered as unauthorized absence as the employee has a lawful excuse for such absence. Therefore, absence from work while the borders remain closed does not constitute the basis for termination of the employment agreement.

However, if the work permit of the foreign employee expires before the borders are opened, this circumstance will be the basis for his/her suspension from work. If a new work permit is not obtained within one month after the expiry of the previous work permit, the employment agreement with the foreign citizen shall be terminated.

Furthermore, the circumstances of the employee's departure abroad are important. If the employee was sent on a business trip, he/she will remain on a business trip at the employer's expense until he/she returns to Russia once the borders are opened or until the employment relations are terminated. If the employee travelled abroad at his/her own initiative, the time during which he/she was unable to return to Russia shall not be paid for by the employer.

In order to minimize the losses of the employee and the employer as well as in order to maintain a continuous work process, it is possible – subject to mutual consent – to introduce remote work for such a foreign employee until the restrictions are lifted. If the foreign employee holds a valid permit to work in Russia, the controlling body will not have any objections to the foreigner's remote work from abroad.

WHAT RESTRICTIONS HAVE BEEN INTRODUCED WITH RESPECT TO FOREIGN EMPLOYEES?

For the time being, the Government of Russia, by its Decree No. 635-r dated March 16, 2020 "On the Temporary Restriction of Entry of Foreign Citizens into the Russian Federation and Suspension of Issuance of Migration Documents", has imposed restrictions on the entry of foreign citizens into the Russian Federation. So far, the restriction has been introduced until May 01, 2020. In addition, from March 18, 2020 the acceptance of documents for, the processing and issuance of permits to engage foreign employees, work permits, invitations and visas has been temporarily stopped.

However, on March 19, 2020 the Ministry of Internal Affairs informed that it resumed accepting documents for issuance of work permits and that it was possible to extend the stay on the basis of a visa, including if an application for extension is filed with the territorial bodies of the Ministry of Internal Affairs after the visa has expired. It should be noted that in practice the competent migration authorities accept only applications for work permits and prolongation of visas for those foreign citizens who currently stay on the territory of the Russian Federation (with some exceptions). Applications for new work permits and/or visas are not accepted or processed.

Foreign citizens who are currently outside of Russia and those leaving the country in March and April will not be able to enter Russia until the restrictions of entry have been lifted.

Moreover, the measures taken will affect those foreign employees whose work permits and visas are about to expire. If they are abroad, they will not be able to obtain a new work permit. In turn, the expiry of a work permit is the basis for suspension of an employee from work for up to a month. If a new work permit is not obtained by the respective foreign employee prior to the end of the suspension period, the employment agreement with him/her shall be terminated, while a new employment agreement will not enter into force until such a permit is obtained, as issuance of a work permit is a prerequisite for employment agreements with foreign citizens.

It is recommended that foreign employees be notified by employers of the introduced restrictive measures, the validity period of permits be checked and the necessary steps to minimize the damage to employees and employers be planned and prepared in advance.

Fulfillment of agreements

IS THE PANDEMIC OF COVID-19 FORCE MAJEURE?

In Russian legislation, the term force majeure is not used, but the provisions concerning it are contained in most agreements entered into in Russia, therefore force majeure can be considered as a covenant that establishes grounds for exemption from liability for non-performance (improper performance) of obligations. First of all, it is therefore necessary to refer to the respective clause in order to determine whether mass diseases (epidemics) constitute a force majeure event.

For companies supplying goods and services in accordance with the Federal Law "On the Contract System in the Sphere of Procurement of Goods and Services for State and Municipal Needs", the Government of the Russian Federation is preparing a special act recognizing the spread of coronavirus as force majeure for public procurement.

MAY CONTRACTUAL OBLIGATIONS BE SUSPENDED DUE TO FORCE MAJEURE?

Force majeure is the basis for exemption from liability for non-performance or improper performance of obligations. Therefore, formally, performance of obligations will not be suspended, however, the breaching party will not be held liable for untimely performance or failure to perform. Nevertheless, the conditions of a specific agreement may provide for other consequences of the occurrence of a force majeure event.

HOW TO REFER TO FORCE MAJEURE CIRCUMSTANCES AND CONFIRM THEIR OCCURRENCE?

As a rule, the provisions of an agreement stipulate the obligation of the party affected by a force majeure event to notify the other party of the inability to perform obligations due to this. With respect to cross-border transactions, the main document confirming the occurrence of a force majeure event is a certificate issued by the chamber of commerce and industry. However, the occurrence of the respective event can also be confirmed by other documents, including acts of state bodies (for example, Rospotrebnadzor[1] or regional authorities).

WHAT CAN BE DONE IF AN AGREEMENT DOES NOT CONTAIN A FORCE MAJEURE CLAUSE?

Clause 3 of Article 401 of the Civil Code of the Russian Federation provides for the possibility of exemption from liability if proper performance of obligations is impossible due to so-called "irresistible force", i. e. extraordinary and unavoidable circumstances under the given conditions. To be exempted from liability, it is important that the pandemic directly affects the possibility of such performance (for example, restrictions on international transportation, isolation of personnel, etc.).

[1] The Federal Service for Supervision in the Sphere of Consumer Rights Protection and Human Welfare.

IS IT POSSIBLE TO TERMINATE OR AMEND AN AGREEMENT?

Article 451 of the Civil Code of the Russian Federation provides for the possibility to terminate or amend an agreement due to a significant change in the circumstances which the parties relied on when entering into the agreement. It should be taken into consideration that if the counterparty does not agree to terminate or amend the agreement, it will have to be terminated or brought in line with the changed circumstances through court action.

Moreover, as a rule, in accordance with the standard contractual provisions on force majeure it is possible to repudiate an agreement out of court if the relevant circumstances last long enough (for example, three months).

Finally, a law or an agreement may provide for the right to unilaterally repudiate the contract without giving any reason. However, in this case, the party terminating the agreement may have additional obligations with respect to the other party (for example, to compensate it for damages).

Corporate management issues

GENERAL SHAREHOLDERS (PARTICIPANTS) MEETINGS

Annual (regular) meetings in limited liability companies should be held before the end of April, in joint-stock companies before the end of June. A specific feature of such meetings is that the decision on the approval of annual reports and annual balance sheets, as well as other issues falling within the competence of such meetings, cannot be taken in absentia.

The Federal Law No. 50-FZ dated March 18, 2020 allows public joint-stock companies to hold annual meetings in 2020 in absentia. As for other companies, their participants can issue powers of attorney or decide to hold meetings after the end of the pandemic.

BOARD OF DIRECTORS (SUPERVISORY BOARD)

The legislation does not contain restrictions regarding the possibility of holding meetings of the Board of Directors in absentia. However, it is recommended to clarify the specific aspects of regulation of such meetings contained in the charter or bylaws of a legal entity.

WHAT IF THE CEO IS UNABLE TO PERFORM HIS / HER DUTIES DUE TO RESTRICTIONS IMPOSED?

The CEO may sign documents electronically or issue a power of attorney to another employee. It should be noted that in certain cases (for example, for applications on registration of rights to real estate), the power of attorney must be certified by a notary public, which will not be possible if the CEO is isolated at home.

The legislation also permits to assign the functions of the single-member executive body to several persons acting independently. However, for that, amendments to the charter should be made. In turn, amendments to the charter require that the General Participants (Shareholders) Meeting be held and certain documents be signed by the CEO in the presence of a notary public, which is also impossible if the CEO is in quarantine.

Finally, it is possible to appoint a temporary new CEO for a definite period of time. If one of the employees is appointed CEO, the relevant employee may perform the functions on the basis of internal secondary employment. The employment agreement with the former CEO will remain valid, and his/her powers will be renewed after the end of the quarantine or recovery period. To implement this option, it is necessary to hold the General Participants (Shareholders) Meeting or a meeting of the Board of Directors (if stipulated by the charter), and the information on the new CEO should be included in the Unified State Register of Legal Entities. However, in this case a visit to a notary public by the "isolated" CEO is not required – the necessary documents will be signed by the new CEO.

Liability

IS IT REQUIRED UNDER RUSSIAN LAW TO COMPLY WITH THE REQUIREMENTS AND INSTRUCTIONS OF PERSONS CARRYING OUT SANITARY AND EPIDEMIOLOGICAL CONTROL (DOCTORS, ROSPOTREBNADZOR)?

Yes, it is. In accordance with Federal Law No. 52-ФЗ dated March 30, 1999 "On the Sanitary and Epidemiological Welfare of the Population", individuals and legal entities are required to comply with the requirements of sanitary legislation as well as decrees and regulations of officials that carry out federal sanitary and epidemiological control. In case of violation of these requirements, Russian legislation provides for liability, the main provisions regarding which are set forth below.

CAN INDIVIDUALS BE HELD LIABLE FOR VIOLATION OF THE RULES ON COMBATING THE SPREAD OF THE CORONAVIRUS INFECTION?

For individuals, regardless of their citizenship, a disciplinary, administrative, criminal and civil liability is established, a brief summary of which is given below. In this context, it should be noted that a number of legal acts are currently being prepared to tighten sanctions for the violation of the rules on prevention of infection and to introduce some new types of offences.

- Disciplinary liability of employees

If the employer has adopted an internal regulation establishing mandatory rules for the prevention of the spread of coronavirus, and an employee has violated these rules, he/she may be subject to disciplinary sanctions – the employee may receive a warning, a reprimand and even be dismissed if there are certain grounds.

- Administrative liability

In Russia, the decree of the country's chief public health officer is currently in force requiring that people with suspected coronavirus infection immediately isolate, and that people returning from the countries with an unfavorable epidemiological situation, including EU countries, are checked. If an individual fails to comply with the instructions of doctors and/or representatives of Rospotrebnadzor, he/she may be subject to administrative liability in the form of a fine. The court, in addition to considering whether the offender should be held liable, may take a decision to order the offender into quarantine.

- Criminal liability

Violation of sanitary and epidemiological rules which entailed through negligence a mass disease or poisoning of people, may constitute a criminal liability. Article 236 of the Criminal Code of the Russian Federation provides for liability in the form of a fine or deprivation of the right to occupy certain positions or be engaged in certain activities for up to three years, community services or deprivation of liberty. In case of violation, which, through negligence, entailed a person's death, a sanction is stipulated even in the form of deprivation of liberty for up to five years.

- Civil liability

A person who has been harmed by an action or omission of a third party has the right to demand compensation in accordance with the provisions of civil law (Chapter 59 of the Civil Code of the Russian Federation). As a general rule, the damage caused shall be compensated for in full by the person who caused the damage.

WHAT PUNISHMENT CAN A COMPANY FACE FOR VIOLATING THE LEGAL REQUIREMENTS REGARDING THE PREVENTION OF THE SPREAD OF THE CORONAVIRUS INFECTION?

A company may be held administratively liable for the failure to comply with the legal requirements of an authorized official in the form of a fine. Also, company officials, executives or employees responsible for the making and implementation of certain decisions may be held liable.

In addition, companies may be subject to civil liability in case of claims with respect to obligations resulting from damage caused.

THE COUNTERPARTY FAILS TO DELIVER GOODS ON TIME DUE TO FORCE MAJEURE. IS IT POSSIBLE TO BE EXEMPTED FROM LIABILITY FOR VIOLATION OF THE RULES REGARDING REPATRIATION OF FOREIGN CURRENCY EARNINGS?

Despite the fact that for the time being no direct exemption from liability due to force majeure is stipulated by legislation, law enforcement practice in most cases is based on the fact that force majeure is a circumstance that excludes the fault of a Russian company and its officials. To minimize the risk of being held liable, it is recommended to obtain a documentary evidence of the occurrence of force majeure circumstances.

IS IT POSSIBLE TO BE EXEMPTED FROM LIABILITY FOR VIOLATION OF THE TIMELINES FOR MIGRATION REGISTRATION OR FOR OTHER VIOLATIONS THAT OCCURRED DUE TO FORCE MAJEURE?

The current Code of Administrative Offences does not provide for the possibility of automatic exemption from liability in case of force majeure. At the same time, such exemption is possible if the court takes into account the absence of fault of the person that committed a breach confirmed by documents concerning the occurrence of a force majeure event.

For the time being, no legislative changes have been made to mitigate administrative liability in force majeure circumstances. However, it is actively discussed that such liability should be excluded (for example, it is mentioned in the Concept of the new Code of Administrative Offences of the Russian Federation).

Services of BEITEN BURKHARDT in Russia

- **Corporate law**, including incorporation of representative offices and branches of foreign companies, subsidiaries and joint ventures, conducting legal Due Diligence of Russian companies to be acquired, consulting on current corporate issues related to management and financing of Russian companies and divisions thereof, reorganisations under company law for the purpose of optimization of taxation and corporate structure;

- **Commercial and contractual law**, in particular, preparation of contractual documentation and structuring transactions from legal and tax point of view;

- **Real estate and construction law**, including conducting Due Diligence of rights to real estate, support in transfer of rights to greenfield and brownfield real estate, preparation of contractual documentation for acquisition of rights to land plots and buildings and performance of construction works;

- **Tax law**, including consulting on tax planning, investment project structuring and financing, legal advice with regard to obtaining tax incentives, analysis of tax consequences of agreements entered into or to be entered into, giving recommendations on minimization of possible tax risks, representation of clients in disputes with tax authorities;

- **Customs law**, including consulting on customs clearance optimization, support in obtaining tax concessions on customs duties and VAT exemption;

- **Employment and migration law**, including preparation of employment agreements, employers' internal regulations, consulting on recruitment, transfer and dismissal of employees, engagement of foreign employees as well as consulting on Russian migration law issues including obtaining work permits and employment visas;

- **Intellectual property rights**, in particular protection of trademarks and patents in Russia, consulting on issues related to license and franchising agreements;

- **Dispute resolution**, including legal appraisal of documents, pre-court and out-of-court dispute resolution (mediation, making claims), representation of clients' interests in state courts of general jurisdiction, state and commercial arbitration courts as well as during enforcement proceedings.

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