

newsletter

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LABOUR LAW

Termination of Employment Agreements with Company's Officers

On 13 May 2014 the Parliament of Ukraine adopted the Law on Amendments to Certain Laws relating to the Protection of Investors' Rights (registered under No. 4586). The law entered into force on 01 June 2014, after it was signed by the Acting President and officially published.

The Law, inter alia, introduces important new provisions relating to termination and liability of companies' officers, as described below.

The Law amends the Labour Code of Ukraine to allow dismissal of the company's officers after they have been recalled from their office.

The Law aims at curing the existing contradiction between the Ukrainian corporate and labour laws. Previously, recalling a company's officer from his office was not a ground for his dismissal as an employee, unless the officer's employment contract expressly provided for termination in such a case. As a result, the company had to find a legitimate ground to dismiss a person who was already recalled from the office.

The Law will considerably ease the complicated and sometimes burdensome process of dismissal of recalled officers.

At the same time, the Law fails to define the term “officer”, which, in light of the absence of a uniform understanding of this term in other laws of Ukraine, may lead to different interpretations in practice. We, however, believe that this issue may be clarified by the laws which are under consideration by the Parliament of Ukraine.

The Law states that in case of dismissal of an officer due to him having been recalled, the company must pay him a severance payment in the amount of at least his six months' salary. Previously, the largest statutory severance payment amounted to an employee's average three months' salary.

It remains unclear for the moment how this average six months' salary will be calculated and it is not evident from the Law whether its calculation will be based on the salary for the last six months. Apparently, the effective Procedure for Calculation of the Average Salary is to be adapted accordingly by the Government of Ukraine.

Liability of Company's Officers

As a general rule under the Labour Code of Ukraine, liability of an employee for losses caused to the company in course of performance of his duties is limited to the amount of his monthly salary, unless otherwise agreed in the employment contract or – in limited cases – an agreement on full material liability. This rule, which previously applied to low rank employees and top officers alike, was highly criticized as unduly protecting managers from liability before the company and its shareholders for obvious improper managerial decisions or other mismanagement which caused significant losses to the company.

The Law effectively introduces full (unlimited) liability of the company's officers for losses caused to the company by, in particular, the officer's failure to prevent manufacturing of inferior goods, stealing, destruction or damaging of the company's assets. Moreover, the Law goes even further and extends the officers' liability to compensation of lost profits of the company.

This provision will primarily apply to directors of Ukrainian companies who are responsible for the day-to-day management of the company. However, it is very likely to also be applicable to other officers of the company, such as chief accountants.

Enhanced Protection of Whistle-Blowers

On 02 June 2014, the Acting President signed the Law On Amendment of Certain Laws of Ukraine Concerning the State Anti-Corruption Policy in Connection with Implementation of the Action Plan Regarding Liberalization of the Visa Regime for Ukraine by the European Union (no. 1261-VII). This law, *inter alia*, significantly modifies Article 20 of the Law On the Principles of Prevention of and Counteraction against Corruption (the “Anti-Corruption Law”) by reinforcing legal protection of informants who voluntarily, without any monetary reasons or personal motives (such as revenge) assist in prevention of or counteraction against corrupt actions of their employer or superior (so called ‘whistle-blowers’).

Under the law, each whistle-blowing report, even anonymous, which relates to a concrete person or contains verifiable facts must be investigated, normally, within 15 days but no longer than within 30 days.

Reiterating the general prohibition to dismiss whistle-blowers or subject them to any other disciplinary sanctions or negative measures as a result of reporting by such person of corrupt actions, the newly adopted law expressly imposes on the employer a burden of proof to demonstrate that the informant was dismissed or otherwise sanctioned due to the reasons other than the whistle-blowing.

This provision of the law will enter into force the next day after the official publication.

BANKING AND FINANCE

Ban on Banks' Activities in the Crimea

On 6 May 2014 the National Bank of Ukraine (NBU) adopted Resolution No. 260 "On Revocation and Cancellation of Banking and General Licences for Foreign Exchange Operations of Certain Banks and Closing of Banks' Branches located in the Autonomous Republic of Crimea and the City of Sevastopol" (the "**NBU Resolution No. 260**") which imposes a ban on all banking operations in Crimea with immediate effect.

In particular, NBU Resolution No. 260 establishes that **banks may not**:

- render any financial services to their clients in the Republic of Crimea and the City of Sevastopol including where banks are acting through commercial agents under agency agreements;
- establish correspondent relations with Ukrainian or foreign banks, credit or other financial institutions which are located and/or are operating in the Republic of Crimea and the City of Sevastopol. Existing correspondent relations and correspondent accounts held with such financial institutions must be terminated and closed immediately after NBU Resolution No. 260 has taken effect. Further, the NBU specified that the termination of correspondent relations with banks, whose local offices in the Republic of Crimea were closed and de-registered in the State Register of Banks, is not required.¹ It is worth noting that this requirement may have a negative impact on the cooperation between Ukrainian banks and Russian or Russian-owned banks in Ukraine operating in Crimea.
- open any branches or outlets in the Republic of Crimea and the City of Sevastopol. Banks' local offices must terminate their activities and be closed within one (1) month which should be notified to the NBU.

Further, the NBU has clarified that although banks' local offices in the Republic of Crimea lost the right to conduct any banking activities set out in Article 47 of the Law of Ukraine "On Banks and Banking Activities" they nevertheless may continue other operations which do not fall within the scope of Article 47 until they are closed. Notably, bank's local branches and outlets undergoing liquidation may receive payments from borrowers under existing loan agreements provided that it brings the credit transaction to an end and may repay the deposits (either at maturity or as a result of early withdrawal).²

On the practical point, we also note that no payments can be made to bank accounts of individuals and legal entities opened with banks' local offices in the Republic of Crimea. Banks must return all such payment instructions back to their clients without fulfilment.³

NBU Extends the 90 Day Rule and Sale of Foreign Currency Proceeds

On 12 May 2014 the NBU issued Resolution No. 270 "On Changing the Deadline for Settlements under Export and Import Transactions and Introduction of the Mandatory Sale of Foreign Currency Proceeds" and Resolution No. 271 "On Setting the Amount of Mandatory Sale of Foreign Currency Proceeds" pursuant to which the 90 day term for settlements under export-import transactions and the mandatory sale of 50% of currency proceeds have been extended for another 6 months period from 20 May 2014 until 20 August 2014.

¹ See NBU Electronic Notice No 18-311/26311 dated 27 May 2014

² See NBU Electronic Notice No 18-311/26311 dated 27 May 2014

³ See NBU Letter No 25-111/22430 dated 12 May 2014

NBU Resolutions No. 270 and No. 271 do not introduce significant changes and provide for:

- an obligatory 90 days period for the completion of settlements under export and import transactions between residents and non-residents;
- the requirement for legal entities (except banks), commercial representations and private entrepreneurs to sell 50% of their foreign currency proceeds irrespective of whether such proceeds are export revenues, foreign borrowings, investments or other capital inflows. It is worth reminding that banks are obliged by law to convert foreign currency proceeds on the same or the next business day when received by their clients even if the bank was not so instructed.

The obligation to sell foreign currency proceeds does not apply to:

- any proceeds backed by a state guarantee or received for the benefit of the state;
- term loan facilities provided in accordance with the international treaties or granted by international financial institutions where Ukraine is either a member or where Ukraine committed to ensure the same favourable regime as applies to other international financial institutions;
- international technical assistance in relation to the projects registered in Ukraine;
- resident intermediaries acting on the basis of commission, consignment or agent agreements to the extent foreign currency received by them is indented for further transfer for the benefit of its ultimate owners;
- any proceeds in so-called "weak" currencies, which are the currencies, other than the Russian ruble, falling within the second and the third group of classification set by the NBU.⁴

Ban on Loan Prepayments Remain in Force until 1 September 2014

On 30 May 2014 the NBU issued Resolution No. 328 "On Regulation of Foreign Exchange Transactions and Operations of Financial Institutions" which re-introduced currency control restrictions, initially adopted by NBU Resolution No. 240, **until 1 September 2014**, amongst which are the following:

- prohibition of early repayment (either involuntarily or voluntarily) of principal, interest and other amounts payable under cross-border loans, including where the parties execute amendments shifting the repayments to earlier dates;
- prohibition of interbank FX transactions without supply of currency;
- prohibition of issuance of deposit (saving) certificates by banks;
- banks may pay back foreign currency deposits upon clients' requests for early withdrawal only in the national currency at the FX rate on the day of payment;
- cash withdrawals and purchase of foreign currency are allowed in amounts not exceeding the equivalent of UAH 15,000 per day per one person;
- limitation on overseas transfers by individuals in the amount not exceeding UAH 150,000 per month except for exempted transfers permitted under NBU Resolution No. 328;

⁴ See the Foreign Currency and Precious Metals Classifier approved by the NBU Resolution No. 378 dated 2 October 2002

In addition, the NBU has limited the right of individuals to withdraw national currency from deposit and current accounts to UAH 150,000 per day. This rule will not apply to salaries, social benefits, business travel costs and the amounts previously deposited in cash (after NBU Resolution No. 328 came into force).

Banks, which failed to comply with provisioning requirements during the relevant reporting period, acquired the right to buy foreign currency on the interbank market in order to repay deposits and accrued interest to its clients on the maturity date.

REAL ESTATE

Notaries to Start Issuing Statements from the Real Estate Register

Law of Ukraine No. 1219-VII on Amending Certain Laws with regard to Issuance of Information about State Registration of Rights and Their Encumbrances from the State Register of Property Rights to Real Estate (hereinafter - Law No. 1219) entered into force on May 8, 2014.

Law No. 1219 allowed Ukrainian notaries to issue statements from the State Register of Property Rights to Real Estate (hereinafter - Real Estate Register). Previously notaries could issue such statements only when notarizing real estate transactions. In other cases owners had to request the statements from the local offices of the State Registration Service of Ukraine (SRA), which could take up to several weeks.

In line with Law No. 1219 notaries will be able to issue statements from the Real Estate Register without limitations. Statements can be obtained by owners or persons enjoying property rights of real estate, their authorized representatives or heirs.

These changes are a good step towards simplification of access to information about real estate. It is worth noting that before the law permitted to everyone to request for information about mortgages and other encumbrances over a real estate.

Changes introduced by the Law on Averting a Financial Catastrophe and Laying the Groundwork for Economic Growth in Ukraine

On March 27, 2014 the Parliament adopted Law No. 1200-VII on Averting a Financial Catastrophe and Laying the Groundwork for Economic Growth in Ukraine (hereinafter - Law No. 1200). For the main part the law came into force on April 10, 2014 and was amended on the very same day to eliminate some technical shortcomings.

Law No. 1200 was designated to generate additional budget revenue. Introduction of new and increase of existing tax and charges was seen as an emergency step to avert severe economic downturn in Ukraine. Key novelties relating to real estate are increase of rent payments for agricultural land owned by the state or a community. Here the rent cannot be less than the triple land tax.

Another amendment relates to the definition of the basis for the real estate tax over residential properties. From now on, for the purpose of taxation, not only the residing area itself but the gross area of a flat or a house shall be taken into account while definition of the real estate tax. Worth noting that the amount of the gross area exceeding which one shall pay the tax, remained the same as it was defined poorly for residing area. Hence, the law in fact increased the prospective "clientele" for the real estate tax.

PUBLIC PROCUREMENTS

New Regulation on Advance Payments and Position of the Ministry of Economy on the April 2014 Law

Shortly after the new Law on Public Procurements (the "Law") came into force on April 20, 2014, the Government of Ukraine issued a separate Regulation on the issue of advance payments under public contracts dated April 23, 2014, no. 117 (the "Regulation"). In accordance with the Regulation any goods, works or services may be purchased with a 30% advance payment, provided that the maximum delay of supplies should not exceed 1 month. Such period may even be longer in a number of exceptional cases, including, without being limited to, construction works (maximum 3 months), importation of specific goods (maximum 3 or 6 months), and implementation of specific environmental preservation projects (1 year or even longer).

Besides, on May 23, 2014 the Ministry of Economy of Ukraine issued an "information letter" aimed at clarifying certain provisions of the above-mentioned new law on public procurements (the "Letter"). The Letter is important in view of the main question raised by the Law, namely, which contracting authorities are obliged to spend their own funds in line with the public tender requirement.

Based on the Letter we may conclude that contracting authorities with a state or municipal stake of no more than 50% should not be affected by the public tender requirement, unless they are delegated the right to spend budget funds (which is usually not the case). At the same time, contracting authorities with a 50% state or municipal stake are obliged to publish post-closing reports on public procurements rendered. In addition, the Letter also confirms the possibility of tender-free procurement of goods or services by natural monopolies and other similar contracting authorities for the amount of up to UAH 1 million (approx. EUR 63,000), or for procurement of works - for the amount of up to UAH 5 million (approx. EUR 312,000), as long as such procurements are not funded from the state budget of Ukraine. ■

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