Jyldyz Tagaeva, Meerim Talantbek kyzy

Kalikova & Associates

**SPECIFIC EMPLOYMENT REGULATIONS FOR SENIOR EXECUTIVES IN LIMITED LIABILITY AND JOINT-STOCK COMPANIES IN THE KYRGYZ REPUBLIC**

**Introduction**

Senior executives in a limited liability or joint stock company (the "company") refer to a category of employees with special managerial status who are subject to specific requirements and conditions upon hire. Consequently, an employment agreement with a senior executive must be tailored to suit specific needs of such status and, like any employment agreement, must equally protect the senior executive as the employee and the company as the employer.

This article offers an overview of specific employment regulations for senior executives in the companies, in particular, limited liability and joint stock companies, including the issues related to hiring, outside employment, termination, and early termination fee.

1. **Specific Hiring Requirements**

Pursuant to the Labor Code of the Kyrgyz Republic (the "KR"), a senior executive is an individual who is authorized by the law or constituent documents to carry out the management services and to act as the company’s sole executive body.

The manner of executing the employment agreement between the company and the senior executive is governed by the Labor Code of the Kyrgyz Republic (the "Kyrgyz Labor Code"). The employment agreement with the senior executive must be executed in writing in two counterparts for each party and must be signed by the employer and the employee. In some cases, before executing the employment agreement with the senior executive certain procedures must be completed, such as competitive selection, election or appointment, etc.[[1]](#footnote-1)

The hiring of the senior executive is subject to the general rules set forth in the Kyrgyz Labor Code and is certified by the hiring order (directive, resolution) issued within three (3) days and signed on behalf of the company by:

* the chairman of the general meeting of participants (shareholders) at which the senior executive was elected; or
* the participant (shareholder) or the person authorized by the decision of the general meeting of participants (shareholders); or
* the chairman of the Board of Directors (if the Board of Directors is competent to transact such business) or the person authorized by the decision of the Board of Directors.

Upon hire, the senior executive must be made familiar with the internal employment policies, bylaws and collective bargaining agreements, if any, and must have his employment record book duly completed.

If the senior executive is a foreign national, it will be required to obtain a work permit for the senior executive and a permit to hire foreign employees for the company. The manner of obtaining such permits is prescribed by Kyrgyz laws.

1. **Term of Employment**

Pursuant to the Kyrgyz Labor Code, the employment agreement with the senior executive is executed for a definite term (fixed-term employment). Generally, the term of employment is set by the constituent documents of the company or by agreement of the parties, but anyway should not exceed five (5) years.

In joint stock companies, the senior executive or the collective executive body is appointed for a term of not more than one (1) year.[[2]](#footnote-2)

1. **Probation**

Upon hire, the senior executives may be required to serve a probation period in order to assess his suitability to the office and job. However, for senior executives, the length of probation may not exceed six (6) months.

In case of failure to successfully complete probation, the company may discharge the senior executive before expiration of the probation period by giving at least three (3) day prior written notice indicating the reasons for considering probation unsatisfactory.

Absent such notice, the senior executive shall be deemed to have successfully completed probation and shall be eligible to continue working.

If during the probation period, the senior executive realizes that the offered job in the company does not suit him, he will be eligible to resign by giving the employer a three (3) day prior written notice.

While on probation, the senior executive remains entitled to all the rights and benefits guaranteed to employee under the Kyrgyz Labor Code. He is equally subject to all the duties and responsibilities of employee of the company and to the requirements of the Kyrgyz Labor Code, other employment laws and regulations, and bylaws of the company. In other words, the senior executives on probation have the same rights and responsibilities as other employees of the company.

It is important to note that the probation period does not include the period of temporary disability and other time during which the senior executive was actually absent from work. In such cases, the probation period is extended for the duration of such absence.

Absent such probation clause in the employment agreement, the executive is deemed hired without probation.

1. **Outside Employment**

The senior executive may engage in outside employment only with the consent of the company’s authorized body or owner or the person or body authorized thereby. The requirement for consent is necessary to protect the interests of the primary employer who is concerned about the senior executive’s ability to perform his primary employment duties in full. Outside employment may interfere with the primary employment duties and can create potential conflict of interest.

It should be noted that the senior executive’s outside employment may not exceed four (4) hours per day or twenty (20) hours per week. At the same time, the amount of his pay is calculated in proportion to the time worked depending on the achievement of output standards or on other terms specified in the employment agreement.

It is also worth noting that the senior executive may not serve as the member of the company's supervisory or controlling bodies.

1. **Termination of Employment**

Pursuant to the Kyrgyz Labor Code, the senior executive refers to a special category of employees subject to specific employment regulations including, in particular, additional grounds for termination of employment. Thus, the employment of the senior executive may be terminated on the following grounds:

* due to expiration of the term of employment;
* by agreement of the parties;
* due to voluntary resignation;
* due to discharge;
* other grounds specified in Article 79 of the Kyrgyz Labor Code;[[3]](#footnote-3)
* *additional grounds applicable to senior executives.*

Each ground for termination of employment of the senior executive is discussed in more detail below.

* 1. **Termination of Employment Due to Expiration of Term**[[4]](#footnote-4)

Since the employment agreement with the senior executive is executed for a definite term, it is generally terminated upon expiration of this term.

Pursuant to Kyrgyz laws, unless either party requests termination of fixed-term employment due to expiration of its term, and if the senior executive continues to work after expiration of the term of employment, the employment agreement is considered executed for an indefinite term. In such case, the agreement becomes subject to regulations applicable to indefinite-term agreements.

In practice, the parties agree in the employment agreement that in case of early termination, either party should notify the other party about this at least one (1) month prior. However, pursuant to Kyrgyz laws, employment can be terminated without notice long before its expiration as it is enough to notify about termination even one (1) day prior to expiration date. Therefore, a one (1) month prior notice clause in the employment agreement creates the risk that in case of failure to notify within this period, the parties will be deprived of the opportunity to terminate employment due to its expiration and, as a result, the employment agreement will be considered executed for an indefinite term.

* 1. **Termination of Employment by Agreement of the Parties**[[5]](#footnote-5)

A fixed-term employment agreement with the senior executive may be terminated at any time before its expiration by agreement of the parties in writing on a date determined by the parties.

The party intending to terminate employment on this ground must send a written offer to terminate to the other party. The party receiving an offer to terminate employment must notify its decision in writing within three (3) days.

As practice shows, termination of employment by agreement of the parties may be subject to specific requirements such as early termination fee, mutual release and waiver of claims and other requirements that the parties may decide to include in the termination agreement.

The employment termination agreement between the senior executive and the company can be cancelled only by mutual agreement of the parties.

* 1. **Termination of Employment due to Voluntary Resignation**[[6]](#footnote-6)

The senior executive may resign by giving at least one (1)-month prior written notice. Upon expiration of a one (1)-month period, the senior executive may stop working and the company must issue his employment record book and pay all amounts due, including, applicable termination fees.

During the above one (1)-month period, the senior executive may withdraw his notice of resignation, unless another senior executive is invited in writing to replace him.

If the company refuses to terminate employment at the senior executive’s request, the latter may refer the dispute to the court.

* 1. **Termination of Employment due to Discharge[[7]](#footnote-7)**

The senior executive may be discharged by the company in cases specifically provided by Kyrgyz laws, for example: liquidation of the company, unsuitability of the employee for his office, medical condition confirmed by a medical certificate, and in other cases provided by Kyrgyz laws.[[8]](#footnote-8)

The manner of termination and payment of termination fee varies depending on the grounds for termination.

* 1. **Additional Grounds for Termination of Employment**[[9]](#footnote-9)

Additionally, Kyrgyz laws provide the following grounds for termination of employment of the senior executives:

* the senior executive is removed from office due to bankruptcy (insolvency) of the company;
* the company’s authorized body or owner or the person or body authorized thereby makes decision on early termination of employment;
* other grounds specified in the employment agreement.

In other words, the termination of employment of the senior executives may occur on any grounds specified in the employment agreement in contrast to other employees whose employment may be terminated only on the grounds specified in the Kyrgyz Labor Code. This provision is unfavorable for the senior executive, as the employee, as his employment may be terminated on any ground at any time. But it is favorable for the company willing to discharge the senior executive as his employment may be terminated without violation of the Kyrgyz law requirements. However, in case of early termination of employment of the senior executive, the company is required by Kyrgyz laws to pay him termination fee as described in more detail below.

Termination of employment is certified by an order (directive, resolution) of the company indicating the ground for termination of employment with reference to the relevant article of the Kyrgyz Labor Code. It is necessary that the senior executive is made familiar with and sign the order (directive, resolution) on his discharge. When employment is terminated, the senior executive must be paid all amounts due to him and issued his employment record book on the last day of his employment. The delay in the payment and issuance of the employment record book entails the company’s liability (fine, penalty) specified in the Kyrgyz Labor Code.

1. **Payment of Termination Fee to Senior Executive**

If the employment agreement with the senior executive is terminated before expiration of its term by the decision the company’s authorized body or owner or the person or body authorized thereby, provided that the senior executive has not committed the act of misconduct, he must be paid the early termination fee, the so-called "golden parachute". The amount of the termination fee shall be specified in the employment agreement; however, Kyrgyz law provides that *it cannot be less than two (2) average monthly salaries.*[[10]](#footnote-10)

In this regard, the parties should specify the amount of the termination fee payable to the senior executive in the employment agreement. If such fee is not specified in the employment agreement, the parties can indicate it in the addendum to the employment agreement.

If the amount of the termination fee is not specified in the employment agreement, the company may face the following problem: the senior executive, referring to the Kyrgyz Labor Code stating that the amount of the termination fee must not be *less than two (2) average monthly salaries*, may claim much more than two (2) average monthly salaries. Therefore, it is recommended that the parties, especially the employer, to specify the amount of the termination fee in the employment agreement and make sure that this issue is settled and will not subsequently cause any problems to the company.

The companies determine the amount of such termination fee at their own discretion depending on the amount of profit, the size of the company, and the employee's value to the company. Often the amount of the termination fee is quite high and put the company at a disadvantage. Therefore, it is recommended to the companies, if acceptable, to wait until the expiration of the term of employment agreement and terminate it upon its expiration.

1. **Notification of Change in Senior Executive**

The senior executive information refers to the data contained in the state register of legal entities, the change of which must be notified to the justice authorities of KR. Therefore, upon termination of employment of the senior executive, the company must send a notice enclosing the decision approving the discharge of the senior executive of the company and the election (appointment) of the new senior executive and the copy of his passport.[[11]](#footnote-11) The justice authority amends the data in the state register of legal entities and notifies the tax, statistics and social fund authorities about the introduced changes within seven (7) business days from the date of receipt of the notice.[[12]](#footnote-12) However, in practice, in order to timely notify other state bodies, the company can independently notify the tax, statistics and social fund authorities about the appointment of the new senior executive.

1. **Civil Law Contract with Senior Executive**

Kyrgyz laws allow the owner of the company to execute civil law contract with the senior executives. The issues of executing such contract are regulated by the Kyrgyz civil laws, in particular, the Civil Code of KR, the Joint Stock Companies Act and the Business Partnerships and Companies Act. According to the Joint Stock Companies Act of KR, by the decision of the Board of Directors or the General Meeting of Shareholders (absent the Board of Directors), the powers of the executive body (in our case, the senior executive) may be transferred to the managing organization or the manager under the contract, the terms of which must be approved by the Board of Directors, unless otherwise provided by the company's charter.[[13]](#footnote-13) In this case, the senior executive of the company will be a manager, who will act under the civil law contract and will be in charge of the current management of the company.

In spite of the fact that Kyrgyz laws allow transferring the powers of the executive body to the manager under a civil law contract, there is a well-established practice that generally the companies execute the employment agreements with the senior executives. This is explained by the nature of the work performed by the senior executive, namely, the current management of the company.

When executing a civil law contract with the company's senior executive, it is necessary to remember the principle of freedom of contract that exists in civil law, which allows the parties to independently determine the terms of the contract and, consequently, the terms of relationship between the parties.

\* \* \*

Thus, the Kyrgyz Labor Code sets forth specific requirements for hiring, termination and employment of the senior executives, which must be taken into account when executing the employment agreements with them.

September 12, 2017

1. Kyrgyz Labor Code, Article 323. [↑](#footnote-ref-1)
2. Joint Stock Companies Act of KR of March 27, 2003 No. 64, Article 58(1). [↑](#footnote-ref-2)
3. Other grounds for termination of employment not covered by this article are: transfer of the employees at their request or with their consent to another job at another employer or transfer to the elective (job) position; occurrence of circumstances beyond reasonable control of the parties; employee's refusal to transfer to another job due to his medical condition confirmed by a medical certificate; employee's refusal to continue employment in case of change of material terms of employment; employee's refusal to continue employment in case of change of control or reorganization; employee's refusal to transfer to another job in case of the employer's relocation; unsatisfactory probation. [↑](#footnote-ref-3)
4. Kyrgyz Labor Code, Article 81. [↑](#footnote-ref-4)
5. *Id.*, Article 80. [↑](#footnote-ref-5)
6. *Id.*, Article 82. [↑](#footnote-ref-6)
7. Kyrgyz Labor Code, Article 83. [↑](#footnote-ref-7)
8. *Id*., Article 83. [↑](#footnote-ref-8)
9. *Id*., Article 326. [↑](#footnote-ref-9)
10. Kyrgyz Labor Code, Article 327. [↑](#footnote-ref-10)
11. The State Registration of Legal Entities, Branches (Representative Offices) Act of KR of February 20, 2009 No. 57, Article 18(3). [↑](#footnote-ref-11)
12. *Id.*, Article 18(5). [↑](#footnote-ref-12)
13. Joint Stock Companies Act of KR of March 27, 2003 No. 64, Article 58(1). [↑](#footnote-ref-13)