

January 2016

On May 05, 2014 the President of the Russian Federation signed Federal Law No. 116-FZ "On Amendment of Certain Legislative Acts of the Russian Federation" (the Law) known as the Law on Prohibition of Loaned Labor. The Law amends the following legislative acts: Law of the Russian Federation of April 19, 1991 No. 1032-I "On Employment in the RF", the Labor Code of the RF, Federal Law of July 24, 1998 No. 125-FZ "On Compulsory Social Industrial-Accident and Occupational-Disease Insurance", and the RF Tax Code. The said amendments that have modelled a conceptually new approach to the regulation of the personnel provision matters took effect as of January 01, 2016.

The fundamental provisions and principles of the new Russian loaned labor legislation are considered below.

Introduction

Until adoption of Federal Law of May 05, 2014 No. 116-FZ "On Amendment of Certain Legislative acts of the Russian Federation" loaned labor (personnel provision, outstaffing, personnel outsourcing) matters had not been specifically regulated by Russian laws. Practically, only the RF Tax Code referred to the tax treatment of "personnel provision services". In actual practice personnel was provided under a service contract. It took rather a long time to adopt that law. The proposed amendments met both support and strong criticism. The language of the draft law underwent substantial changes: the initial version that proceeded from the principle of complete prohibition of loaned labor was subsequently mitigated and consequently the personnel provision activity took legal shape.

In summary, what are the fundamental provisions and principles formulated in the new legislation that came into force as of January 01, 2016?

Basic Concepts

New Article 56.1 of the RF Tax Code introduces the concept of loaned labor:

"Loaned labor is labor performed by an employee by order of the employer for the benefit and under management and control of an individual or a legal entity, who is not the employer of this employee".

In new Article 18.1. of the Employment Law¹ the employees' labor provision activity was also defined:

***"Employees' (personnel) labor provision activity** is secondment by the employer (hereinafter also the seconding party) of its employees, subject to their consent, to an individual or a legal entity, who is not the employer of such employees (hereinafter also the host party), for the performance by those employees of job functions determined in their employment contracts for the benefit and under management and control of the host party".*

Categories of Entities

The new legislation limits considerably the range of entities who are allowed to engage in the provision of loaned labor. As from January 01, 2016 personnel may be seconded by:

ACCREDITED PRIVATE EMPLOYMENT AGENCIES (PEA)	LEGAL ENTITIES OTHER THAN PEAs (RUSSIAN OR FOREIGN) ²
• To INDIVIDUALS for personal service and housekeeping; • To LEGAL ENTITIES as a substitute for temporarily absent employees who retain their job; • To LEGAL ENTITIES for performance of work connected with knowingly temporary (up to 9 months) expansion of business.	• To their AFFILIATED LEGAL ENTITIES; • To a JOINT-STOCK COMPANY, if the seconding party is a party to a shareholders' agreement on exercising of rights certified by the shares of such joint-stock company; • To a LEGAL ENTITY that is a party to a shareholders' agreement with the seconding party.

Specifics of secondment of personnel by legal entities other than PEAs will be determined by a separate federal law which has not yet been adopted.

Changes concerning payment of insurance contributions are essential for entities engaging in the provision of loaned labor. For instance, pursuant to amendments³ made in Federal Law of July 24, 1998 No 125-FZ "On Compulsory Social Industrial-Accident and Occupational-Disease Insurance", such insurants are obligated to pay insurance contributions based on insurance rate determined in accordance with the host party's types of activities as per the Russian National Classifier of Economic Activities, and on markups/discounts applicable to the host party. The party hosting secondees must submit relevant information required for the determination of the applicable insurance rate, discounts, and markups.

PEA Accreditation Rules

¹Law of the Russian Federation of April 19, 1991 No. 1032-I "On employment in the Russian Federation"

²See item 2 of part 3 of Art. 18.1 of Law of the Russian Federation of April 19, 1991 No. 1032-I "On Employment in the Russian Federation" as amended by Federal Law of May 05, 2014 No. 116-FZ "On Amendment of Certain Legislative Acts of the Russian Federation"

³See item 2.1 of Art. 22 of Federal Law of July 24, 1998 No 125-FZ "On Compulsory Social Industrial-Accident and Occupational-Disease Insurance" as amended by Federal Law of May 05, 2014 No. 116-FZ "On Amendment of Certain Legislative Acts of the Russian Federation"

PEA Accreditation Rules are established by Government Resolution of October 29, 2015 No. 1165⁴. They took effect as of January 01, 2016.

The following requirements have been set for PEAs seeking accreditation⁵. To obtain accreditation a PEA must have charter capital of at least 1 million rubles. Another prerequisite that is to be met is no outstanding tax, duties or mandatory payment debts to the fiscal system. The head of a private employment agency must meet the established requirements (higher education and at least 2 years of work experience in the recruitment and promotion of employment in the RF during the latest three years, no prior convictions for crimes against the person or crimes in the economic sphere). It is specifically stated that a PEA will not obtain accreditation unless it is a Russian legal entity, nor will it be accredited if it applies a special tax treatment⁶.

According to the Rules, the accrediting agency is the Federal Labor and Employment Service (Rostrud). It takes a decision to grant (or deny) accreditation within 15 business days after the date of delivery to it of a respective set of applicant's documents. Accreditation may be granted for a maximum term of three years and may be extended subject to PEA's compliance with certain requirements, including submission of annual reports on its operations.

The Rules also establish that during the accreditation period Rostrud may carry out audits of PEA's compliance with the accreditation requirements, as provided for by the Federal Law "On protection of rights of legal entities and individual entrepreneurs during governmental audits (supervision) and municipal audits". Based on audit results accreditation may be suspended or revoked.

According to the register of accredited private employment agencies, posted at the official website of Rostrud, by January 11, 2016 accreditation had been granted to 73 private employment agencies.

Restrictions and Guarantees

The new legislation establishes restrictions applicable both to the provision of loaned labor in general (e.g., it is prohibited to second personnel for the replacement of employees who are on strike⁷) by all above referenced entities, and to PEAs only⁸. For more detailed information about such restrictions, please refer to the chart at the last page of this overview. It is important to

⁴See Resolution of the Russian Federation Government of October 29, 2015 No.1165 "On Approval of the Rules of Accreditation of Private Employment Agencies for the Employees' (Personnel) Labor Provision Activity"

⁵See part 6 of Art. 18.1 of Law of the Russian Federation of April 19, 1991 No. 1032-I "On Employment in the Russian Federation" as amended by Federal Law of May 05, 2014 No. 116-FZ "On Amendment of Certain Legislative Acts of the Russian Federation", item 2 of the Rules of Accreditation of Private Employment Agencies for the Employees' (Personnel) Labor Provision Activity) (approved by RF Government Resolution of October 29, 2015 No. 1165)

⁶See part 8 of Art. 18.1 of Law of the Russian Federation of April 19, 1991 No. 1032-I "On Employment in the Russian Federation" as amended by Federal Law of May 05, 2014 No. 116-FZ "On Amendment of Certain Legislative Acts of the Russian Federation"

⁷See part 12 of Art. 18.1 of Law of the Russian Federation of April 19, 1991 No. 1032-I "On Employment in the Russian Federation" as amended by Federal Law of May 05, 2014 No. 116-FZ "On Amendment of Certain Legislative Acts of the Russian Federation"

⁸See part 13 of Art. 18.1 of Law of the Russian Federation of April 19, 1991 No. 1032-I "On Employment in the Russian Federation", Art. 341.2 of the Labor Code of the Russian Federation as amended by Federal Law of May 05, 2014 No. 116-FZ "On Amendment of Certain Legislative Acts of the Russian Federation"

understand that the above referenced restrictions are not exhaustive because lawmakers have provided for possible establishment of additional restrictions by other federal laws⁹.

Certain guarantees have been provided for to protect employees involved in legal relationships associated with loaned labor, among which we would highlight the following:

- ✓ Obligatory obtainment of employee's consent to the secondment to a host party;
- ✓ Seconded employees' compensation package must not be inferior to that of the host party's employees performing identical job functions and having equal qualifications;
- ✓ Host party's subsidiary liability for obligations to pay salary or other amount due to the secondees, which the employer (i.e. the seconding party) has failed to pay;
- ✓ Host party's performance of the obligation to ensure safe working environment for and protection of labor of secondees;
- ✓ In each case of secondment of an employee to a host party a supplement agreement to the employment contract must be made between the employee and the PEA, where information about the host party must be set out;
- ✓ PEA must make in the employee's work book a record about employee's work for the host party;
- ✓ PEA must maintain compliance control over the use by the host party of the secondees' labor and control over its compliance with labor laws.

With regard to foreign employees seconded under a personnel provision contract, it is established that their arrival to Russia and their labor activity is regulated by relevant federal laws (in particular, Federal Law of August 15, 1996 No. 114-FZ "On Procedures for Leaving the RF and Arriving to the RF", Federal Law of July 25, 2002 No. 115-FZ "On Legal Status of Foreign Citizens in the RF"). Since no changes have been made yet to legislation regulating foreign labor, for the time being it is not clear whether any specific provisions, including prohibitions, will be provided for with respect to foreigners.

Contract for Provision of Employees' Labor

Civil-law regulation of relationships between the seconding company and the host party is currently limited to the following definition of a relevant contract:

"Contract for provision of employees' (personnel) labor is a contract whereunder the contractor seconds its employees, subject to their consent, to the customer for performance by those employees of job functions determined by their employment contract, for the benefit and under management and control of the customer and the customer agrees to pay for the services consisting in the provision of employee's (personnel) labor and use labor of secondees in accordance with the job functions, determined by employment contracts between those employees and the contractor".

It is not quite clear from the above definition whether such contract will be regarded as services contracts or the above definition introduces a new type of civil law contracts. In our opinion, a contract for provision of employees' (personnel) labor, by virtue of its legal nature, will be a services contract, which is also indirectly supported by certain provisions of the RF Tax Code (para

⁹See part 14 of Art 18.1 of Law of the Russian Federation of April 19, 1991 No. 1032-I "On Employment in the Russian Federation" as amended by Federal Law of May 05, 2014 No. 116-FZ "On Amendment of Certain Legislative Acts of the Russian Federation"

6 of item 4 of section 1 of Art. 148, item 19 of section 1 of Art. 264 of the RF TC¹⁰), where the provision of employees' (personnel) labor is defined as a service.

We would like to specifically focus attention on the following. The Law establishes that a mandatory provision requiring performance by the host party of its obligation to ensure safe working environment and protection of labor must be included in any contract for provision of employees' labor¹¹.

Companies in which employees' trade union organizations have been formed and exist should be aware that in certain cases a decision to engage workforce under a personnel labor provision contract should be taken with due consideration given to the opinion of the elected body of the primary trade union organization, as provided for by the RF LC with respect to adoption of company regulations. In particular, consideration of the trade union opinion is required where number of secondees exceeds 10% of the average number of host company's own staff and where employees are seconded for the performance of work which is connected with a knowingly temporary expansion of business.

Liability

No special liability has been yet provided for the breach of the rules of and conditions for the use of the loaned labor, therefore one should rely on provisions of Art. 5.27 of the RF Administrative Offences Code, establishing liability for labor violations. At present time, proceeding from the literal interpretation of the definition of the loaned labor, given in Art. 56.1 of the RF LC, one can say that liability for the violation of the prohibition of loaned labor is to a considerable extent imposed on the seconding party (i.e. a PEA or another employer that provides labor of its employees). At the same time, this conclusion is not completely in line with the purposes of adoption of the new legislation, which were referred to during its discussion and adoption. As parliamentarians told on several occasions, the objective of the new regulation is, in particular, to prevent employers from using leased labor mechanisms to avoid conclusion of employment contracts. Therefore establishment of specific liability of both parties to an employees' (personnel) labor provision contract for non-compliance with the leased labor laws requirements, that came into force as of January 01, 2016, cannot be ruled out.

¹⁰See the referenced provisions of the RF Tax Code as amended by Federal Law of May 05, 2014 No. 116-FZ "On Amendment of Certain Legislative Acts of the Russian Federation"

¹¹See part 11 of Art. 18.1 of Law of the Russian Federation of April 19, 1991 No. 1032-I "On Employment in the Russian Federation" as amended by Federal Law of May 05, 2014 No. 116-FZ "On Amendment of Certain Legislative Acts of the Russian Federation"

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This overview is not intended to provide legal advice and/or any other form of legal assistance that may be rendered by attorney-at-law to client. The exclusive purpose of this review is to make aware its recipient of certain recent changes in Russian laws and regulations, and of the development of law application practice. Any use of the information contained herein for particular purposes may require more detailed case-specific explanations. Further information can be obtained via +7 (495) 933 75 67 or office@agp.ru



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