Andrey Gorodissky & Partners

Legal Overview

Labor Corona-Law – The Organization is to Work, but there are Circumstances Preventing Certain Types of Work from being Performed

29 April '20

In this overview we will talk about the situation where the “non-working days” do not apply to an organization but due to a number of reasons not all of its employees can perform their usual job functions.

Practice has shown that with regard to employees falling within such category the employer either (a) transfers employees to remote work /work from home (distant work) which can be performed in accordance with the employee’s job description or (b) give the employee an assignment to do other work remotely or at the employer’s office, often after delivering of necessary prior training or learning.

In an ideal scenario, a written supplement agreement to the employment contract should be made with such employees. In this regard the Labor Ministry by its Letter dd. March 27, 2020 N 14-4/10/П-2741 has authorized using electronic sample documents only to the extent they pertain to such amendments to the employment contract that regulatt the transfer to the remote working regime.

It is noteworthy that in the said letter the Labor Ministry uses the term remote work (not outworking!). Outworking rules are regulated by special norms of the RF Labor Code in sufficient detail. In our opinion, during the “non-working days” period in conditions where it is necessary to “stay at home” it is more appropriate, from the legal viewpoint, to speak about the temporary transfer of employees to the work-from-home regime for the period when measures aimed at the prevention of spreading of the new coronavirus disease are in force or, as the Labor Ministry states, to the remote work regime.

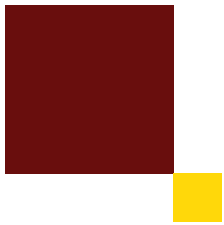
What is the extent of risk to which the employer would be exposed in case of transfer of its employees to work-from-home (remote work) by issuing of and order and circulating it by email, making an agreement with employees about remote / outworking or performance of other work “on actual basis”, i.e. when the employee has actually commenced working under new conditions?

In our opinion, the transfer of an employee to work from home (remote work) within the framework of his/her job description by issuing and circulation via corporate email of an order applicable to certain group of employees, does not pose considerable risk of recognition of breach by the employer of labor laws or risk of employee’s refusal to work under such conditions. However in actual practice there occurred situations where an employee refuses from outworking/remote working, referring to family reasons or other circumstances. In such cases we recommend to try to find for such employee work at the office, or agree upon provision of an additional unpaid leave. An employer has no right to compel its employee to work remotely from home.

A little bit differently looks the situation where work within the scope of employee’s job description cannot be provided for the employee due to objective reasons while the employer needs other work to be done (beyond the scope of the employee’s job description), which the employee could potentially do. Strictly speaking, an employee has the right to refuse from doing other work, even after receiving of respective internal training /learning. If the employee does not refuse from doing other work and has commenced performance thereof, then, in the absence of a written agreement between the parties to the employment contract, there is the risk that subsequently the employee would request the employer to provide him/her extra pay for positions overlapping or appeal to court, and the risk that the employee would refuse form returning to the performance of his/her former work duties. We believe that if an employee works remotely , electronic correspondence with the employee may serve as a certain kind of protection for the employer, where such correspondence shows what and how the parties to the employment contract agreed upon as new conditions of work, whether such conditions were agreed for the period when corona virus disease curbing measures were in effect, etc.

The employer may also refer to the fact of receiving by the employee of internal training /leaning in connection with the new work and the fact of performance by the employee of the new work without any objections as arguments to the effect that an agreement with the employee on temporary transfer to other work with salary pay had been reached. In such situation failure to sign a separate written agreement may be explained by employer's reluctance to expose the employee to additional risk of contracting the disease and the intention to comply with the "stay at home" requirement. In our opinion, courts and the labor inspection should take such arguments into consideration if they are supported by evidence such as email correspondence, evidence of giving and performance of tasks, receiving of training/learning.

If other work is going to be performed at the employer's premises, a supplement agreement to the employment contract should be signed, considering that the organization continues working and that the employee is at his/her work place, therefore it would be problematic for the employer to refer to any obstacles to signing of an agreement or to find reasonable explanations for failure to execute such an agreement.



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