

Methods of formalization of relations when performing work

Relations between persons in the performance of certain works depending on objectives pursued by the parties can be formalized in different ways. One such method is the conclusion of an employment contract and another method is the conclusion of a civil contract for performance of works or provision of services, and involvement of a person (in this case an individual) to work on the basis of a voluntary patent¹.

These two contracts serve different purposes and are concluded under different circumstances, and have their own peculiarities. However, some organizations-employers often resort to signing of the civil contract instead of the employment contract, for example, when they do not wish to make tax and social contributions for their employees, provide them with guarantees and compensations provided by the labour legislation, and for other possible reasons².

This article will consider issues such as what rights and obligations the parties have in each of the cases, and which contract, in our opinion, should be concluded for the purposes of the most effective protection of the rights and interests of persons performing certain works.

1) *Employment contract:*

The employment contract is concluded between an employer (hereinafter referred to as the “Employer”) and an employee (hereinafter referred to as the “Employee”) for a specified period or indefinite period (hereinafter referred to as the “Employment Contract”) and is regulated by the Labour Code of the Kyrgyz Republic No. 106 dated 04.08.2004 (the “Labour Code”).

According to the Employment Contract, the Employee undertakes to perform work of a particular specialty (profession), qualification or position, while observing the rules of internal labour regulations. The Labour Code, in turn, sets the duration of a working day, weekends and holidays, as well as vacation days, which must be included in the contract and thus respected by the parties.

Under the Employment Contract, the Employee receives a salary that cannot be less than a minimum monthly wage³ established by the legislation of the Kyrgyz Republic (hereinafter the “KR”) and must be paid regularly, at least, once a month in accordance with the Labour Code.

¹ Separate taxes can be paid by purchasing a mandatory patent (for legal entities) or a voluntary patent (for individuals) (paragraph 1 of Article 345 of the Tax Code of the KR No. 230 dated 17.10. 2008 (hereinafter the “KR Tax Code”).

A patent is a document issued by a tax service body or a document obtained by a taxpayer using a payment terminal that certifies the taxpayer’s right to carry out a certain type of activity and payment of taxes for this type of activity, and also confirms the receipt of income during the period in which the patent was valid (paragraph 2, Article 345 of the KR Tax Code).

² Except for the cases when a will for the conclusion of the civil contract comes from a person performing or rendering certain work/services.

³ The minimum wage per month is 1662 Kyrgyz soms (≈ 24 USD) according to Article 13 of the Law of the Kyrgyz Republic “On the Republican Budget of the Kyrgyz Republic for 2018 and the Forecast for 2019-2020” No. 218 (23) dated 28.12.2017.

The Labour Code provides for the Employer's obligation under the Employment Contract to provide the Employee with the necessary working conditions, workplace, work equipment, materials, etc. The Employer is also obliged to provide the Employee with adequate labour protection and safety.

The Employee, in turn, is obliged to observe the rules of labour regulations (labour discipline). He/she has the right to rely on guarantees and compensations provided by the labour legislation of the Kyrgyz Republic in appropriate cases (for example, in case of staff reduction, unused vacation days of work, etc.).

It should be noted that according to the Employment Contract, the Employer himself makes monthly payments for the Employee on mandatory social deductions to the Social Fund of the Kyrgyz Republic and income tax stipulated by the Kyrgyz legislation: 10%⁴ in the form of social deductions from a salary⁵ of the Employee is sent to the Social Fund of the Kyrgyz Republic and 10% goes to the budget in the form of income tax; in addition to these deductions from all types of payments accrued in favor of each hired Employee, the Employer separately pays for each Employee another 17,25%⁶ to the Social Fund of the Kyrgyz Republic.

Further, the Employee bears disciplinary and/or material liability in accordance with the Labour Code for violation of the terms of the Employment Contract.

Also, in accordance with the Labour Code, there is a special mechanism for resolving labour disputes. To protect his/her rights and interests, the Employee can apply to (1) the Labour Disputes Commission⁷, (2) the authorized state body of the Kyrgyz Republic in the field of supervision and enforcement of labour legislation⁸, and (3) a court for restoring his/her violated rights in accordance with the Employment Contract.

Moreover, when formalizing relations through the Employment Contract, the Labour Code and the Law of the Kyrgyz Republic "On Trade Unions" No. 130 dated 16.10.1998 (the "Trade Union Law") allow workers, that is, each citizen who has reached the age of 14 (fourteen) and who is engaged in labour activity or studying in an educational institution, as well as pensioners at their

⁴ The distribution of insurance contributions is made in the following amounts: 8% to the Pension Fund, 2% to the State Accumulative Pension Fund (paragraph 2 of Article 2 of the Law of the Kyrgyz Republic "On Tariffs of Insurance Contributions upon State Social Insurance" No. 8 dated 24.01.2004 (the "Law on Insurance Contributions")).

⁵ With the exception of retired employees (subparagraph (a) of paragraph 2 of Article 2 of the Law on Insurance Contributions); this rate is equal to 8% for retired workers, which is sent only to the Pension Fund.

⁶ The distribution of insurance contributions is made in the following amounts: 15% to the Pension Fund, 2% to the Compulsory Medical Insurance Fund, 0,25% to the Fund for the Recovery of Workers (subparagraph (a) of paragraph 1 of Article 2 of the Law on Insurance Contributions).

⁷ Labour Disputes Commissions are established in organizations with 10 or more employees (Article 415 of the Labour Code).

⁸ The State Labour Inspectorate under the Ministry of Labour and Social Protection of the Kyrgyz Republic.

discretion to voluntarily join trade unions⁹ to protect their rights and interests provided that charters of the trade unions are observed, and in case of disputes with the Employer, Employees can initiate a collective labour dispute procedure and announce a strike.

It should also be noted that according to Article 30 of the Labour Code, an employee who is not a member of a trade union may, on contractual terms, has the right to authorize an organ of a trade union organization to represent his/her interests in a relationship with the Employer.

2) Civil contract:

The civil contract is concluded between a customer (the “Customer”) and a contractor (the “Contractor”) for performing specific works/services (the “Civil Contract”) and is regulated by the Civil Code of the Kyrgyz Republic. The Civil Contract usually terminates after the performance of such works/services. As a rule, the parties to the Civil Contract can themselves negotiate terms and conditions for the performance of works/services, the cost of such works/services.

Under the Civil Contract, the Contractor is paid remuneration with corresponding expenses related to the performance or provision of works/services. The fact of providing works/services is always formalized by an act on acceptance of the works/services performed. Depending on the parties’ agreement, the cost of the works/services provided can be of any amount and paid, as a rule, after the completion of such works/services. However, prepayment in percentage (%) out of the total cost of services may be provided.

The Contractor of the Civil Contract provides himself with everything necessary to perform the work/services, unless the parties agree to include in the terms of the contract the Customer’s obligation to provide the Contractor with a workplace, work equipment, materials, etc.

Unlike the Employment Contract under the Civil Contract the Contractor is not obliged to observe labour discipline, cannot count on guarantees and indemnifications provided by the labour legislation of the Kyrgyz Republic. A significant difference between the Civil Contract and the Employment Contract is that the Customer in the Civil Contract is not obliged to pay taxes and make mandatory social contributions to the Social Fund for the Contractor. The Contractor under the Civil Contract himself pays taxes¹⁰ by acquiring the voluntary patent and makes obligatory social deductions¹¹ to the Social Fund of the KR.

⁹ In accordance with Article 1 of the Trade Union Law, trade unions in the Kyrgyz Republic are voluntary public associations of citizens on the basis of a community of interests in the field of activity, both in the production and non-production spheres, created to protect the labour and socio-economic rights and interests of its members.

In accordance with Article 2 of the Trade Union Law, trade unions may be established at enterprises, institutions and organizations, regardless of the form of ownership, employing three (3) or more people. Their representative bodies are committees or trade unionists elected at trade union meetings (conferences).

¹⁰ The basic amount of tax (in Kyrgyz soms for 30 days) on the basis of the voluntary patent depends on the type of economic activity that is established by the Government of the Kyrgyz Republic in agreement with the specialized committee of the Jogorku Kenesh of the Kyrgyz Republic on the proposal of the authorized tax authority (paragraph 1 of Article 354 of the KR Tax Code, the Decree of the Government of the Kyrgyz Republic “On approval of the base amount of tax on the basis of the voluntary patent by types of activity” No. 418 dated 25.06.2015).

The Parties bear civil liability provided by the contract and civil legislation of the Kyrgyz Republic for violation of the terms of the Civil Contract, and can only apply to the court for restoring their violated rights.

Thus, each of the above contracts has its own peculiarities. For example, under the Civil Contract, the Contractor must independently perform all the necessary tax and social deductions, while under the Employment Contract this obligation lies with the Employer. Further, the Civil Contract does not provide the Contractor with the guarantees and compensations provided for by the labour legislation of the Kyrgyz Republic. For example, upon termination of the Civil Contract at the initiative of the Customer, the Contractor of works/services is not entitled to demand from him those guarantees and compensations that he would receive under the Employment Contract.

As mentioned earlier, the Contractor under the Civil Contract can only apply to the court for restoring his/her violated rights, while the Employment Contract provides the Employee with a special mechanism for resolving labour disputes, according to which the Employee has the right to apply not only to the court, but also to the Labour Disputes Commission in case of its presence in an organization, as well as to the State Labour Inspectorate under the Ministry of Labour and Social Protection of the Kyrgyz Republic (the authorized state body in the field of supervision and monitoring compliance with labour laws). Moreover, the labour legislation, unlike the civil one, in order to protect workers' rights and interests in the most effective way, allows them to unite in trade unions¹², and in case of disputes with the Employer, employees have the right to initiate a collective labour dispute procedure against him, and also to go on strike.

Having regard to all the above peculiarities of each contract, a person who will perform work or provide services, prior to entering into any relations with the employer, is highly recommended to weigh the pros and cons regarding a contract which is being concluded and make sure that such a contract will provide maximum protection of his/her legitimate rights and interests as an employee, since there is currently a trend in which more and more organizations-employers resort to the conclusion of the Civil Contract instead of the labour one to avoid giving to employees, for instance, the guarantees and compensations provided for in the labour legislation of the Kyrgyz Republic, and for other possible reasons (except for the cases when the person performing or rendering certain works/services expressed his/her desire to conclude the Civil Contract with the Employer).

Individuals who pay tax on the basis of the voluntary patent pay taxes except for profit tax and sales tax (paragraph 2, Article 353 of the KR Tax Code of the).

It should be noted that individuals who are taxpayers of VAT and/or whose income for the year exceeds the registration threshold for VAT (8,000,000 Kyrgyz soms) are not entitled to apply the tax payment regime on the basis of the voluntary patent (subparagraph 1 of paragraph 4 Article 353 of the KR Tax Code);

¹¹ Tariffs of insurance contributions for Contractors (individual entrepreneurs) who pay taxes on the basis of a special tax regime through the acquisition of the voluntary patent are set monthly at a rate of not less than 6%, calculated from the average monthly wage established in the regions and cities of the republic for the previous calendar year. The distribution of insurance contributions is made in the following amounts: to the Pension Fund – 89,75%; to the Compulsory Medical Insurance Fund – 10 %; to the Fund for the Recovery of Workers – 0,25% (paragraph 2 of Article 6 of the Law on Insurance Contributions).

¹² If they join these unions and comply with their charters.

The article has been written by Umtul Murat kyzy, a lawyer of Lorenz Law Firm. Bishkek, August, 2018.

The used literature:

- 1) The Labour Code of the Kyrgyz Republic No. 106 dated 04.08.2004;
- 2) The Tax Code of the Kyrgyz Republic No. 230 dated 17.10.2008;
- 3) The Civil Code of the Kyrgyz Republic;
- 4) The Law of the Kyrgyz Republic “On Tariffs of Insurance Contributions upon State Social Insurance” No. 8 dated 24.01.2004;
- 5) The Law of the Kyrgyz Republic “On Trade Unions” No. 130 dated 16.10.1998;
- 6) The Law of the Kyrgyz Republic “On the Republican Budget of the Kyrgyz Republic for 2018 and the Forecast for 2019-2020” No. 218 dated 28.12.2017.