Agency Labour Law: legal regulation of staff secondment in Russia

Flash Report: Russia
Issue No 21 (92), May 2014
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### What's new?

On 22 April 2014 a new Federal Law No. 116-FZ On Amending Separate Legislative Acts of the Russian Federation (the "Law") was adopted. The new Law will regulate the relationships related to secondment of staff in Russia. The law was pending by the State Duma for over three years and its initial wording has been significantly amended.


The key novelty introduced by the Law is the total ban of agency labour (i.e. work performed by an employee at the employer's order under control and supervision of an individual or a legal entity not being the employee's actual employer). The exception from this ban states that the staff secondment activity, on the condition that certain provisions are fulfilled, can be performed by:

1) private employment agencies (PEA), and
2) other legal entities that conform with the requirements prescribed by law (e.g., affiliation or a shareholder agreement with a legal entity receiving seconded staff).

The Law neither regulates nor establishes any outsourcing bans (ban for transfer by a company, on the basis of an agreement, of certain business processes or manufacturing functions to other company specialising in the respective area).

Please note that the lawmakers have provisioned quite a lengthy transitional period: the Law shall come into force only on 1 January 2016. The Government also plans to adopt by this date some other corresponding regulations and legislative acts.

The Law has it that only a Russian accredited legal entity not applying a special tax regime can act as a PEA.

In order to obtain an accreditation [1] a PEA must conform with the following criteria:

- charter capital amounting to at least RUB 1 million;
- lack of indebtedness on taxes, dues and other compulsory payments to Russian budgets;
- PEA management having a higher education degree, as well as professional experience in employment or promotion of employment in the Russian Federation of at least two years within the latest three years, and not having any prior criminal convictions for crimes committed against a person or economic crimes.

[1] The accreditation procedure has not been accepted yet and will be determined by the Russian Government in the future with consideration to an opinion voiced by Russian Trilateral Commission for the Regulation of Social and Labour Relations.

### Requirements for private employment agencies

In addition to PEA, other legal entities (including foreign legal entities with their affiliates) shall have a right to second staff on the condition that an employee will be seconded to:

- a legal entity being an affiliate [2] of the seconding party;
- a legal entity being a joint-stock company if the seconding party acts as a party to a shareholder agreement on the exercise of rights attached to shares of such joint-stock company [3];
- a legal entity acting as a party to a shareholder agreement with the seconding party.

[2] For the purposes of identifying the affiliated nature of a company it is currently advisable to follow Article 4 of RSFSR Law No. 948-1 as of 22 March 1991 On Competition and Limiting Monopolistic Activity in Commodity Markets. For example, most common affiliation criteria include: membership in a single group of entities (you can find the description of a “group of entities” in Article 9 of Federal Law No. 135-FZ as of 26 July 2006 “On Protection of Competition”); possibility to impose control over 20% of the total number of votes attached to voting shares or comprising charter or share capital, contributions, participatory interest in a legal entity.

[3] Please note that this criterion rules out the possibility for the party accepting seconded staff to adopt such a legal form as a limited liability company, which is the most common organisational form for Russian businesses.
Under the new Law, a reduced working week and part of annual additional vacation exceeding seven calendar days may be replaced with a monetary compensation. This option may be used, subject to employee consent given in writing and under a cross-industry agreement and a collective bargaining agreement. Such compensation can be paid in the procedure, in an amount and under the terms set out in the relevant industrial (cross-industry) and collective bargaining agreements.

These amendments do not have a retroactive effect and apply only to future periods. The procedure and conditions for any compensatory measures that employees are entitled to, should they have been working in hazardous and/or dangerous conditions by the date when the Law comes into force, cannot become worse and compensation paid to them cannot be reduced if the respective working conditions, which were the reason for compensatory measures, are preserved by the employer.

Previously, an employer could be liable to undertake appraisal of all workplaces every five years. Under the new Law, they are released from this responsibility, if an employer proves, by a special declaration, that the working conditions are compliant with statutory labour safety requirements.

This means that, if following the results of the special assessment, no hazardous and/or dangerous factors have been identified at workplaces, the employer must report this fact to the local office of the Federal Labour and Employment Service, which maintains a register of such declarations. Declarations are valid for five years and prolonged automatically, unless either of the following occurs:

- An occupational accident (through no fault of third parties);
- An employee has been diagnosed with a work-related disease as a consequence of hazardous and/or dangerous occupational factors.

Staff secondment is possible upon fulfilment of the following general conditions:
- obtaining the employee’s consent;
- concluding a staff secondment agreement between the client (the receiving party) and the provider (the seconding party);
- performance of work by the employee for the receiving party in accordance with the employee’s labour function under the employment agreement with the seconding party;
- performance of an employment function by the employee on behalf, under management and supervision of the receiving party;
- performance of the receiving party under its obligations on ensuring labour safety and security for the employee (this provision must be included in the staff secondment agreement);
- ensuring, from the seconding party’s side, that the seconded employee’s labour payment conditions, employment function performance conditions and the employee’s qualification are the same as those of employees of the receiving party.

The Law provides for additional conditions and limitations for staff seconded by PEA (for more details please see below).

The Law also provides certain limitations on staff secondment. It expressly mentions cases when the receiving party is not permitted to use labour of seconded staff, namely in case of:

- replacement of employees engaged in an industrial action;
- performance of work at idle time or during a bankruptcy procedure, introduction of a part-time employment regime to deal with possible collective resignation of workforce;
- replacement of employees who refuse to perform work in cases set forth by labour law (including replacement of employees who temporary suspend their work due to a delay in salary payment that exceeds 15 days).

In addition to the aforesaid, the Law introduces special limitations on staff secondment by PEA for the following purposes:

- performance of certain types of work at sites classified as hazardous facilities (hazard class I and II);
• performance of work at workplaces with harmful (hazard level 3 or 4) or hazardous labour conditions;
• job replacement in accordance with the staff schedule if the availability of employees replacing the said jobs is the condition for the company to get a license or a special permit to discharge certain operations, become a member of a self-regulated organisation, receive a certificate from a self-regulated organisation permitting a certain type of work;
• performance of work by employees acting as members of sea vessel crews or crews of mixed navigation vessels.

The Law contains detailed regulations regarding staff secondment by PEA. Following an interpretation of the Law, PEA can second staff only in the following cases:

• providing housekeeping support to an individual, who is not a self-employed entrepreneur;
• temporary performance of duties of an absent employee, who retains his/her job;
• performance of work related to a knowingly temporary (up to 9 months) extension of manufacturing capacity or scope of services provided (in this case please note that if the number of seconded employees exceeds 10% of the receiving party's average number of workers then the corresponding resolution on concluding an agreement with PEA must be taken with regard to an opinion voiced by the primary trade union organisation in accordance with the procedure established by the Russian Labour Code for the purpose of adopting local regulations).

That said, this type of secondment is possible only on the basis of an employment agreement signed by the PEA and employee, which agreement includes a provision on the employee's performance, at the employer's order, of the corresponding employment function specified in the employment agreement on behalf, under control and supervision of an individual or legal entity not being an employer under the said employment agreement.

The Law also states that PEA may second representatives of socially unprotected population categories including full-time students, single parents, parents with many minor children and former convicts. Secondment of these types of personnel goes beyond the above rules of staff secondment by PEA (it may be possible in other cases when employees sign or may sign fixed-term employment agreements).

Secondment of an employee must be documented by an addendum to the corresponding employment agreement containing information on the receiving party, the place and date of its signing, number and validity term of the secondment agreement. If so prescribed by the secondment agreement, the addendum may include other special conditions. If an employee is seconded to another receiving party under another staff secondment agreement, PEA and the employee must conclude a new addendum.

PEA shall record data on the employee's work under the respective secondment agreement into the employees employment record book.

PEA must control the actual use of seconded employees' labour by the receiving party with regard to their employment function, as well as monitor the receiving party's compliance with labour law. The Law does not clarify the procedure for discharging such control and PEA's interaction with the receiving party in the course of the receiving party's use of employees' labour. This will require to include additional regulatory provisions in staff secondment agreements, in particular pertaining to holding employees materially liable and imposing disciplinary sanctions on them.

The Law sets forth that employers (insurers) temporary seconding their employees out under staff secondment agreements shall pay insurance contributions from earnings of such seconded employees on the basis of an insurance tariff determined in accordance with the key type of business operations discharged by the receiving party, as well as mark-ups and discounts on the insurance tariff, which is set based on the results obtained in the course of a special assessment of labour conditions at workplaces where the seconded employees actually work.

In this case, the receiving party will have to provide the seconding party (insurer) with information on the main type of its business operations, the results of such special assessment of labour conditions at workplaces and any other data required for setting the insurance tariff and the applicable mark-ups and discounts.
According to the Law, in case of a work-related accident involving a seconded employee the receiving party shall be obliged to hold an investigation and include a representative of the employee’s employer in the investigating committee.

The Law also states that the receiving party shall bear joint responsibility on obligations of the seconding party (employer) arising out of employment relationships with workers under the staff secondment agreement (salary payment, leave compensation etc.). That said, the practical implementation of this provision raises many questions, e.g., regarding the way how the receiving party obtains information on the salary payable to the seconded employee or on his/her average salary for the purpose of leave compensation.

Pursuant to the Law, there will be future laws and other regulations regarding the following aspects:

- specifics of legal regulation of work performed by employees sent on temporary secondment to other legal entities under staff secondment agreements by an employer not actually being a PEA;
- specifics of entry to the Russian Federation, stay in the Russian Federation, registration with migration authorities and employment activities of foreign nationals sent, upon their consent, on a temporary secondment by their employer to an individual or legal entity not being an employer of such foreign nationals under a staff secondment agreement;
- procedures for accreditation of PEAs entitling them to engage in staff secondment activities.

The companies planning both to second staff and receive seconded workforce should thoroughly prepare to the emerging changes.

Companies should fundamentally analyse the possibility of staff secondment in each particular case, specifics of such secondment (including conditions of an agreement between the seconding and receiving party, conditions of the respective employment agreement/addendum with the worker etc.), as well as other legislative and tax aspects pertaining to staff secondment.

If a company is unable to apply the mechanisms provisioned by the Law, it should consider other business models that help to resolve topical issues and satisfy business needs in seconded staff.
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