AMERICAN CHAMBER OF COMMERCE IN MONTENEGRO
AMERIČKA PRIVREDNA KOMORA U CRNOJ GORI
CREATING OPPORTUNITIES · STVARA MOGUĆNOSTI

POSITION DOCUMENT

AMERICAN CHAMBER OF COMMERCE IN MONTENEGRO

LABOR RELATIONS COMMITTEE

Podgorica, April 2014

Dear Sir/Madam,

This Document submitted for your review represents the position of the American Chamber of Commerce in Montenegro and the members of its Labor Relations Committee with reference to the changes and amendments of the Montenegrin Labor Law. This Document is aimed at proposing alternative options for the regulation of certain issues within labor relations, in order to improve overall labor conditions and working and business environments in Montenegro.

This Document is the result of work of the Labor Relations Committee and it contains the recommendations derived from our members' daily work, along with the overview of the legal regulations and best practice used in this area by the neighboring countries.

The recommendations stipulated in this Document refer to the specific problems which are the consequence of the existing legal framework in the labor area, such as back monetary claims, procedure for establishing violation of work order, duration of the Work Agreement (Contract of Employment), regulation of the duration of annual leave, regulation of salaries and notice period. We are hereby proposing the following:

- **Back monetary claims** should be limited in terms of a time period, i.e. for the period of three years. Such legal framework would provide for the financial predictability and stability for the employer. Comparative practice also shows that this is a preferred attitude.
- **Procedure for establishing violation of work order** is necessary to be stipulated by the Labor Law only and not by the General Collective Agreement as it has been the case insofar. In that way, situation similar to the previous one would be avoided in the future, i.e. we would avoid having an invalid General Collective Agreement. In addition, it would be practical to leave it up to the employer to stipulate the procedure for establishing violation of work order by a General Regulation, whereby the procedure in question, of course, has to be harmonized with the provisions of the Labor Law.
- Speaking about the **duration of the Work Agreement (Contract of Employment)**, we are proposing to have Article 25 changed, in a way to remove inconsistencies contained in this Article. AmCham members would like to stress that the duration of the work agreement itself is not a problem as long as the termination of the work agreement initiated by the employer is allowed in a more flexible manner.
- **Segmented use of the annual leave** should be regulated in a more liberal manner as it is necessary to give enough space to both employer and the employee to agree on the

duration and the way of using the annual leave. Protective measure of 10 days should remain in force, while the other part of the annual leave should be provisioned in a way which would provide for a better flexibility of both employment parties. In addition, the deadline within which the employee should be informed about the approved annual leave should be decreased from 30 to 15 days.

- **The term 'Salary'** should be precisely defined. Namely, it is necessary to differentiate the terms of gross salary and gross salary with increases to it. The basis for the salary increase should be gross salary of the employee consisting of the complexity coefficient increased for the past labor and accounting value of the coefficient. The term defining contracted gross salary should be clearly defined in a way that the only condition posed is that it cannot be lower than the gross salary defined by the previous Paragraph. In addition, Article 85 of the Labor Law should provision for the possibility to suspend payments or to cover the lost payments to the employee, with his/her consent, to the amount higher than 1/3 of the salary or compensation for the lost payments.
- **Notice period, both in the cases of technical, technological and restructuring changes which caused the employee to become redundant, as well as in other cases provisioned by the Law,** should be defined in a way to harmonize its application and causes for it with the reasons for which the employment had been terminated in the first place. Having in mind the fact that other mechanisms for protecting the rights of the employees in cases of **technical, technological and restructuring changes** are already in place, we find this mechanism to be redundant.

AmCham members believe, and that is a clearly evident from all the proposals given within this Document, that General Collective Agreement is fully redundant. It is the Document which is clearly outdated and as such is not recognized in any contemporary legal system.

The text below contains details of the given proposals and suggestions we believe reflect current environment and labor market needs. As such, we believe they will represent a good basis for the improvement of the regulatory framework in the area of labor relations in Montenegro.

Yours Sincerely,

AmCham Montenegro
Labor Relations Committee

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1. BACK MONETARY CLAIMS

The existing Labor Law provisions that monetary claims arising from or related to the employment cannot have statute of limitation. Such regulation of monetary claims is contrary to the foreseeable financial situation that any employer is aiming at.

There is no reason to treat monetary claims arising from or related to the employment differently to other claims which can have legally defined statute of limitation. All the employees are familiar with their rights and there is no reason for not imposing limitation sanction if they do not do anything to protect their own rights i.e. do not timely collect the money they are entitled to.

By having researched the comparative practice, we have found out that labor legal framework of the countries of the region, i.e. the Labor Laws from Croatia and Serbia provision that all monetary claims made during or related to the employment period shall be statute-barred within 3 years as of the date of the obligation occurrence. In line with all the above-mentioned, AmCham members believe that it is necessary to provision within Montenegrin legislature to have monetary claims arising from or related to the employment statute-barred within 3 years as of the date of the obligation occurrence, in order to provide for the stable and predictable financial environment.

Therefore, in line with the above-mentioned, we propose for the Article 123 of the Labor Law to be changed and to read the following:

'Monetary claims arising from and related to the employment period shall be statute-barred within 3 years as of the date of the obligation occurrence.'

2. PROCEDURE FOR ESTABLISHING VIOLATION OF WORK ORDER

2.1. <u>The procedure is to be determined and provisioned only by the Labor Law</u>

The proposal of the AmCham members is to have the entire procedure for establishing and processing the violation of the work order regulated only by the Labor Law. For the time being, the Labor Law provisions in its Article 143 bases for termination of employment, while Articles 124 and 125 of the Labor Law generally define the issues related to the responsibilities for violating work orders and penalties to be imposed in such cases, while the reasons and procedure for the very establishment of the violation of the work order are regulated by General Collective Agreement. We believe that it is not practical to have the same procedure regulated by the General Collective Agreement as well, as it creates dilemmas when applied in

practice and raises the issue of the legality in the situations such as the previous one – when the Document in question was not in force.

The Labor Law, being the most important regulation in the area of labor issues, should regulate in detail all the important issues in this area, such as the procedure for establishing the violation of work order.

In line with all the above-mentioned, we are hereby proposing to have two new Articles introduced into the Labor Law, which would provision for all the petty and serious violations of work orders, which are provisioned by the General Collective Agreement, with certain amendments, as follows:

After Article 125 new Articles 125a and 125b shall be added and they shall read the following:

Article 125 a

Petty violation of work order shall be the following:

1) *No- show at work at the provisioned time as well as leaving the work before the end of the working hours, or some other form of not following the decision of the employer regulating the working hours;*
2) *Negligence at work or irresponsible keeping of official documents, data, materials or office equipment;*
3) *Unapproved absenteeism for one working day;*
4) *Non-conformance with the provisioned measures for fire protection and safety regulations, or not using the personal safety-at-work means, whereby by not following the above-mentioned either the life or health of the employee in question or the working environment safety would not be seriously endangered.*
5) *Unprofessional attitude towards clients, co-workers or employees, offending them, threatening them or similar behavior;*
6) *Inobservance of the internal regulations or decisions reached by the employer's authorized bodies, which does not cause a significant damage to the employer;*
7) *Causing material (financial) damage to the employer due to negligence, by act of commission or act of omission, where caused material damage is not higher than 500€;*
8) *Omission of the employee to inform the employer in writing within the period of three days as of the day he/she has been incapacitated to practice;*
9) *Illegal communication, submission or in some other way making the data available to another person or entity, which had been stipulated by the employers regulations as being*

a trade secret or the collection of such data with an intention to transfer them to another person, which in turn did not cause or is not causing a significant damage to the employer;

10) *Other violations provisioned by the Collective Agreement, Work Agreement or internal regulations of the employer.*

Article 125b

Serious violation of work order shall be the following:

1) *Failure to perform or negligent, non-timely or reckless performance of work orders;*
2) *Inadequate use or disposal of the entrusted equipment or materials belonging to the employer;*
3) *Abuse of authority or transgression of competence;*
4) *Non-conformance with the provisioned measures for fire and explosion protection, safety against natural disasters, detrimental effects of toxic and other dangerous materials or violation of regulations or not using the personal safety-at-work means, whereby by not following the above-mentioned either the life or health of the employee in question or the working environment safety would be seriously endangered;*
5) *Unapproved absenteeism for more than two working days in a row, i.e. seven working days with interruptions during the overall period of three months;*
6) *Disclosing a trade secret, stipulated as such by the employer's regulations;*
7) *Violent, inappropriate or offensive behavior towards clients or other employees or demonstration of any form of animosity;*
8) *Showing at work being drunk or under the influence of narcotics;*
9) *Violation of work order which can cause serious consequences for the employer;*
10) *If the employee has already been fined for the violation of work order twice or more than twice during the period of six months in total;*
11) *If the employee does not come back to work within the period of 30 days, pursuant to the Article 76, Paragraph 3 of this Law;*
12) *If the employee performs on his/her own behalf and for his/her own benefit, as well as on behalf or for the benefit of another legal entity or physical person, without the employer's consent, any work that falls within the scope of work done by the employer, whereby the conflict of interests is strictly forbidden by the Work Agreement;*
13) *Physical abuse and humiliating of another employee thus endangering his/her reputation, personal dignity or integrity (mobbing), and*

14) *Other violations provisioned by the Collective Agreement or Work Agreement or employer's internal regulations.*

We are hereby proposing to have Article 143b amended in a way that a warning to the employee, apart from the cases presented in the Article 143, Paragraphs 1, 2 and 3, is also forwarded in the cases stipulated by the Article 125b. In that case, the amended Article 143b would read the following:

"The employer can reach the decision on the termination of the Work Agreement in the cases provisioned by the Article 143, Paragraph 1, Items 1, 2 and 3, as well as in the cases provisioned by the Article 125b of this Law after the employer in question had first warned the employee about the reasons for the termination of the Work Agreement."

2.2. The Procedure for establishing violation of work order should be simplified

The procedure for establishing violation of work order, as it is regulated by the General Collective Agreement, is too complex and unnecessarily complicated. In most developed countries this procedure is regulated in a way that once the employer has a reasonable doubt that the employee has violated a work order, the employer collects material evidence and statements from the employee in question and other employees as well in order to determine the factual situation. After that, the employer reaches a decision.

It should be kept in mind that most employers in Montenegro do not have expert services which could determine whether or not the employee is guilty, so that the procedure of establishing violation of the work order must not turn into an internal trial. Undoubtedly, the current Law has to reflect market trends and employers' profiles in the country where small and medium-sized enterprises are overrepresented at the market. A stabile working and legal status of the employee must not be debatable. However, the current solution fully paralyzes liberal labor market, whereby liberal market is something that both parties are aiming at.

Disciplinary procedure provisioned by the General Collective Agreement is to formal and courts often override employer's decision due to formal omissions and not due to the fact that the decision which had been made was in fact essentially wrong. By simplifying this procedure, i.e. by making it less formal, the above-mentioned problem would be resolved. A simple procedure would be beneficial both for the employee and the employer.

If the employee is not satisfied with the decision, and if the court case occurs, it is of course up to the employer to prove the justifiability of the decision he/she had made.

Finally, we propose to enable the employer to regulate by some General Regulation the very procedure for processing the establishment of the violation of work order, whereby the procedure in question has to be harmonized with the Labor Law.

2.3. Additional tools to be used in case of having an employee violate work order

It is also necessary to provide for the additional tools that can affect the incidence of violation of work order, such as warnings and notices. Those would serve in case of a petty violation of work order, i.e. in cases where it is not an intention of the employer to fine the employee, whereby it is evident that a certain omission in performing daily tasks has happened.
The above-mentioned tools are not aimed at sanctioning the employee but to be used as preventive measures affecting the employee's behavior in order to raise his awareness about the necessity to follow work orders and to obey company culture, in order to prevent petty violations and breach of what just seems to be less important rules.

Current legal solutions include warnings as necessary tool which in some cases comes before the termination of the Work Agreement, whereby we believe that a legal base should be established for its broader use in the proposed way.

3. DURATION OF THE WORK AGREEMENTS

We believe that Article 25 of the Labor Law represents a business barrier, especially having in mind an extremely inflexible procedure for termination of the Work Agreement.
The very Article 25 is contradictory onto itself and unclear. Namely, Paragraph 2 provisions that an employer cannot conclude one or more Work Agreements with the same employee, as provisioned in the Paragraph 1 of this Article, if their overall duration is, continuously or with interruptions, longer than 24 months. Paragraph 3 (interruption shorter than 60 days shall not be deemed interruption as provisioned in the Paragraph 2) is totally useless as the previous Paragraph clearly states that fact as being irrelevant. This norm leads to the conclusion that regardless of the interruptions, the employer cannot conclude one or more Work Agreements with the same person if the total duration of those Agreements is longer than 24 months.
AmCham members are fully dedicated to the stabile employment, however it is necessary to create preconditions for it, first of all in the system itself and public awareness. Unfortunately, current situation which virtually makes it impossible (except declaratively – pursuant to the Law) to terminate a Work Agreement with an employee without giving the employee severance pay represents a significant burden to the employers. Time and practice will show that current

legal solution is not in the best interest of either the employer or the employee, as any restructuring of the given norms decreases freedom to both parties. A stabile employment is not an employment for an indefinite period of time but the employment which is beneficial for both parties and respected by both parties. That respect, unfortunately, has disappeared due to the obligatory legal norms.

Accordingly, we recommend the amendment of Article 25 to remove inconsistencies provided in this Article. Likewise, we stress the necessity to provide a more flexible way to terminate the work agreement, initiated by the employer. This recommendation is presented having in mind that guaranteed work places are not sustainable in today's market, regardless of the conduct and overall performance of the employee.

4. SEGMENTED USE OF THE ANNUAL LEAVE

Labor Law provisions that annual leave shall be used in two parts, whereby the first part can last for at least 10 working days intermittently during one calendar year, while the other part shall be used until June 30 of the following calendar year at the latest.

The legal minimum of 20 days annual leave may be increased on various grounds. We have identified a problem in segmented use of the annual leave provided by the current Labor Law. The employers are often faced with employee requests for using the annual leave in more than 2 parts, which is against the current Law.

Having in mind the practice used by most employees, as well as the interests of both employers and the employees, AmCham proposes to have the Article stipulating the segmented use of the annual leave changed in a way which would enable the employer and the employee to reach mutual agreement for using and the duration of the annual leave, i.e. to enable the employee to use the annual leave in more than 2 parts. Thereby, we are not bringing into question the duration of the annual leave.

We hereby propose the following solution:

We propose Article 69 of the labor Law to be changed in a way that Paragraph 1 is changed so that it reads the following: *'Annual leave can be used in parts.'*

Paragraph 2 shall be changed so that it reads:

'If an employee uses his/her annual leave in parts, the first part shall consist of at least 10 consecutive working days during one calendar year, while the rest of the annual leave shall be used until June 30 of the following calendar year at the latest.'

In this way, using annual leave in parts is enabled, whereby protective measure defining that the first part is to last at least 10 working days intermittently during one calendar year is in

place, while both employer and the employee can decide by mutual agreement on the timing and the way of using the rest of the annual leave, depending on the needs and possibilities.

Proposed solutions are in line with the Convention No. 132 of MOR on paid annual leaves, which was ratified in 1973. The Convention in question regulates the segmented use of the paid annual leave; however it does not stipulate that the annual leave can only be used in one or two parts as it is currently provisioned by the Labor Law. Therefore, this Convention enables State Authorities or competent bodies to regulate using annual leave in parts – which means that we have in mind using it in two, three or four parts (not provided by the current Labor Law). The above-mentioned is also confirmed in the Article 9 of the Convention: *'The first part of the paid annual leave as provisioned in the Article 8, Item 2 shall be approved and used within one year at the latest, while the rest of the paid annual leave shall be used within 18 months at the latest, as of the end of the calendar year in which the annual leave was approved.'*

In addition, it is very hard in practice to forward to the employee the Resolution on the Use of the Annual Leave 30 days at the latest before the date of the commencement of the annual leave. It is difficult to foresee the workload and the possibility to approve of the annual leave in such a long period of time. It would be much more realistic to have a shorter deadline proscribed for the submission of the Resolution, whereby we propose the deadline to be 15 days. This deadline is also provided by the Labor Law in neighboring Croatia.
To be more specific, we propose Article 68, Paragraph 2, to be changed so that figure *'30' is replaced with figure '15'.*

5. THE TERM 'SALARY' TO BE CLEARLY DEFINED IN THE LABOR LAW

As far as regulating salaries of the employees by the Labor Law is concerned, AmCham members propose the following two options:

<u>Proposal 1</u>
We propose that a new Paragraph 3 shall be added to the Article 78, as follows:
'The basis for the salary increase should be gross salary of the employee consisting of the complexity coefficient increased for the past labor and accounting value of the coefficient.'

Gross salary and salary increase
Article 78

The income that the employee has earned for the work performed and the time spent at work, wage compensations and other earnings provisioned by the Collective Agreement and Work Agreement comprise gross salary under this Law.
(2) Salary shall be increased pursuant to the Collective Agreement and Work Agreement for the following:
1. extra working hours,
2. nighttime work,
3. past labor,
4. work during public and religious holidays which are provisioned by the Law as being days off work and in other cases provisioned by the Collective Agreement and Work Agreement.
(3) The basis for the salary increase should be basic gross salary of the employee consisting of the complexity coefficient increased for the past labor and accounting value of the coefficient.

We propose to have the Article 79 of the Labor Law changed in a way that the following wording would be erased from Paragraph 1 'part of the salary related to the past labor' and to have the following wording included in this Paragraph: *'Salary made for the work done and time spent at work shall consist of the basic salary and increases to it, pursuant to the Collective Agreement and Work Agreement.'*
In addition, we propose to have a new Paragraph 3 introduced into this Article as follows:
„The employer and the employee can agree not to have the amount of the contracted salary increased for the past labor, as provisioned in the Article 78, under the condition that the amount of the contracted salary is not lower than the basic gross salary.'
We propose to have the existing Paragraph 3 of this Article erased.

Salary for the work done and time spent at work

Article 79

(1) Salary for the work done and time spent at work consists of the basic salary and increases to it, pursuant to the Collective Agreement and Work Agreement.
(2) The contracted salary is the salary provisioned by the Work Agreement and it cannot be lower than the minimum salary provisioned by the Article 80 of this Law.
(3) The employer and the employee can agree not to have the amount of the contracted salary increased for the past labor, as provisioned in the Article 78, under the condition that the amount of the contracted salary is not lower than the basic gross salary.

We propose to have the Article 85 of the Labor Law changed by adding Paragraph 3 which shall read the following:

(3)The exception to Paragraph 2 of this Article shall be that the salary to the employee or compensation can be suspended upon the consent of that employee, to the amount higher than 1/3 of the salary or its compensation.

Suspensions of salaries and salary compensations

Article 85

(1) Monetary claims from the employee can be collected by the employer by suspending (withholding) employee's salary only based on the valid court judgment, in the cases provisioned by the Law or in the case where the employee has given his/her consent.

(2) Employee's salary or wage compensation can be coercively suspended (withheld) in the highest amount of fifty percent due to the obligatory alimony payment, based on the valid court judgment and to the highest amount of 1/3 of the salary in question or wage compensation for any other obligation of the employee.

(3) As an exception to the Paragraph 2 of this Article, the salary or wage compensation to be paid to the employee can be withheld in the amount higher than 1/3 of the salary or wage compensation in question only upon the consent of that employee.

Proposal 2

We propose to have the Articles 78 and 79 erased from the Labor Law and to have them as the part of the Rule Book, being a by-law.

We believe that the Articles 78 and 79 are inconclusive and unclear and that it should be presented in details what has to be and what should not be the subject of the Labor Law. A great problem is created by the fact that some of the salary issues are currently regulated by the Labor Law, a part of them is regulated by the General Collective Agreement, while other part is regulated by the Guidelines for salary calculation, the Law on the Physical Persons Income Tax and the Law on the Benefits Paid for Obligatory Social Insurance. If we add to this individual Collective Agreements or Collective Agreements valid in certain lines of business, it is evident that as far as the salaries are concerned, there are certain misconceptions related to the interpretation and application of those norms which can harm the interests of the employers all over the country.

The interpretation of the contracted salary should undoubtedly be the subject of the liberalization in a way that we should overcame heritage from the past, such as increasing salaries based on the past labor. By increasing salaries based on the past labor, the employer is obliged to evaluate past labor performed with previous employers, whereby the current

inconclusive situation related to the contracted salaries significantly endangers the improvement of the business environment as it limits the freedom of contracting between the employer and the employee.

6. NOTICE PERIOD, BOTH IN CASES OF TECHNICAL, TECHNOLOGICAL AND RESTRUCTURING CHANGES WHICH CAUSED THE EMPLOYEE TO BECOME REDUNDANT, AS WELL AS IN OTHER CASES PROVISIONED BY THE LAW

Article 143 of the Labor Law provisions that the employer is obliged to follow notice period of at least 30 days as provisioned by the Article 144 of the Labor Law in the case when due to the technical, technological or restructuring changes the employer terminates the Work Agreement with the employee as there is no more need for his/her services, if the Agreement is terminated due to the economic business problems or even if the employee refused to accept the Annex to the Work Agreement in order to be reassigned to another appropriate duty.

This norm is especially inappropriate having in mind that recent amendments to the Law have enabled the employer to make an employee redundant due to the economic problems in business making. In addition, it is disputable as which position the employee will be reassigned to during the notice period if his/her employment had been terminated due to the refusal to accept the Annex to the Work Agreement in order to be reassigned to another appropriate position.

As the procedure relating to the termination of the Work Agreement due to the technical, technological and restructuring changes provisions for the employer to take certain formal steps when making several employees redundant pursuant to the Article 92, Paragraphs 1 and 2 of the Labor Law, where one of those obligatory steps it to inform the representative of the employees, i.e. Labor Union, we believe that following the notice period in situations as those ones does not really contribute to the protection of the rights of the employees who have been made redundant. On the other hand, we believe that following the notice period in situations when it is clear that there will not be any need for the services of certain employees permanently employed, in the numbers that are lower than those provisioned by the Paragraphs 1 and 2 of the Article 92 of the Labor Law, can be justified as it can provide the employees who are about to be made redundant with adequate time to look for a new employment.

Therefore, we suggest to have this norm stipulated as follows:

„An employee can terminate Working Agreement without having to follow the notice period provisioned in the Article 144 of this Law in the cases provisioned in the Article 143, Paragraph 1, Item 2 and Items 3, 4, 6, 7 of this Article and in the cases provisioned in the Article 125b.
An employer can terminate Work Agreement without having to follow the notice period as provisioned in the Article 144 of this Law and in the cases provisioned in the Article 143, Paragraph 8 when it is stated that there is no more need for services of the employees permanently employed, in the numbers lower than those provisioned by the Paragraphs 1 and 2 of the Article 92.