

Replacement of the Administrative Fine with the Warning for the Legal Entities

Newsletter

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If the company is not a small or medium-sized enterprise (hereinafter also SME), it should have a right to ask for **the replacement of the administrative fine with the warning**. This is the initiative of the Ministry of Economic Development of the Russian Federation (hereinafter also **Ministry**), [which proposed to make amendments to the Code of the Russian Federation on Administrative Offenses](#) (hereinafter also **Code**). The proposed law is on the stage of the Regulatory Impact Analysis now.

According to the proposed amendments, the effect of the articles 1.4, 3.4 and 4.1.1 of the Code, which allow replacement of the administrative fine with the warning, should be extended and include not only SMEs, but also the other types of the legal entities and persons conducting entrepreneurial activity without the formation of a legal entity.

The current provisions of the Code don't work for all administrative offences, neither will the new amendments. For example, it would be impossible to replace the fine with the warning, if unfair competition, a failure to perform in time an official order, an illegal gratification from the legal entity or some other types of the offences took place.

At this point, the multiple legal precedents show the activity of the SMEs, which successfully challenge the imposition of the administrative fines and achieve the replacement of these fines with the warnings.

1. GROUNDS FOR THE REPLACEMENT OF THE ADMINISTRATIVE FINE WITH THE WARNING

Replacement of the administrative fine with the warning is possible, if the following **conditions** are met:

- ▶ the administrative offence is the first administrative offence of this type;
- ▶ there is no injury or occurrence of threat of harm to life and health of people, animals, plants, environment, objects of cultural heritage of peoples of the Russian Federation and state security;
- ▶ there is no threat of natural and man-made emergencies;
- ▶ no damage was incurred.

2. ADMINISTRATIVE OFFENCES MADE FOR THE FIRST TIME

One of the main problems is to define when the administrative offence is the first of this kind.

If the person wants to replace the fine with the warning, the current administrative offence committed by him mustn't be duplicative. It means:

- ▶ The person mustn't have been already punished for the administrative **offence provided by the same article of the Code, OR**
- ▶ **One year has already passed** since the execution of the other administrative decision, where the liability is provided by the same article of the Code.

3. RETROSPECTIVE ACTION OF THE PROVISIONS ON THE REPLACEMENT OF THE FINE WITH THE WARNING

The provisions of the amended articles are expected to have a retrospective effect.

Firstly, the Code itself provides in para. 2 art. 1.7. that the law which soften or abolish the liability for the administrative offence or otherwise improve the position of the offender has retrospective effect. **It means that the law can be applied by the person, who had made an administrative offence, but the administrative decision hadn't been executed, before the amendments have become effective.**



The provisions of the amended articles including art. 4.1.1 are expected to have a retrospective effect.

Secondly, this position is confirmed by the existing case law of the Supreme Court of the Russian Federation (hereinafter also SCRF). In particular, the Supreme Court decision from 28.11.2016 № 305-АД16-16035, case № А40-70146/2016 **establishes an opportunity to enforce provisions of the article 4.1.1 on the basis of the article 1.7 of the Code regarding an administrative offence made by the SME before the amendments about the replacement of the fine with the warning were included to the Code.**

It means that the SCRF established that although an administrative offence had been made in 2015 and an administrative decision had been issued in March 2016 i. e. before the article 4.1.1 was included to the Code, the fine could be replaced with the warning.

4. EXISTING GROUNDS FOR THE COURTS AND ADMINISTRATIVE AUTHORITIES TO ENFORCE ARTICLE 4.1.1

According to the decision of the Intellectual Property Court of Russian Federation from 23.05.2017 № С01-176/2017 in case № А32-28256/2016, **the presence of the legal causes must be investigated by the court or administrative authority even if SME hasn't demanded that.**

At the same time, if the company fails to give evidence of the opportunity to enforce provisions of the article 4.1.1 of the Code, according to the decisions of the SCRF from 16.02.2017 № 305-АД16-20397, **this can lead to the denial of the replacement of the fine with the warning**. It means that burden of proof that this article can be enforced lies with the company itself.

5. SUMMARY

If the initiative of the Ministry is supported and the proposed law comes into legal force, the entrepreneurs will be able to count on the replacement of the fine with the warning in many cases. These amendments will also affect the administrative decisions on fines already put in force, but not performed by the company.

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