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AN OVERVIEW OF VIETNAM LABOR LAW

This article provides a comprehensive introduction to Vietnam labor law, including information on hiring an employee, maintaining the employment relationship, modifying the employment relationship, and terminating the employment contract.

HIRING THE EMPLOYEE

Main Sources of Employment Law

The main sources of employment law in Vietnam are:

1. the Labor Code (adopted by the National Assembly of Vietnam on June 23, 1994, as amended on April 2, 2002, November 29, 2006, and April 2, 2007);
2. the Law on Sending Vietnamese Laborers to Work Overseas (adopted by the National Assembly of Vietnam on November 29, 2006);
3. government decrees, ministerial circulars and decisions, provincial decisions and guidelines;
4. collective labor agreements, company rules, individual contracts; and
5. the Supreme Court's annual practice summaries and guidelines.

(collectively referred to as, "Labor Law")

Vietnamese Labor Law applies to all individuals working for Vietnam-based organizations or Vietnamese individuals, regardless of their nationality. Basic contractual law and enterprise (i.e., corporate) law provisions may also govern certain matters.

Normally, Vietnamese Labor Law is also applied when Vietnamese companies send their employees to work overseas, per the Law on Sending Vietnamese Laborers to Work Overseas. Technically, the employment contract need not specify this choice of law.

Special Hiring Considerations

Hiring Non-Nationals

In general, if an expatriate wants to work in Vietnam for three months or longer, he/she must

obtain a work permit. Vietnamese employers are required to provide support and submit application documents for the work permit.

Hiring Specified Categories of Individuals

Employers are prohibited from employing female employees, pregnant employees, child employees, and old employees for hazardous and hard work that may cause health problems.

Normally, the minimum working age is 15. There is no restriction on the maximum working age. The daily working hours of senior workers (over 60 for men or over 55 for women), however, should be reduced.

Outsourcing and/or Subcontracting

There is no clear definition of outsourcing or subcontracting under the Vietnamese Labor Code. The Labor Code contains an inflexible provision stating that a labor contract must be directly entered into by an employer and an employee. In addition, the tasks stipulated in the labor contract must be carried out by the employee under his/her labor contract; the transfer of such tasks to another person must be approved by the employer. In practice, if an employer wishes to use a labor outsourcing service, he/she will not enter into a direct labor contract with workers, but will enter into a labor outsourcing service agreement with the service provider.

Basic Employment Terms

A labor contract must be written in Vietnamese or in both Vietnamese and the foreign language that is applicable to the employer and employee. Contracts for temporary jobs lasting less than three months or for domestic helper work do not need to be in writing and can be oral.

The Labor Code of Vietnam requires that a labor contract include the following material terms: (i) work to be performed; (ii) working hours and rest hours; (iii) wages; (iv) working place/location; (v) duration of contract; (vi) conditions on occupational safety and hygiene; and (vii) social insurance for the employee. In practice, statutory material terms are for standard labor contracts for simple work only.

Working Hours and Rest Hours

The maximum working hours are eight hours per day or 48 hours per week for normal working conditions. Daily working hours must be reduced by one or two hours for employees subject to extremely heavy, dangerous, or toxic working conditions.

Employees must take a rest period of a minimum of 24 consecutive hours per week. There are also various compulsory daily and weekly rest periods and breaks that must be observed.

Wages

Employees may not earn an amount below the minimum salary level, which is reviewed from time to time. Different minimum levels exist and depend on the location of the workplace.

Working Place/Location

An employee's place of work must be stated in the labor contract. Mobility clauses can be included in employees' labor contracts, if necessary. Where a job requires travel to other temporary locations, it is normal for employers to reimburse all reasonable travel expenses.

Duration of the Contract

Under the Labor Code of Vietnam there are three types of labor contracts: (i) an indefinite-term labor contract; (ii) a fixed-term labor contract with duration of 12 to 36 months; and (iii) a labor contract for a specific or seasonal job of less than 12 months.

Conditions on Occupational Safety and Hygiene

Employers are required to provide employees with sufficient protective equipment to ensure occupational safety and hygiene and to improve working conditions in the workplace. Employees must comply with occupational safety and hygiene regulations and the internal labor rules of employers.

Social Insurance and Leave

Compulsory Social Insurance applies to enterprises, entities, and organizations that employ employees under indefinite-term labor contracts or under definite-term labor contracts with a duration of three months or more. Both employees and employers are required to contribute to the social insurance fund at statutory rates. The social insurance fund pays allowances for sick leave, maternity leave, work-related accidents, occupational disease, and pensions.

Sick Leave

Employees who suffer from illness and/or disability or take leave in accordance with a doctor's order receive an allowance paid by the social insurance fund, provided that they submit the required documentation evidencing their leave. The sick leave allowance is based on the employee's salary used to calculate the social insurance premium. The maximum entitlement is:

- 30 days per year (if the employee contributes to the social insurance fund for less than 15 years) or
- 40 days per year (if the employee contributes to the social insurance fund for between 15 and 30 years) or
- 60 days per year (if the employee contributes to the social insurance fund for more than 30 years).

Maternity Leave

Employers must allow pregnant workers to have their health checked regularly. A female employee (who works in normal working conditions) is normally entitled to take four months' maternity leave. If the female employee works in heavy and/or harmful working conditions or works in a remote location, she is entitled to take up to six months' maternity leave. Where an employee gives birth to more than one child at one time, she is entitled to take an additional 30 days' leave for every additional child calculated from the second child onwards. The employee will receive a maternity allowance from the social insurance fund during maternity leave.

Accidents at Work

Work-related accidents are defined as accidents that injure any bodily parts or functions of an employee or cause the employee's death during the process of working and closely relate to work performance or labor activity. An employee who is injured in a work-related accident must be immediately treated and be fully attended to. The employer must take full responsibility for the occurrence of the work-related accident.

During the period in which an employee is absent from work for medical treatment related to a work-related accident or occupational disease, the employer must pay the employee his/her full salary and expenses for the treatment. After the treatment, the employee will be examined and assigned a category of injury, which depends on the reduction of his/her ability to work due to the work-related accident or disease. The employee will be entitled to a social insurance benefit paid as a lump sum or in monthly installments by the social insurance fund.

Pension Plans

There is no scheme for pension plans under Vietnamese Labor Law. Both employers and employees are required to contribute to the compulsory social insurance fund that pays pensions to employees when they retire.

Absence for Military or Public Service Duties

Employees are entitled to suspend performing their duties under labor contracts if they are required to carry out military service or other public civic obligations. Employers are required to reemploy the employees at the end of the suspension period.

Noncompulsory Contract Terms

Employers and employees are free to agree any other terms in addition to the compulsory provisions, provided that these terms are no less favorable than certain statutory rights and must not be contrary to social morals.

Trial Period

There is no compulsory obligation to provide trial periods, otherwise known as "probationary periods," when engaging new employees, but it is common in practice to do so. A probationary period must not exceed 60 days for work that requires specialized or highly technical skills or 30 days for other types of work.

Training Obligations

In general, employers have no statutory obligation to train their employees. In certain cases, however, such as reorganization or change of technology, employers are required to retrain their employees.

Secrecy/Confidentiality

There is no specific statute governing secrecy and confidentiality. An employee is generally required to protect trade secrets and/or confidential information of his/her employer. If an employee fails to do so, the employee may be subject to a labor disciplinary hearing and disciplinary action.

Ownership of Inventions and Other Intellectual Property Rights

The employer owns all inventions and other intellectual property rights created by employees, unless there is an agreement that states otherwise between the employee and the employer.

MAINTAINING THE EMPLOYMENT RELATIONSHIP

Employee Rights

Harassment/Discrimination/Equal Pay

Employees have the right to work without being discriminated against on the basis of their gender, nationality, social class, beliefs, or religion. Moreover, employers are strictly prohibited from discriminatory behavior toward female employees or conduct that degrades female employees' dignity and honor. Employers must implement the principle of gender equality in regard to recruitment, utilization, wage, and wage increase.

Work Councils or Trade Unions

Employers are required to facilitate the establishment of a trade union organization within their company. A company's trade union should be established within a company within six months after the company is set up and put into operation. The obligation for establishing a trade union organization within a company falls on the local trade union or industry trade union, not the employer.

The main function of a trade union organization is to represent and protect employees' legal rights and interests. Therefore, most decisions relating to employee benefits should involve the trade union representative, such as execution of a collective labor agreement, decisions regarding labor discipline, and termination of labor contracts. Any act that obstructs the establishment and activities of an enterprise's trade union is strictly prohibited.

Employees' Right to Strike

Employees may voluntarily go on strike. However, strikes must be organized and led by the executive committee of the company's trade union or representatives of employees. Employees must also adhere to statutory procedures and steps for the organization of strikes. Strikes are prohibited at businesses that supply certain types of products and services and at enterprises that are essential for the national economy or for national defense and security.

Employees on Strike

Employers are not required to pay salary or other benefits to employees who participate in a strike. Employers are prohibited, however, from terminating labor contracts or applying labor disciplinary penalties to employees or to organizers of strikes or transferring employees or strike organizers to do other jobs or to work at other locations because of their preparation for or participation in a strike.

MODIFYING THE EMPLOYMENT RELATIONSHIP

Changes to the Contract

General Provisions

In general, a labor contract must be made in writing and signed by both the employee and employer. Therefore, in theory, any change to the content of a labor contract must be also made in writing and signed by both parties. The change can be in the form of an appendix attached to the original labor contract and will form an integral part of the labor contract.

In practice, however, there are certain changes that can be made by employers without the employees' consent, such as salary increase and promotion. In these cases, employers need only send a notice to employees notifying them of the change.

Change in Ownership of the Business

Where there is a merger, consolidation, division, separation, transfer of ownership, change in the right to manage, or change in the right to use assets, succeeding employers are responsible for the continuous performance of all employees' labor contracts.

If all available employees are unable to be employed, there must be a plan for labor usage. This plan must be communicated with the trade union organization, if any, which will provide input where necessary. If a labor contract is terminated under these circumstances, an employee who is let go, but who has worked for the former employer for 12 months or longer, is entitled to a job-loss allowance equaling one month's salary for each working year, but no less than two months' salary.

Employment Disputes

Employers' Responsibility for Actions of Their Employees

Employers are responsible for the acts of their employees, except where the employees act wholly outside the course of their employment.

Discipline and Grievance

Depending on the seriousness of the breach of labor rules committed by an employee, he/she may be subject to one of the three types of labor disciplinary measures, which are: (i) reprimand; (ii) extension of the period for wage increase by no more than six months or transfer to another position with a lower wage for a maximum period of six months or removal from position or demotion; or (iii) dismissal. A number of procedures and steps must be followed. A hearing meeting must be organized, wherein the employer will bear the burden of proving fault.

Offsetting Earnings

It is possible for employers to make a deduction from an employee's salary/wage, provided the employee is aware of the reasons for the deduction before the deduction is made. Before making a deduction from an employee's wage/salary, employers are required to discuss such

deduction with the executive committee of the company's trade union. The aggregate amount deducted must not exceed 30 percent of the employee's monthly salary/wage.

Forums for Adjudicating Employment Disputes

A Labor Conciliation Council, established within a company, handles most employment disputes. The law also provides for District Conciliators appointed by the District Department of Labor as well as for Provincial Labor Arbitration Councils (consisting of various advocates or professionals), which conduct statutory conciliation of either individual or collective disputes before the disputes are brought to the specialized Labor Court of the People's Court. In certain disputes, parties may bring cases directly to the courts for settlement without conciliation.

TERMINATING THE EMPLOYMENT CONTRACT

Procedures for Terminating the Agreement

Proper legal grounds must exist in order for an employer to terminate a labor contract with an employee, such as performance issues, prolonged illness, a force majeure event, or winding up of the company. Employers are required to follow a number of statutory steps such as sending a warning letter to employees and/or sending advance written notice regarding the termination of employment to employees within a statutory time limit.

If an employer fails to prove that there are legal grounds for the termination or fails to follow the proper statutory procedure, a termination may be declared wrongful. In the event of a wrongful termination, employers may be required to reinstate the employee, pay their salary for the period that they were not allowed to work, and pay two months of the employee's salary as a penalty for the wrongful termination.

Types of Termination

Employee's Resignation

An employee may resign from his/her job without giving any legitimate reason, so long as the employee gives advance notice to the employer (30 working days for termination of a fixed term labor contract or 45 working days for an indefinite labor contract).

Instant Dismissal

Dismissal is the severest labor disciplinary measure. Employees may be dismissed when they commit an act of gross misconduct such as theft, embezzlement, disclosure of business or technology secrets, or repeatedly commit acts in violation of the employers' work rules or policies. A disciplinary hearing meeting must be held and a number of statutory procedures must be followed.

Termination on Notice

An employer may terminate a labor contract by serving advance notice of 30 working days for termination of a fixed term labor contract or 45 working days for an indefinite labor contract. Note that employers must have proper legal grounds for termination (see the above section on procedures for terminating the agreement).

Termination by Reason of the Employee's Age

There are no specific provisions governing the termination of labor contracts based on an employee's age. The normal retirement age is 60 for men and 55 for women. A retired person will receive his/her pension and/or allowance from the social insurance fund.

The Vietnamese Labor Code allows employers to extend labor contracts or enter into a new labor contract with a retired employee.

Automatic Termination in Cases of Force Majeure

Force majeure is one of the legal grounds for employers to terminate labor contracts with employees. Employers are required to send advance notice to employees and a number of procedures should be followed. Employers are also required to pay severance to their employees due to the termination of employment.

Termination by Parties' Mutual Agreement

The parties are entirely free to agree to terminate an employment contract on any grounds they desire. Where the parties agree, they are not required to give advance notice of termination. The parties may also waive certain procedures. All the necessary terms, such as employment termination, severance payments, personal income tax, and social insurance, should be finalized and addressed in a document and should be signed by both parties.

Special Considerations

Directors or Other Senior Officers

In addition to Labor Law, certain high-ranking employees, such as general directors and members of the board, are subject to Vietnam Investment Law and Enterprise Law, as well as the company's charter (Articles of Association). The term for the above positions may not exceed five years, but the term is renewable.

A director or senior officer may have their job description set out in a labor contract. The functions, duties, obligations, rights, and authority of such employees, however, may also be provided for by the relevant law and the company charter and/or decisions assigned by general shareholding meetings, members' council, and boards.

Special Rules for Categories of Employees

There are no categories of employees to whom special rules apply, but certain categories of persons (e.g., pregnant women or mothers of babies less than 12 months old, junior employees, senior employees, and disabled employees) benefit from more generous protection from discrimination.

Specific Rules for Companies in Financial Difficulties

If a company goes into liquidation, then an employer has legal grounds to unilaterally terminate all employees' labor contracts. Employers are required to send a minimum advance notice to employees.

If the employer is in bankruptcy, the employees become unsecured creditors. The employees' claims for salary, allowance, social insurance, and other contractual benefits will be given priority over other unsecured creditors.

Restricting Future Activities

People have the right to work, to freely choose their type of work, and only competent courts have the right to prohibit certain people from doing certain jobs. Therefore, generally, clauses that attempt to restrict the future activities of an employee are unenforceable.

In practice, certain employers may include "unfair competition" clauses in labor contracts to prevent their former employees from working for their competitors during a certain period of time after termination. Adherence to such clauses, in reality, will depend on the voluntary compliance of employees.

Severance Payments

Employers must pay severance to employees who have continually worked for the employer for 12 months or more. There are certain cases in which employers are exempted from paying severance, such as dismissal or retirement. If employees have made contributions to the unemployment insurance fund, employers are not required to pay severance for the duration of time that the employees paid their unemployment insurance premium.

Special Tax Provisions and Severance Payments

Any income earned by an employee in the form of salary, wage, allowance, and bonus is subject to personal income tax (PIT). Severance payments at the minimum statutory level are not subject to PIT, whereas any extra payments are subject to PIT. Employers are required to withhold and pay PIT to taxation authorities.

Allowances Payable to Employees after Termination

Employers are not required to contribute to any allowances after termination, unless otherwise agreed by the parties in the labor contract and so long as all required severance payments are paid in full.

Time Limits for Claims Following Termination

The statute of limitations runs one year from the date of the conduct that any party claims breached its rights or benefits, where the claim arises from:

1. disciplinary measures resulting in dismissal;
2. unilateral termination of a labor contract; or
3. compensation for loss and damage or payment of allowances.