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Employment Subleasing: A New Form of Labor Supply in Vietnam

On June 18, 2012, the National Assembly of Vietnam adopted a new Labor Code which will take effect on May 1, 2013. One of the most notable issues of the new Labor Code is a provision allowing for the sublease of employees—a practice that is commonly known as labor outsourcing in other jurisdictions.

This is indeed good news for foreign investors involved in the manufacturing and construction sectors, as the nature of their business often requires seasonal workers who can provide services for a short period of time to help meet project deadlines.

Subleasing of employees has become popular in Vietnam's industrial areas, namely, Hanoi, Ho Chi Minh City, Dong Nai, Binh Duong, and Can Tho provinces. Until recently, however, subleasing of employees has been illegal. Traditionally, the government had taken the view that this form of labor supply benefits both the employee lessor (the company providing the employees) and the employee lessee (the company receiving the employees), while the employees being outsourced are "exploited." This is because the hiring company, typically a Vietnam-based foreign company, does not have to pay high salaries and provide correspondingly high statutory insurance schemes, which would need to be provided if they employed the workers directly. Instead, the company providing the employees, usually a local company, pays the sublet employees low salaries and provides minimal insurance schemes, while enjoying the high leasing fees themselves.

The New Subleasing Regime

In order to deal with this imbalance, while also providing companies with a commercially efficient and legally viable option, the new Labor Code stipulates that the employee lessor must pay salary to a sublet employee equal to the salary the employee lessee pays for its own employees at the same level, job, or position of equal value as the sublet employee. In addition to the salary, the employee lessor must pay statutory payment allowances and insurance for the sublet employees.

The new Labor Code legalizes the leasing of labor on the basis of the company being able to meet certain conditions as listed in the Code. Mainly, the Code necessitates a deposit from the hiring company prior to obtaining a license to lease labor. Then, it delegates the government to elaborate other conditions such as the list of the business sectors in which outsourcing is permitted.

In subleasing employees, the employee lessor and the employee lessee must enter into a written sublease agreement that contains the place of work, type of work, work and rest time, labor safety and workplace conditions, term of sublease (12 months at maximum), and the respective rights and obligations of each party toward the sublet employees, among other conditions. The sublease agreement must not contain provisions that adversely affect the rights and

benefits of the sublet employees provided in their own labor contracts. In addition, the company supplying employees must notify the sublet employees of "the contents" of the sublease agreement before seconding them to the company outsourcing the employees.

At work, the sublet employee will receive instructions from the hiring company. They must follow the hiring company's work rules and collective labor agreements provided by the employee lessee. However, in the case of a breach, the employee lessor will act as the real employer of the sublet employee, and has the power to impose disciplinary measures against the violating employee.

Unresolved Issues

In delineating the rights and duties of the related parties to the labor sublease agreement, the new Labor Code still reveals the following shortcomings that the Vietnamese government needs to address in its draft legislation guiding the Code.

First, it is hard to understand why the lawmakers impose a 12-month employment term limit in the sublease agreement, particularly since the sublet employees' salaries cannot be lower than the salaries of the actual long-term employees of the hiring company. Also, the new Labor Code is silent on the possibility of renewal of the labor sublease agreement.

Second, there is no clear statement on how the Vietnamese labor authorities can enforce the mandatory requirement that the salaries paid to the sublet employees by the employee lessor be equal to (or more than) the employees of the employee lessee (who have the same positions or jobs). The legislation fails to outline a systematic method on how the authorities will identify which employees are at the same level. Moreover, this raises a question as to how this requirement will be applied in cases where no such employee and work position already exists in the hiring company.

Third, as mentioned above, the employee lessor must notify the sublet employees of "the contents" of the sublease agreement. This requirement seems very impractical since there is confidential information inside the sublease agreement that does not necessarily need to be disclosed to a third party, including the sublet employees. The employees' knowledge should be limited to their rights and benefits following the sublease. They should not know any other information that might relate to trade secrets or the contract price in the sublease agreement. The Vietnamese government should therefore define the mandatory information in the sublease agreement that the employee lessor must disclose to the sublet employees.

Moving in the Right Direction

Despite these shortcomings, however, the new subleasing regime reflects the willingness of the Vietnamese legislature to provide benefits and commercial advantages to foreign investors. The new labor subleasing regime will allow investors to overcome the difficulties that lie with long-term hiring by allowing them to accommodate for seasonal demands for labor in the construction and manufacturing fields. This will not only improve operations management and encourage development initiatives for the investor, but will also enrich employment opportunities for the laborers in Vietnam without sacrificing the protections that labor gets under the Labor Code. With a few revisions, which may occur over time, the new Labor Code provisions on labor outsourcing will be a significant positive legislative development. 🏠