

Informed Counsel

Analysis of Recent Legal Developments in Thailand and Vietnam



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Vietnam's New Labor Code: Key Changes for Employers

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After lengthy debates, negotiations, and several redrafts, the National Assembly of Vietnam finally passed the new Labor Code (10/2012/QH13) on June 18, 2012. The new Labor Code, which will take effect on May 1, 2013, will replace the current Labor Code of 1994 with the stated aim of improving the labor market and industrial relations in Vietnam. From an employer's perspective, however, the new Code appears set to strengthen the position of employees and decrease management flexibility.

The new legislation introduces significant new developments relating to labor contracts, work hours, labor outsourcing, internal labor rules, and foreign employees, each of which will be discussed separately below. In addition, the new Labor Code sets forth several changes to working conditions that are favorable to employees. Examples include:

- ◆ Increasing the minimum salary level during probation from 70 percent to 85 percent of full salary
- ◆ Adding an extra day to the Lunar New Year holiday, bringing the total number of public holidays in Vietnam (during which employees are entitled to fully paid leave) to ten
- ◆ Increasing maternity leave from four months to six months

The new law also substantially amends already existing provisions, such as those regulating overtime work and collective labor agreements. This article will review the most important changes introduced by the new Labor Code and their expected impact on employers.

Labor Contracts

The new Labor Code introduces a number of important provisions with respect to procedures for entering into labor contracts and the contents of such contracts. When entering into labor contracts, the new Labor Code requires that contracts must be signed between the employer and the employee before the employment begins. This is to avoid a situation where local employers try to escape their statutory obligations to pay insurance, etc., and deprive workers of their statutory rights and benefits. The new Labor Code also prohibits employers from keeping employees' original identification cards and qualifications when signing and performing labor contracts. Moreover, an employer may not require an employee to pay cash or provide any assets to guarantee performance under the labor contract.

Concerning the contents of a labor contract, the new Labor Code allows an employer to require an employee whose work is related to business or technological secrets to enter into a separate agreement on confidentiality and nondisclosure of those secrets. The confidentiality agreement may contain a clause on compensation consequences in case of breach of contract. In practice, this means that an employer and employee may formally enter into a confidentiality agreement under which, in case of breach, the employee may be liable to pay damages. This is an important new protection granted to employers under the new legislation.

The new Labor Code also adds a new notice period with respect to termination of definite-term labor contracts (i.e., labor contracts with a fixed term of 12 to 36 months): the employer must inform the employee of the termination at least 15 days before the

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expiry date of the contract. The law also clarifies the consequences of an employer failing to comply with the new notice period.

Invalid Labor Contracts

The new Labor Code introduces four circumstances under which labor contracts will be deemed invalid:

- ◊ When the entire contents of the contract are inconsistent with labor laws
- ◊ When the job subject to the contract is prohibited by law
- ◊ When the contract contains an agreement that prohibits or obstructs the employee from forming or joining a trade union
- ◊ When the signatories to the contract lack signing power

The Code further prescribes how to deal with invalid labor contracts. When the contract is deemed invalid due to illegal contents or the job being prohibited by law (under the first three points above), the rights and obligations of the parties will be settled in accordance with the law. In a case where a signatory lacks the authority to sign, the state administrative body for labor will guide the parties to re-sign the contract. The Code states that the government will provide detailed guidance on the implementation of this provision.

Work Hours

According to the new Labor Code, working hours can be determined on a daily or weekly basis; if on a weekly basis, the normal working hours may not exceed 10 hours in one day and may not exceed 48 hours in one week. With respect to overtime, employees are not allowed to work more than 50 percent of the official working hours in a day (in cases where weekly working hours are applied, the total time of normal work and overtime work may not exceed 12 hours in one day), 30 hours in a month, or 200 hours in a year.

Labor Outsourcing Services

The new Labor Code introduces an entirely new section on labor outsourcing. This is good news for foreign-invested companies in the manufacturing and construction sectors, given that such work often requires seasonal workers and/or limited-time workers during certain periods.

However, the new Code imposes fairly extensive restrictions on labor outsourcing. Most notably, the sublessor (defined as “an enterprise licensed to conduct labor outsourcing”) must pay salary to a sublet employee at least equal to the salary that the subleasing employer pays its employees who have the same professional qualifications and are doing the same job or a job of the same value. Labor outsourcing is permitted only for certain types of jobs and the term may not exceed 12 months. Further, the labor outsourcing enterprise must, in addition to paying a deposit, be licensed for labor outsourcing activities. The government will regulate licensing of labor outsourcing activities, deposit payments, and the list of jobs for which labor may be outsourced.

A labor outsourcing agreement must contain the following information:

- ◊ Place and type of work
- ◊ Term of outsourcing
- ◊ Work and rest time and labor safety conditions for the employees
- ◊ The respective rights and obligations of each party toward the sublet employees

Importantly, a labor outsource agreement may not contain any provisions that are less favorable to employees

than those in the labor contract which the labor outsourcing enterprise signed with the employee.

Internal Labor Rules

New grounds for dismissal of employees will be introduced under the new law. These grounds include gambling, deliberate violence causing injury, use of drugs at the workplace, and disclosure of business and technological secrets. These rules must all be accounted for in the employer's internal labor rules (ILRs), a written list of company regulations registered with the local labor authority. The registration of ILRs is already required under the Labor Code of 1994 for all employers with ten or more employees.

Under the current Labor Code of 1994, a person who breaches the ILRs can be transferred to another position with a lower wage for a maximum period of six months. However, the new Labor Code abolishes this disciplinary measure. Other previously existing disciplinary measures—including reprimand, deferral of wage increase, removal from office, or dismissal—remain intact in the new Labor Code.

The new Code increases the statute of limitations for dealing with a breach of labor discipline from three months to six months from the date the breach occurs. In special cases, including breaches directly related to finance, property, or disclosure of technological or business secrets, the statute of limitations is extended from six months to twelve months from the day of breach.

Finally, the new Code requires that the application dossier for registration of ILRs be supplemented with a statement of opinion obtained from the organization representing the labor collective at the grassroots level. Thus, obtaining the opinion of the employees' representative will be a required task in obtaining approval for the ILRs.

Foreign Employees

The new Labor Code supplements Decree 46/2011/ND-CP, which restricts the management and employment of foreign employees. The new Code reduces the maximum term of a work permit for foreign employees from three years to two years. As before, domestic employers are only permitted to recruit foreign employees for jobs as managers, executives, experts, and technicians, provided that Vietnamese employees are not able to satisfy the production and business requirements. However, now foreign employers may only recruit foreign citizens to work in Vietnam upon explaining their needs to employ the foreign workers and receiving prior approval in writing from the competent state authority.

Implementing Regulations

The new Labor Code will indeed have a significant effect on the Vietnamese labor market in the coming years. However, there are still uncertainties with respect to its interpretation and application on a number of concerns. These will hopefully be clarified in the approximately 20 guiding decrees and circulars expected to be issued in the upcoming months.

This being said, the full extent to which the new Labor Code strengthens the position of employees and decreases employer flexibility remains to be seen. Based on the information currently available, the Code will grant some new and important rights to employers, such as the ability to protect confidential information and the option of labor outsourcing. But these points notwithstanding, the bulk of the changes that are being introduced seem to lean largely in favor of the employees. Employers will need to closely monitor the implementing regulations in order to assess how these new provisions will impact their labor-management structures and strategies. 🛠️