

Vietnam

*Tu Ngoc Trinh and Dzung Nguyen
Tilleke & Gibbins
Hanoi, Vietnam*

Introduction

The Labor Code promises that the government will assist and facilitate any activity that will create jobs and promote employment.¹ However, the complexities of Vietnamese history prove that it has often been difficult to regulate employment in Vietnam.

Vietnam's Labor Code was originally created based on the foundations of the Constitution reflecting the many policies of a centrally planned economy. The first Labor Code was created in 1994, several years after *Doi Moi* economic reforms were introduced in the country. For example, the Social Insurance Law at that time only applied to state-owned enterprises and businesses that employed 10 or more employees.

In the early 1990s, the working population that fell under the scope of the social insurance law was only approximately 8 per cent.² The insurance therefore excluded those working in private family businesses or agricultural workers, which represented a majority of the population at that time. The main focus of the employment law in the 1990s was on regulating state-controlled enterprises.³

Nearly two decades later, the Vietnamese economy has changed significantly. Accession to the World Trade Organization (WTO) in 2006 resulted in trade regulations loosening up and a sizable influx of foreign direct investment. By 2011, 3.4 per cent of the working population worked for foreign enterprises and 8.1 per cent worked for private domestic enterprises, making the private sector larger than the public sector.⁴ As these sectors grow year by year, employment law is becoming more relevant. The government must strive to strike a balance between protecting the basic rights of workers and ensuring stable economic growth through a flexible labor market.

1 Labor Code, art 4.

2 McCarthy, *Vietnam's Labor Market in Transition*, Institute of Social Studies, The Hague, 1999.

3 McCarthy, *Vietnam's Labor Market in Transition*, Institute of Social Studies, The Hague, 1999.

4 Labor Force Survey 2011, General Statistics Office, Total: Occupied population.

The government passed a new Labor Code in 18 June 2012 that provided a major overhaul of employment law.

Legal Relationship of Employer and Employee

Employment

Employment is broadly defined in the Labor Code as “any labor activity that creates a source of income and is not prohibited by law”.⁵ In Vietnam, it is difficult to draw a distinction between formal employment relationships and independent contracting relationships.

Contract of Employment

The Labor Code defines a labor contract as an agreement between the employer and employee on a paid job and on working conditions, and has terms, conditions, rights, and obligations of the parties to the labor relationship.⁶ A labor contract can be entered into directly between the employee and the employer or be signed by the employer and an employee who is legally authorized to represent a group of employees. The latter contract is enforceable and effective as if it were entered into with each employee.⁷

Parties

Capacity

An employee must be a person of at least 15 years of age with the ability to work, who works pursuant to a labor contract, who is paid wages, and who is subject to management by the employer.⁸ An employer must be an enterprise, body, organization, co-operative, business household, or individual who has full legal capacity for civil acts.⁹

Special Categories

In general. The law recognizes various types of employees and provides detailed regulations for each category. This includes junior employees, apprentices, senior employees, disabled employees, foreign employees, and domestic servants.

Junior employees. A junior employee is an employee under the age of 18.¹⁰ Employment of any person under the age of 13 is prohibited in Vietnam, with

5 Labor Code, art 9 (1).

6 Labor Code, art. 15.

7 Labor Code, art 18.

8 Labor Code, art. 3(1).

9 Labor Code, art 3(2).

10 Labor Code, art 161.

exceptions listed by the Ministry of Labor, War Invalids, and Social Affairs (MOLISA).¹¹

An employer is only permitted to employ a junior worker in jobs that are suitable for the health of the junior worker to ensure the development and growth of the worker's body, mind, and personality.¹² An employer has the responsibility of looking after the interests of the junior worker in respect of labor, wages, health, and training during the period of their work.¹³ It is prohibited to employ junior workers in heavy or dangerous work, work requiring contact with toxic substances, or in workplaces which have adverse effects on their personality.¹⁴ The normal working hours may not exceed 8 hours per day or 40 hours per week for a junior employee from the age of 15 to below 18; or 4 hours per day or 20 hours per week for a junior employee below 15.¹⁵

Apprentices. In order to work for an employer, apprentices and practice trainees must be at least 14 years of age and be in good health, sufficient to satisfy the requirements of the particular trade, except for a number of trades stipulated by the MOLISA.¹⁶

Senior Employees. Senior employees are employees who are over the age of 60 for male employees and over the age of 55 for female employees.¹⁷ Senior employees are entitled to negotiate with the employer to extend or to enter a new labor contract and are still entitled to enjoy the benefits under the retirement scheme.¹⁸

Disabled Employees. The government recognizes the right of disabled persons to employment and encourages business to employ disabled workers.¹⁹ The government may regulate the policy on providing low-interest loans from the Job Creation Fund to employers employing disabled employees.²⁰

The Labor Code prohibits allowing a disabled person whose ability to work has been reduced by 51 per cent or more to work overtime or at night. In addition, an employer is prohibited from assigning disabled workers to heavy, toxic or dangerous work, or work requiring contact with toxic substances as stipulated by the MOLISA.²¹

11 Labor Code, art 164 (3).
12 Labor Code, art 162 (1).
13 Labor Code, art 162 (1).
14 Labor Code, art 163(1).
15 Labor Code, art 163.2 & 3.
16 Labor Code, art 61.1
17 Labor Code, art 166 and 187(1).
18 Labor Code, art 167.
19 Labor Code, art 176(1).
20 Labor Code, art 176(2).
21 Labor Code, art 178.

Foreign Employees. The Labor Code does not provide any definition of a foreign employee. However, under a decree guiding the Labor Code, a foreign employee is defined as a person without Vietnamese nationality. A foreign employee (with the exception of some professionals) working in Vietnam for three months or more must obtain a work permit. Foreign employees must satisfy the following conditions:

- They must have full legal capacity for civil acts;
- They must possess specialized and technical skills, and have good health appropriate for the work requirements;
- They must not have been convicted for a crime or be subject to investigation for a criminal offense in accordance with the law of Vietnam and foreign laws.
- They must have a work permit issued by the competent Vietnamese authority, except in special cases.²²

Transfers of Business. If organizational restructuring/technological changes or economic reasons adversely affect the jobs of many employees, the employer must formulate and implement a labor usage plan²³ that contains the following basic details:

- List and number of employees who will continue to be employed, and of employees to undergo retraining for further employment;
- List and number of employees who will retire;
- List and number of employees who will be transferred to work part-time, and of employees whose labor contract will be terminated;
- Measures and financial funding for ensuring implementation of the plan.²⁴

If the employer is unable to resolve new jobs but must retrench employees, the employer must pay an allowance for loss of work equivalent to the aggregate amount of one month's wages for each year of employment, and no less than two months' wages.²⁵

In cases where an enterprise merges, consolidates, divides, or separates, the succeeding employer must continue to employ the current number of employees and amend and supplement their labor contracts.²⁶ On transfer of ownership or right to use assets of an enterprise, the previous employer must prepare a labor usage plan with the foregoing particulars.²⁷

22 Labor Code, art 169.

23 Labor Code, art 44.

24 Labor Code, art 46.

25 Labor Code, art 48 and art 49.

26 Labor Code, art 45(1).

27 Labor Code, art 45(2).

If the employer is unable to utilize all the available employees, there must be a plan for labor usage in accordance with the law. An employee whose labor contract is terminated under such circumstances is entitled to the same allowance for loss of work as outlined above.²⁸

Terms and Conditions of Employment

In General

A labor contract must be written and made in two copies, with each party to retain one copy.²⁹ Contracts for temporary jobs lasting less than three months can be oral.³⁰ The Labor Code of Vietnam requires that a labor contract must include the following particulars:

- Name and address of the employer or the employer's legal representative;
- Full name, date of birth, sex, residential address, and number of identity card or other legal document of the employee;
- Job description and workplace;
- Term of the labor contract;
- Wage rate, method and time of payment of wages, allowances and other additional payments;
- Regime for wage increases and promotion;
- Working hours and holidays;
- Personal protective equipment of the employee;
- Social insurance and health insurance;
- Training and skill improvement.³¹

In practice, statutory material terms are used for standard labor contracts for simple work only. Employers and employees are free to agree on any other terms in addition to the compulsory provisions, provided that these terms are not contrary to law, to the collective labor contract or to social morals.³²

The Labor Code recognizes three types of labor contracts, namely:

- An indefinite-term labor contract;
- A fixed-term labor contract with duration of 12 to 36 months; and
- A labor contract for a specific or seasonal job of less than 12 months.³³

28 Labor Code, art 45(3).

29 Labor Code, art 16.

30 Labor Code, art 16.

31 Labor Code, art 23(1).

32 Labor Code, art 17(2).

33 Labor Code, art 22.

There is no compulsory obligation to provide trial periods (otherwise known as “probation periods”) when engaging new employees, but it is common in practice to do so. A probation period may not exceed 60 days for work that requires high-level specialized or highly technical skills or 30 days for intermediate-level specialized or technical expertise or 6 days for other types of work.³⁴ There may only be probation on one occasion for one job and the wages of an employee who is on probation must be at least 85% of the wage for the relevant position.³⁵ The Labor Code of Vietnam requires that a probationary contract must include the following details:

- Name and address of the employer or the employer’s legal representative;
- Full name, date of birth, sex, residential address, and number of identity card or other legal document of the employee;
- Job description and workplace;
- Term of the labor contract;
- Wage rate, method and time of payment of wages, allowances and other additional payments;
- Working hours and holidays;
- Personal protective equipment of the employee.³⁶

Remuneration

The Labor Code of Vietnam stipulates that wages are the amount of money which the employer pays to the employee in order to undertake the work as agreed upon and paid in consideration of the rate of production and quality of the work completed. Wages include wage rates for the work or position plus wage allowances and other additional items. Employees may not earn an amount below the minimum salary level stipulated by the government.³⁷

The minimum rate is fixed on a monthly, daily and/or hourly basis that varies with regions and industries.³⁸ Depending on the minimum living conditions of employees and family households, socio-economic conditions and wage rates on the labor market, the Vietnamese government will announce minimum regional wage rates on the basis of recommendations from the National Wage Council.³⁹

Accordingly, for 2012, different minimum wages were set in different cities and provinces, ranging from VND 1,400,000 to VND 2,000,000 per month.⁴⁰

34 Labor Code, art 27.

35 Labor Code, art 28.

36 Labor Code, art 26(1) and art 23.

37 Labor Code, art 90.

38 Labor Code, art 91(1).

39 Labor Code, art 91(2).

40 Decree Number 70/2011/ND-CP.

Overtime work must be remunerated at 150 per cent of the wage rate for overtime work during business working days, 200 per cent of the wage rate for overtime work performed during weekly days off (e.g., weekends), and 300 per cent of the wage rate for overtime work performed during holidays and paid leave days.⁴¹ Employees working at night will be paid an additional minimum 30 percent of the wage rate.⁴²

Working Hours and Holidays

The maximum working hours are 8 hours per day or 48 hours per week under normal working conditions.⁴³ Daily working hours must not exceed 6 hours in one day for employees subject to extremely heavy, dangerous, or toxic working conditions.⁴⁴

Overtime work is strictly regulated by the Labor Code. The employer ensures the number of overtime hours of the employee does not exceed 50 per cent of the normal working hours in one day, and if the employer stipulates work on a weekly basis, it is prohibited to work more than 12 hours per day or 30 hours per month and the total overtime hours may not exceed 200 hours per year, except in special circumstances where the maximum overtime hours may not exceed 300 hours.⁴⁵

Employees are also entitled to fully paid days off on public holidays, paid annual leave, personal leave, sick leave, and maternity leave. Sick leave and maternity leave are covered by the social insurance fund and are not paid by the employer.

There are 10 statutory public holidays.⁴⁶ If the public holidays fall on a weekly day off, the employee is entitled to take the following day off.⁴⁷ The amount of annual leave varies by industry, with 12 days off for standard industry; 14 days off for heavy, dangerous, and toxic work; and 16 days for extremely heavy and dangerous and toxic work.⁴⁸

A female employee (who works in normal working conditions) is normally entitled to take 6 months' maternity leave.⁴⁹ When an employee gives birth to more than one child at one time, she is entitled to take an additional 1 month's leave for every additional child calculated from the second child onwards.⁵⁰

41 Labor Code, art 97(1).

42 Labor Code, art 97(2).

43 Labor Code, art 104(1).

44 Labor Code, art 104 (3).

45 Labor Code, art 106(2).

46 Labor Code, art 115.

47 Labor Code, art 115 (3).

48 Labor Code, art 111(1).

49 Labor Code, art 157(1).

50 Labor Code, art 157(1).

Healthcare coverage

There is no uniform mandatory healthcare coverage. Instead, there are some provisions that impose certain financial obligations on the employer in relation to the health of the employees.

The law requires that employers and employees must participate in compulsory social insurance and compulsory health insurance.⁵¹ Health examinations must be arranged by the employers at least once every 6 months for female employees who shall be given a specialized gynecological examination, for workers performing extremely heavy or toxic work, for disabled employees, for junior employees and senior employees.⁵² During the period when an employee on leave receives social insurance, the employer is not obliged to pay wages to such employee.⁵³

Vocational Training

The law requires employers to have annual plans for and devote budget to training and improving job and professional skills of employees.⁵⁴ In addition, employers are also obliged to provide a report regarding the results of training to the provincial administrative authority for labor.⁵⁵

The employer and employee must sign a professional training contract if the employee is provided with training, job and professional skills improvement or re-training in Vietnam or overseas with funding provided by the employer.⁵⁶ A trade training contract must include the following details:

- The profession in which training is provided;
- Training location and training period;
- Training fees;
- Period for which the employee undertakes to work for the employer after training;
- Responsibility to refund training fees;
- Responsibilities of the employer.⁵⁷

Directors

In addition to the labor law, some high-ranking employees, such as general directors and members of the board, also are governed by the Vietnam

51 Labor Code, art 186(1).

52 Labor Code, art 152(2).

53 Labor Code, art 186 (2).

54 Labor Code, art 60(1).

55 Labor Code, art 60(2).

56 Labor Code, art 62(1).

57 Labor Code, art 62 (2).

Investment Law and the Enterprise Law, as well as the company charter (articles of association). The term for the above positions may not exceed five years, but it is renewable.⁵⁸ The company has the right to pay remuneration, salary, and bonus to members of the board, director, or general director and other managers in accordance with its business results and efficiency.⁵⁹

In addition to the job description (which may be stipulated in a labor contract), the functions, duties, obligations, rights, and authorities of these employees may be provided by the relevant law and the company charter and/or decisions assigned by general shareholding meetings, members' council, and boards.⁶⁰

Discrimination

In General

Discrimination on the basis of gender, race, color, social class, beliefs, religion, HIV infection, or disability is strictly prohibited under the Labor Code.⁶¹

Gender

The Labor Code provides the State with the obligation to grant equal rights to women as those granted to men.⁶² In addition, it should encourage creating favorable conditions for women in regard to employment conditions.⁶³ 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, training, working hours, rest breaks and holidays, and wage rates.⁶⁴

Age

There is no specific provision of discrimination of age, apart from the general provision in the Labor Code that entitles employees to work without being discriminated against on the basis of their gender, race, color, social class, beliefs, religion, HIV infection, or disability.⁶⁵ The Labor Code does restrict the age of an employee to be at least of 15 years of age.⁶⁶ The retirement age is 60 years of age for men and 55 years of age for women.⁶⁷

58 Law on Enterprise, arts 109 and 116.

59 Law on Enterprise, art 58.

60 Law on Enterprise, art 58.

61 Labor Code, art 8(1).

62 Labor Code, art 153(1).

63 Labor Code, arts 153.

64 Labor Code, art 154(1).

65 Labor Code, art 8(1).

66 Labor Code, art 3(1).

67 Labor Code, art 187(1).

Disability

The law does provide specific discrimination prohibitions in regard to disabled employees, as well as certain provisions suggest preferential treatment for them. The government, in general, recognizes the right of disabled persons to employment and encourages business to employ disabled workers.⁶⁸ In addition, the government may regulate the policy on providing low-interest loans from the Job Creation Fund to employers employing disabled employees.⁶⁹

The Labor Code prohibits allowing a disabled person whose ability to work has been reduced by 51% or more to work overtime or at night. In addition, an employer is prohibited from assigning disabled workers to heavy, toxic or dangerous work, or work requiring contact with toxic substances as stipulated by the MOLISA.⁷⁰

Race

There is no specific provision of discrimination of race, apart from the general provision in the Labor Code that entitles employees to work without being discriminated against on the basis of their gender, race, color, social class, beliefs, religion, HIV infection, or disability.⁷¹

Religion

The Labor Code holds that employees are entitled to work without being discriminated against on the basis of their gender, race, color, social class, beliefs, religion, HIV infection, or disability.⁷² Other than this general provision, however, there is no specific provision providing additional details on religious discrimination.

Collective Bargaining and Worker Participation in Management**Employer and Employee Rights and Duties under Collective Bargaining**

In Vietnam, the State encourages the parties to sign an agreement through a collective bargaining process, where such an agreement would provide employees with more favorable conditions than those stipulated in labor law.⁷³ Under the Labor Code, collective bargaining means debate and negotiation between the labor collective representative and the employer with the following objectives:

68 Labor Code, art 176(1).

69 Labor Code, art 176(2)

70 Labor Code, art 178.

71 Labor Code, art 8(1).

72 Labor Code, art 8(1).

73 Labor Code, art 73.

- Formulating a harmonious, stable and progressive labor relationship;
- Establishing new working conditions to provide a basis for signing a collective labor agreement;
- Resolving problems and difficulties in the exercise of rights and implementation of obligations of each party to the labor relationship.⁷⁴

The collective agreement should include these following details:

- Wages, bonuses, allowances, and pay raises;
- Working hours and rest breaks, overtime and rest breaks between shifts;
- Job security for employees;
- Ensuring occupational safety and hygiene; implementation of internal labor rules;
- Other matters in which the parties are interested.⁷⁵

The representative of the labor group must be the organization representing the labor collective at the grassroots level of the enterprise, and the other party must be the employer or legal representative of the employer.⁷⁶ When collective bargaining comes into effect, all employers and employees must be responsible for full implementation of the terms and conditions under the collective agreement.⁷⁷

If the rights that are stipulated in the signed labor contract of an employee are less favorable than those provided for in the collective agreement, the respective terms of the collective agreement take precedence. The employer must amend the internal regulations to comply with the collective agreements within 15 days after the effective date of the collective agreement.⁷⁸ The parties have the right to request full compliance with the agreement. If any breach of the agreement occurs, each party has the right to request a resolution of the collective labor dispute in accordance with the procedure stipulated by law.⁷⁹ The employer bears all expenses of negotiation, signing, registration, change, and announcement of the collective bargaining agreement.⁸⁰

Employer Obligations to Implement Worker Participation Schemes

The employer has the responsibility to facilitate employees to establish or join trade unions and to participate in employee activities.⁸¹ The employers must

74 Labor Code, art 66.

75 Labor Code, art 70.

76 Labor Code, art 69(1).

77 Labor Code, art 84 (1).

78 Labor Code, art 84(2).

79 Labor Code, art 84(3).

80 Labor Code, art 82.

81 Labor Code, art 192 (1).

guarantee operational conditions for trade unions.⁸² In addition, the Labor Code strictly prohibits employers from hindering or causing difficulty for employees to establish or join a trade union.

Health and Safety Protection in the Workplace

Under Vietnamese labor law, employers are required to carry out appropriate measures to ensure occupational safety and hygiene.⁸³ The employers must rely on standards, national technical regulations, and local technical regulations in order to formulate their own internal rules and working procedures to ensure occupational safety and hygiene as appropriate for each type of machinery, equipment and workplace.⁸⁴

Furthermore, employers also have the obligation to inspect and evaluate dangerous and harmful factors in workplaces, to periodically check and maintain machinery, equipment, workshops and warehouses.⁸⁵ Employees are also required to comply with these regulations and internal labor rules of employers and to promptly report to the employer the discovery of work-related accidents, occupational diseases, dangerous toxicity or breakdown.⁸⁶

Workers' Compensation

Under Vietnamese labor law, work-related accidents are defined as accidents which injure any body parts or functions of the body of an employee, or cause an employee's death during the process of working and closely related work performance or labor task.⁸⁷ An employee who is injured in a work-related accident must be immediately treated and fully attended to.

During the period in which an employee is absent from work for medical treatment in respect of a work-related accident or occupational disease, the employer must pay full salary and expenses for the treatment.⁸⁸

Dispute Resolution

In General

There are strict regulations on dispute resolution of labor agreements. The regulations differ depending on whether the dispute is individual or collective.

82 Labor Code, art 192 (3).

83 Labor Code, art 138.

84 Labor Code, art 136(2).

85 Labor Code, art 138 (1).

86 Labor Code, art 138(2).

87 Labor Code, art 142 (1).

88 Labor Code, art 144.

Procedures for Individual Employees

Individual labor disputes with an employee are handled by labor conciliators or the People's Court.⁸⁹ Within five working days from the date of receipt of the request for conciliation, the labor conciliator must terminate the conciliation.⁹⁰ The labor conciliator must put forward a settlement proposal for consideration by the two parties.⁹¹

If the two parties agree to the settlement proposal, the labor conciliator must prepare the minutes of settlement. Both parties are obliged to comply with the agreements recorded in the minutes of settlement. If the two parties do not agree to the settlement proposal or if one of the disputing parties is not present for a second time without proper reason after being validly summonsed, the labor conciliator must prepare the minutes of unsuccessful conciliation.⁹² In the event of an unsuccessful conciliation, or if one of the parties fails to implement the minutes of settlement, or if the labor conciliator has not resolved the matter on expiry of the time limit for resolution, each disputing party has the right to bring the dispute to court in Vietnam.⁹³ An individual labor dispute must pass through conciliation procedures prior to petition to a court, except for the following labor disputes:

- A dispute relating to the disciplinary measure of dismissal for breach of the law on labor, or a dispute arising from unilateral termination of a labor contract;
- A dispute relating to payment of compensation for loss and damage of payment of allowances upon termination of a labor contract;
- A dispute between a domestic servant and an employer;
- A dispute relating to social insurance or health insurance; and
- A dispute relating to payment of compensation for loss and damage pursuant to a contract between an employee and a labor export enterprise or professional labor export enterprise.⁹⁴

Procedures for Groups of Employees

In General

Collective labor disputes may involve either rights or benefits.⁹⁵ The procedure for settling collective labor disputes is the same as the procedure for settling the labor disputes with an individual employee.⁹⁶

89 Labor Code, art 200.

90 Labor Code, art 201(2).

91 Labor Code, art 201(3).

92 Labor Code, art 201(3).

93 Labor Code, art 201(4).

94 Labor Code, art 201(1).

95 Labor Code, art 203.

96 Labor Code, art 204 (1).

Collective Labor Dispute Concerning Rights

The employees and the employer may select the labor conciliators, Chairman of a district People's Committee or the People's Court to settle the collective labor disputes concerning rights.⁹⁷

In the event of an unsuccessful conciliation or if either of the parties fails to implement the minutes of settlement, each party has the right to petition the Chairman of a district's People's Committee to resolve the collective labor dispute.⁹⁸ The Chairman is responsible for resolving the collective labor disputes within five working days from the date of receipt of the request for resolution.⁹⁹

The authorized representatives of the parties must be present at a session resolving a collective labor dispute about rights. If necessary, the Chairman may invite representatives of other bodies and organizations concerned to attend the session for some cases. In resolving the dispute, the Chairman may rely on various regulations, such as the law on labor, the collective labor agreement, and internal labor rules in order to consider and deal with conduct in breach.¹⁰⁰ If the Chairman resolves the matter but the two parties remain in dispute or if the Chairman fails to resolve the matter on time, each party has the right to petition to the courts to resolve the matter.¹⁰¹

Collective Labor Disputes Concerning Benefits

The employees and the employer may select the labor conciliators or the Labor Arbitration Council to settle the collective labor disputes concerning benefits.¹⁰²

In the event of an unsuccessful conciliation or if either of the parties fails to implement the minutes of settlement, each party has the right to petition the Labor Arbitration Council to resolve the dispute.¹⁰³ The Labor Arbitration Council is responsible for resolving collective labor disputes within seven working days of the date of receipt of the request for resolution.¹⁰⁴

The authorized representatives of the two disputing parties must be present at a session resolving a collective labor dispute about benefits. In necessary cases, the Labor Arbitration Council may invite representatives of other bodies and organizations concerned to attend the session. At the dispute resolution meeting, the Labor Arbitration Council of the company must put forward a settlement proposal for consideration by the two parties.

97 Labor Code, art 203(1).

98 Labor Code, art 204(2).

99 Labor Code, art 205(1).

100 Labor Code, art 205(2).

101 Labor Code, art 205(3).

102 Labor Code, art 203(2).

103 Labor Code, art 204(2).

104 Labor Code, art 206(1).

If the two parties agree to the settlement proposal, the Labor Arbitration Council must prepare the minutes of settlement. Both parties are obliged to comply with the agreements recorded in the minutes of settlement. If the parties disagree with the settlement proposal or if one of the disputing parties is not present for a second time without proper reason after being validly summonsed, the Labor Arbitration Council must prepare the minutes of unsuccessful conciliation.¹⁰⁵ When one of the parties fails to implement the minutes of settlement after five days from the date of the minutes of settlement or within three days after the establishment of the minutes of unsuccessful conciliation, both parties have the right to conduct procedures in order to initiate a strike.¹⁰⁶

According to the Ministry of Labor, War Invalids and Social Affairs, the number of Conciliation Councils set up in business is quite low, accounting for around 30 per cent of all businesses. According to a survey on the implementation of labor laws in 2009, out of 1,500 enterprises surveyed, 82.67 per cent of enterprises had a trade union but only approximately 60 per cent had established a Labor Arbitration Council. This may be attributed to the fact that Labor Arbitration Councils are not consistently used to resolve collective disputes because they lack credibility among workers, particularly in terms of the staff's legal capacity to handle the process.

In fact, the functions of Labor Arbitration Councils are not widely recognized and very few cases are given to the councils to resolve, since resolving collective labor disputes is not compulsory by law. According to incomplete statistics in April 2011, there were only two cases resolved in Ho Chi Minh City, one case in Binh Duong, and four in Dong Nai.

Termination

Under Vietnamese law, unilateral termination by employers is strictly regulated. On the other hand, the parties are entirely free to agree on termination on any grounds they desire for mutually agreed termination.¹⁰⁷ When the parties agree to terminate employment, they are not required to give advance notice.

Aspects of Termination of Employment

A contract is deemed terminated:

- Upon the expiry of the contract term, except in case the labor contract of an employee who is a part-time trade union officer is still within term of such office, such contract will be extended until expiry of the period of such office;
- If the task required under the contract is completed;
- When both parties agree to terminate the contract;

¹⁰⁵ Labor Code, art 206(2).

¹⁰⁶ Labor Code, art 206 (3).

¹⁰⁷ Labor Code, art 36 (3).

- When the employee has satisfied the conditions of period of employment for social insurance contribution and reaches the age of pension entitlement;
- When the employee is sentenced to a jail term or to the death penalty, or is prohibited from performing the job prescribed in the labor contract by a legally enforceable decision of a court;
- When the employee dies; or is declared by a court to have lost legal capacity for civil acts, to be missing or to be dead;
- When the employer being an individual dies, or is declared by a court to have lost legal capacity for civil acts, to be missing or to be dead; or the employer not being an individual terminates its operation;
- When the employee is disciplined in the form of dismissal;
- When the employee exercise his right to unilaterally terminate the labor contract in accordance with the Labor Code;
- When the employer exercise his right to unilaterally terminate the labor contract in accordance with the Labor Code; or the employer retrenches the employee as a result of restructuring, change of technology, for economic reasons, or due to merger, consolidation or separation of the enterprise or co-operative.¹⁰⁸

Under Vietnamese labor law, dismissal is the highest labor disciplinary measure, and it may be applied to employees when they (i) commit an act of theft, embezzlement, gambling, deliberate violence causing injury, using drugs at workplace, disclosure of business or technology secrets or infringement of intellectual property rights of the employer, or are guilty of conduct causing or threatening to cause serious loss or damage to the property or interests of the employer; or (ii) the employee is disciplined by the form of deferral of a wage increase and then commits a second offense during the period when the initial disciplinary measure had not been absolved, or the employee was disciplined in the form of demotion and thereafter committed a second offense; or (iii) an employee of his or her own accord takes an aggregate of 5 days off in one month or an aggregate 20 days off in one year without proper reasons.¹⁰⁹

A disciplinary hearing meeting must be held and the employee has the right to defend himself or herself or to employ a lawyer or another person to do so.¹¹⁰

When an enterprise or a co-operative has its operation terminated, or is dissolved or declared bankrupt, there shall be priority payment of wages, allowance, social insurance and health insurance, unemployment insurance, and other interests of the employees.¹¹¹

108 Labor Code, art 36.

109 Labor Code, art 126(1).

110 Labor Code, art 123(1).

111 Labor Code, art 47(4).

Restrictions on Termination

The law provides restrictions on unilateral termination, which in practice makes it very difficult for the employer to dismiss an employee. An employer may unilaterally terminate the contract only under the following conditions:

- The employee repeatedly fails to perform the work in accordance with the terms of the labor contract;
- The employer is ill or injured and remains unable to work after having received treatment for a period of 12 consecutive months in case of an indefinite term labor contract; or 6 consecutive months in case of definite term labor contract; or more than half of duration of the contract in case of a seasonal or specific job labor contract with a duration of less than 12 months;
- As a result of natural disaster, fire or for any other reason of *force majeure* despite all necessary measures to remedy the problem implemented by the employer;
- The employee fails to attend the workplace for a period of 15 days.¹¹²

Required Notice Periods

Employers must provide an advance notice to their employees within a minimum statutory time limit.¹¹³ Employees who resign are required to give advance notice to their employers before a minimum statutory time limit. In both cases, the relevant time limits are 30 days in advance for fixed term labor contracts, 45 days for indefinite labor contracts, and 3 days for seasonal or specific job labor contract with a duration of less than 12 months.¹¹⁴

Procedures for Termination

There must be proper legal grounds for an employer to terminate a labor contract with an employee. Employers are required to follow a number of statutory steps, such as sending an advance written notice regarding the employment termination to employees within the minimum statutory time limit.

If employers fail to prove the legal grounds for termination or fail to follow proper statutory procedures, a termination may be declared to be wrongful. If this is the case, employers may be required to reinstate the employees, pay their salaries for the period that they were not allowed to work, and pay two months of the employees' salaries as a penalty for wrongful termination.

Severance or Redundancy Payments

Vietnamese labor law requires employers to pay severance to employees who have been regularly working for the employer for 12 months or more.¹¹⁵ The

112 Labor Code, art 38 (1).

113 Labor Code, arts 37(2) and 38(2).

114 Labor Code, art 38(3).

115 Labor Code, art 48(1).

severance allowance shall be one half of one month's wage for each year of employment.¹¹⁶

If contributions to the unemployment insurance fund were made for the benefit of the employee, employers are not required to pay severance for the duration of time that the employees paid their unemployment insurance premium. Any income earned by an employee in the form of a 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. 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 Limit for Claims Following Termination

The limitation period for requesting a labor conciliator to resolve an individual labor dispute is 6 months and one year for requesting a court to resolve an individual labor dispute from the date of the conduct that any party claims breached its rights or benefits.¹¹⁷

Employer Duties, Liabilities and Worker Benefits under National Unemployment Insurance Programs

In Vietnam, unemployment insurance is governed by the Law on Social Insurance and relevant regulations on unemployment insurance. The unemployment insurance regime provides unemployment compensation and introduces new jobs to employees after they have lost a job or their labor contract has been terminated and they have not been able to find a job.¹¹⁸ The employees working for enterprises employing ten or more persons and under the labor contract with indefinite term or term of 12 to 36 months must participate in unemployment insurance.¹¹⁹

The employers and employees must contribute 1 per cent of their salary, which will be matched by the State.¹²⁰ The employees must receive the monthly unemployment compensation, equivalent to 60 per cent of their average salary during the last 6 months. The period in which unemployment compensation is received depends on the period during which the employee has paid the unemployment insurance.¹²¹

116 Labor Code, art 18(1).

117 Labor Code, art 202.

118 Law on Social Insurance, art 3(4).

119 Law on Social Insurance, art 2(3) and (4).

120 Law on Social Insurance, art 102.

121 Law on Social Insurance, art 82.

Mandatory Job-Retraining Programs and/or Placement Programs

In cases of reorganization or changes in technology, employers are required to retrain employees. When there is a merger, consolidation, division, or separation, succeeding employers must be responsible for continuous performance of the labor contract.¹²² On transfer of ownership or right to use assets of an enterprise, the previous employer must prepare a labor usage plan with the foregoing details.¹²³

In cases of reorganization or changes in technology or when all available employees are unable to be employed, there must be a plan for labor usage.¹²⁴ 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 must be entitled to receive a job-loss allowance equal to one month's salary for each working year but no less than two months' salary.¹²⁵

Retirement

There is no scheme for pension plans under Vietnamese labor law. However, both employers and employees are required to contribute to the compulsory social insurance fund that shall pay pensions to employees when they retire.¹²⁶

Employer and Employee Contributions

Employers and employees are required to make social insurance, medical, and unemployment contributions to the social insurance fund. The fund shall pay allowances to employees for sick leave, maternity leave, work-related accidents, occupational disease, and pensions.¹²⁷

Conclusion

In general, Vietnamese labor law is very protective of employees. Employers are required to have legal grounds for termination of labor contracts or have evidence of violations by employees for labor disciplinary measures.

In practice, in order to avoid further claims regarding unfair termination, employers normally pay out their employees by offering a severance payment level that is higher than the minimum level required by law and the employer should consider employing workers on a short-term contract basis. This situation

122 Labor Code, art 45.1.

123 Labor Code, art 45(2).

124 Labor Code, art 44 (1).

125 Labor Code, art 49 (1).

126 Labor Code, art 187.

127 Labor Code, art 186.

does not provide security or enhance the position of the employees in the long run.

The new Labor Code also promises to ensure benefits and rights of the employers. However, it seems to impose more burdensome obligations, such as the obligation to hire disabled persons and the duty to provide training. It will be beneficial to see which direction the debates go within the Party, and whether labor market flexibility could be enhanced by the new law without compromising the basic rights of the workers.