The Employment Law Review

Fourth Edition

Editor
Erika C Collins

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Chapter 55

VIETNAM

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I INTRODUCTION

Vietnam's Labour Code forms the fundamental basis for employment law in Vietnam. The Labour Code was initially introduced in 1994 and was amended several times before being entirely replaced by the new Labour Code, adopted by the Vietnam National Assembly of Vietnam on 18 June 2012, which shall take effect from 1 May 2013 ('the Labour Code 2012'). For the purpose of this chapter, all regulations mentioned below are those of the Labour Code 2012 and other current regulations.

The Labour Code 2012 regulates minimum employment standards; rights and obligations of employers, employees, and organisations representing employers and employees in the employment relationship; other directly related labour relationships; and the state management of employment. In addition to the Labour Code 2012, employment relationships and other related matters are also governed by other statutes such as the Law on Social Insurance, the Law on Health Insurance, the Trade Union Law and the Civil Procedure Code.

Currently, the people's courts and employment inspectors are the authorities that have the power to directly enforce the law of employment in Vietnam. To settle a labour dispute, however, different procedures may be applied depending on the type of dispute.

For individual labour disputes, the competent authorities include labour conciliators and the people's court. Individual labour disputes generally must be settled by a labour conciliator appointed by the local labour authority before submitting to the people's court, unless the dispute relates to dismissal, unilateral termination, severance allowance or social insurance. If no agreement is reached, any party can bring the dispute before a competent people's court for settlement.

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For collective labour disputes, the competent authorities include labour conciliators, the chairman of the People's Committee at the district level, and the people's court, if the dispute is concerned with labour rights. If the dispute is concerned with labour benefits, the competent authorities include labour conciliators and labour arbitration councils comprising the head of the local labour authority, a secretary, a representative of the employees, and a representative of the employer. Collective labour disputes, similar to individual disputes, shall initially be settled by way of conciliation through the labour conciliator. If conciliation fails, the dispute shall be brought to the chairman of the People's Committee at the district level or the labour arbitration council for settlement, as the case may be. The parties can appeal a decision of the chairman of the People's Committee at the district level at a competent people's court, while a decision of the labour arbitration council may be rejected by way of strike procedures.

II YEAR IN REVIEW

As mentioned above, Vietnam has recently introduced the Labour Code 2012, which shall take effect from 1 May 2013. There are many changes and new regulations in this Code. Below are some of the changes that are significant to employment law in Vietnam:

a the duration of maternity leave has increased from four months to six months;

b new breaching acts that shall result in dismissal have been added to the Labour Code 2012, including gambling, deliberate violence causing injury, use of drugs at the workplace, and disclosure of business or technology secrets;

c labour contracts must be signed between the employer and the employee before employment;

d the employer must not keep an employee's original identification card and qualifications, nor must the employer collect cash or other assets from the employee as a guarantee;

e the employer may provide, in the contract, the employee's obligations to keep trade and business secrets, and the compensation consequences in case of breaches;

f the wage during the probationary period increases from 70 to 85 per cent of the scale wage rate for the relevant working position;

g in order to terminate a definite-term contract whose term expires, the employer must inform the employee of the intention not to renew the contract at least 15 days before its expiry date;

h circumstances are now provided in which a labour contract is deemed to be invalid. These include situations where (1) the contents do not comply with labour laws; (2) the job is prohibited by law; or (3) the signatories do not have signing power;

i working time can be on a daily or weekly basis. Overtime working is allowed (1) if it is agreed to by the employee; (2) if on a daily basis, it does not exceed 12 hours a day, 30 hours per month, and 200 hours per year; and (3) if on a weekly basis, the total daily working time does not exceed 10 hours a day; and

j for the first time, the Labour Code 2012 allows labour outsourcing. This service is a conditional business that is permitted for certain types of jobs only, and a deposit is required for carrying out the business. The Labour Code 2012 provides general principles for this kind of service. For example, the lessor is required to pay salary

to a contractor at least equal to the salary the lessee pays for its own employee who has the same level and same job, and the maximum term for outsourcing is 12 months.

III SIGNIFICANT CASES

In a recent employment termination dispute, a foreign employee, the plaintiff, was appointed as the managing director of a foreign-invested company in Vietnam ('the company') by way of internal assignment from the parent entity of the company. In his appointment letter, the plaintiff agreed that any labour disputes would be governed by the law of his nationality and his country court would have the authority to settle any dispute. After working in Vietnam for several years, due to poor performance of the employee, the management of the parent entity of the company decided to terminate the labour contract with the employee. Disagreeing with this termination decision, the employee submitted a petition to the People's Court of Ho Chi Minh City to challenge the termination decision and asserted that Vietnam has jurisdiction over the labour dispute. Later, the employee also, concurrently, filed a lawsuit relating to the labour dispute in the country of his nationality. The employee's salary was paid by the company and not the parent entity.

The People's Court of Ho Chi Minh City, as the court of first instance, dismissed the case on the grounds that the case did not fall within the jurisdiction of the Vietnamese court according to the current Civil Procedural Code of Vietnam. The employee appealed this first instance judgment to the Appellate Court under the People's Supreme Court in Ho Chi Minh City. In November 2012, the Appellate Court confirmed the People's Supreme Court decision on the following grounds:

a first, the employee was not directly recruited by the company; instead, he was transferred by the parent company to the company in Vietnam by way of internal assignment; and

b second, the documents submitted showed that the employee had submitted a petition at the competent court of his nationality.

This recent decision by the Appellate Court helps bring clarity as to whether a Vietnamese court will assert jurisdiction over a labour dispute involving a foreign national seconded to work in Vietnam under a foreign labour contract.

IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

A written employment contract is required under the Labour Code 2012. Before the official start of work, the employer and the employee must directly enter into a written employment contract. For temporary jobs with an employment term of less than three months, an oral employment contract is permissible.

For an employee of between 15 and 18 years of age, the employer is required to obtain consent from his or her legal representative before execution of the contract.

With regard to seasonal jobs and specific jobs with terms of less than 12 months, a group of employees may authorise one employee among them to enter into a written contract with the employer on their behalf, which is legally binding on each employee in the group. However, a list of employees that expressly specifies their names, ages, genders, permanent addresses, occupations and signatures must be attached to the signed contract.

The Labour Code 2012 classifies employment contracts into three types as follows:

a indefinite-term contract;

b fixed-term contract of 12 to 36 months ('fixed-term contract'); and

c contract for seasonal or specific jobs of less than 12 months (collectively referred to as 'seasonal contract').

If, upon expiry of a fixed-term contract or a seasonal contract, the employee still continues his or her work, a new contract must be entered into within 30 calendar days of the expiry date of the signed contracts. Otherwise, such signed contracts shall respectively become indefinite-term contracts or fixed-term contracts of 24 months. If the parties agree to enter into a new fixed-term contract, then only one more fixed-term contract is permissible. If the employee, thereafter, still continues his or her work, an indefinite-term contract must be executed.

A seasonal contract may be temporarily entered into to replace an employee who is off work due to his or her participation in military service, maternity leave, sick leave, labour accidents, etc. However, entering into a seasonal contract with the intention of doing substantially regular work for 12 months or more is prohibited.

An employment contract should contain the following primary contents:

a name and address of the employer;

b name, date of birth, gender, residential address, identity card number, or other similar documents of the employee;

c scope of work and place of work;

d term of the contract;

e salary and time and method for payment, allowances and other extra amounts (if any);

f regime for salary increase;

g working and resting hours;

h labour protection equipment;

i social insurance and health insurance; and

j regime for training and improving professional skills/levels for the employee.

A request of one party to amend or change the signed employment contract must be notified to the other party at least three business days in advance, and the amendments are to be later made into appendices or a new labour contract. The appendix may also be used to regulate, in detail, specific terms and conditions of the signed contract. In this case, if the appendix results in any conflict with the terms of the signed contract, the signed contract shall prevail.

ii Probationary periods

According to the Labour Code 2012, any probationary period must be agreed upon by the employer and the employee. The parties may enter into a probationary contract, which should cover the following terms and conditions:

a name and address of the employer;
b name, date of birth, gender, residential address and identity card number or other similar documents of the employee;
c scope of work and place of work;
d term of the probationary contract;
e salary, payment method and time, and allowances (if any);
f work and rest hours; and
g labour protection equipment for the employee.

For one recruited or employed position, only one period of probation shall be allowed, and a probationary period for seasonal contracts is legally impermissible. The probation length depends on the nature and complexity of the work, and must not exceed 60 calendar days for job titles requiring qualification levels of three years, junior college, or more; 30 calendar days for levels of vocational qualifications or technical workers and professional staff; and six business days for other titles.

The probationary salary must be at least equal to 85 per cent of the agreed-upon official salary for the recruited or employed position. The employer must enter into an employment contract with the employee when he or she satisfactorily completes the trial work. At any time during the probationary period, either party may, at its sole discretion, terminate the probationary agreement without giving any advance notice or paying any compensation if the trial work is not satisfactory as so agreed.

iii Establishing a presence

It is legally unclear as to whether a foreign company without presence in Vietnam may employ Vietnamese employees. In practice, recruiting local employees, without having official presence in Vietnam, is impossible. This relates to the issues of registration of employees, contribution of social, health and unemployment insurance, and payment of personal income taxes. To deal with this issue, foreign employers normally sign a service contract with Vietnamese individuals for their performance of agreed-upon work.

According to the Labour Code 2012, an employer may sublease employees (in several limited jobs) through a licensed employment services agency. However, it is unclear whether a foreign company that does not have presence in Vietnam can hire employees via a licensed employment services agency. This problem has not been resolved by the Labour Code 2012, and it is hoped that upcoming implementing regulations of the Code will provide clearer guidance.

Generally the employer is required to declare its employees' salary payments to the tax authority and to withhold a certain percentage of its employees' salary payments in accordance with the tax laws. In addition, the employer must contribute statutory prescribed amounts of social insurance, health insurance and job-loss insurance if its employees are Vietnamese.

V RESTRICTIVE COVENANTS

In general, the validity of non-compete clauses in employment contracts is still in question. From a flexible point of view, the parties to the employment contract can freely agree upon such kinds of terms. However, with a stricter perspective, those kinds of conditions may be considered invalid because they violate an employee's fundamental right to work for any employer and at any place not prohibited by law. In practice, companies still put these non-compete clauses in employment contracts to gain as much protection as possible, despite the uncertainty in legality and enforceability. To prevent employees who are granted access to business and technology secrets from disclosing these secrets, the Labour Code 2012 allows the employer to enter into a separate (confidentiality) agreement with such employees. The agreement should address terms and conditions of the period of protection of these secrets, rights and duties, and damages due to the employees' violations.

VI WAGES

i Working time

The regular working hours shall not exceed eight hours a day or 48 hours a week. Working hours may be on an hourly, daily or weekly basis subject to the employer's options; on a weekly basis, the regular working hours must not exceed 10 hours a day or 48 hours a week. For jobs on the list of extremely heavy, toxic or dangerous working conditions as specified by the competent authorities, the regular working hours shall not exceed six hours a day. Night working hours run from 10pm to 6am of the subsequent day.

An employee who works at night is entitled to a break of at least 45 minutes, which shall be included in the number of working hours. Employees working on shifts are entitled to a break of at least 12 hours before moving to another shift.

ii Overtime

Overtime means a period of working time in addition to regular working hours as stipulated by law, in the collective labour agreement, and/or in the internal labour rules of the employers. Overtime arrangements require consent from the employees in advance. The amount of overtime may not exceed 50 per cent of regular working hours a day, 30 hours a month or 200 hours a year, except for special cases in which 300 hours a year are permissible. It should be noted that for a weekly working regime, overtime combined with regular working hours may not exceed 12 hours a day.

Employers must compensate employees for any overtime worked. The rates for overtime compensation must be at least (1) 150 per cent of the agreed-upon salary if working on regular working days; (2) 200 per cent if working on weekly days off; and (3) 300 per cent if working on public holidays and leave days with full pay. Any employee working at night shall be paid an additional amount of a minimum of 30 per cent of the agreed-upon regular salary. An employee working overtime at night shall be paid, in addition to the rates described above, an additional 20 per cent of his or her salary for such work conducted during the daytime.

VII FOREIGN WORKERS

Except for definite exemptions, foreigners who enter into Vietnam to work are legally required to have a work permit, which is applied for by the employer. The term of a work permit may not exceed two years and is renewable subject to the terms of the employment contract, letter of secondment or appointment, or similar documents.

Foreigners typically work in Vietnam by being employed by employers in Vietnam ('direct hire'), or by being seconded or appointed from parent companies overseas to their subsidiaries commercially present in Vietnam such as legal entities, branch offices or representative offices ('internal transfer'). For direct hire by Vietnamese employers, only management, executive, specialist, and technical positions for which Vietnamese employees are not sufficiently qualified, are permitted to work in Vietnam. In addition, for internal transfer, the law requires the seconded or appointed foreign employees to be previously employed by their parent companies for at least one year before the effective date of secondment or appointment, which must be officially reflected in the letter of appointment or secondment or similar documents.

Foreign employees who work without work permits shall be forced to exit or be expelled from Vietnam. Employers employing foreign employees without work permits are subject to an administrative fine. Since foreign directly hired employees are subject to the Labour Code 2012, they are protected by Vietnamese employment laws and regulations. It should be noted that income that foreign employees earn due to their performance of jobs in Vietnam is subject to Vietnamese personal income tax regardless of where the income is paid.

VIII GLOBAL POLICIES

Written internal labour rules are legally required by the Labour Code 2012 for employers with 10 or more employees. The rules regulate compliance with time, technology and management of business and production in accordance with the labour, labour discipline and other relevant laws. They must cover:

a work and rest hours;
b order in the workplace;
c labour safety and hygiene in the workplace;
d protection of assets, business and technology secrets, and intellectual property of the employer; and
e misconduct, disciplinary measures and procedures, and liability for damages.

Before issuance of the rules, the employers must consult with the trade union that acts for the rights and interests of the employees. The opinions of the trade union shall be written in minutes as a compulsory part of the application file for registration of the rules. To be effective, the rules must be registered with and approved in writing by the local labour authority. In reviewing the rules, the local authority may point out any improper content that may adversely affect the employees, and force the employers to revise the rules to address this content. No approval is granted until every revision is fully made as so required. The approved rules must be circulated to each employee, and key contents must be posted where necessary in the workplace. The rules may be in

Vietnamese and other languages; however, the rules submitted for registration with the local authority must be in the local language (i.e., in Vietnamese).

IX TRANSLATION

Under Vietnamese law, labour contracts and internal labour rules must be written in Vietnamese. Foreign languages may be used in bilingual documents. Although the position is unclear with regard to other related documents, it is recommended that they also be written in Vietnamese as the Vietnamese authorities (including Vietnamese courts) only accept Vietnamese documents.

Failure to comply with language requirements as described above may lead to the invalidity and/or unenforceability of the employment documents, as the case may be.

X EMPLOYEE REPRESENTATION

A trade union is defined under Vietnamese law as the body that represents and protects the lawful benefits and interests of the employees. Generally, the trade union is authorised to participate in, negotiate, sign, and supervise the implementation of collective labour agreements, wage scales, payrolls, internal labour rules, etc.; to assist in resolution of labour disputes; and to discuss and cooperate with the employers to formulate a harmonious, stable and progressive labour relationship within enterprises.

The trade union system consists of the Vietnam General Confederation of Labour and the trade unions at the provincial, district and grassroots levels. Grassroots trade unions are formed upon request of the employees at the enterprises with the assistance of, normally, the district-level trade union, provided that there are at least five employees registered as trade union members. A Vietnamese employee working in an enterprise has the right (but not obligation) to establish and join a grassroots trade union and to participate in its activities in accordance with the Law on Trade Unions and Vietnam's Trade Unions Charter.

Employers are required to facilitate and assist the establishment and operation of the grassroots trade union and, once the grassroots trade union is established, the employer must recognise it and create favourable conditions for its operation. Employers are also required to contribute 2 per cent of the payroll, which is used as the base salary for contribution of social insurance for the employees for the operation of the trade union, while the rate contributed by the employee shall be 1 per cent of his or her salary.

General meetings of trade unions must be convened periodically, at least once or twice in a period of five years, as the case may be. The general meeting of a trade union is the highest decision-making authority of this organisation. However, in the period between the two meetings, an executive committee elected by the trade union members shall be the authority managing the operation of the trade union.

XI DATA PROTECTION

i Requirements for registration

Vietnamese law generally requires consent from an individual when personal information from the individual is processed or stored in any way. However, there is no registration requirement with the state authorities for the collection, use or processing of personal data of an employee by an employer.

ii Cross-border data transfers

The transfer of data or onward transfer is not required to be registered with the Vietnamese authorities. However, the consent of the employee is necessary. The best practice is to sign an agreement on the collection and use of personal information between the employee and employer – this agreement should be an integral part of the labour contract.

iii Sensitive data

Vietnam does not currently have a regulation dealing solely with sensitive data privacy. Instead, different pieces of legislation refer to the protection of data privacy. Therefore, there is no uniform definition of 'sensitive data' in Vietnam.

Under the Civil Code, consent from an individual is required when collecting or publishing any information about the private life of that individual. The Civil Code does not, however, define what constitutes 'information about the private life'. Under this law, the honour, dignity and reputation of an individual shall be respected and be protected by law. Mail, telephone conversations, e-mail and other forms of electronic information of an individual must be protected and kept confidential. The information may not be accessed or controlled without the individual's permission or a decision issued by an authorised state body.

The law protects the individual's personal rights. Unauthorised access to, collection of, or publication of an individual's personal information and data, mail, telephone conversations, or e-mail constitutes a violation of one's personal rights. Consequently, a person whose personal rights have been violated may request a competent body or person to compel the infringing party to terminate the infringing act and to issue a public apology and retraction, and to compensate for damages. Under the Criminal Code, those who commit a violation against the regulations on personal privacy or safety of mail, telephone, and/or telegraph may be sentenced up to two years.

iv Background checks

Background checks are generally allowed in Vietnam. The Labour Code 2012, for the first time, requires the employee to provide the employer with information regarding residential address, education, professional skills, health status, and other information which relates to the execution of a labour contract, as required by the employer, before signing the labour contract.

Legally speaking, with respect to the personal information of an employee, the employer is allowed to ask for information from the employees, including a credit check and access to any criminal record, so long as the employee consents to providing it.

XII DISCONTINUING EMPLOYMENT

At-will termination is prohibited in Vietnam. The employer may only terminate a labour contract prior to its term under certain specific conditions as set out by the law. Depending on the grounds for termination, the requirements for severance or job-loss allowance, notice periods and procedures differ. Currently, termination of employment by the employer can be classified into three groups: (1) termination without cause; (2) termination with cause; and (3) dismissal due to serious violation of discipline.

Termination without cause includes:

a retrenchment (or redundancy) due to technological or organisational structure changes or for economic reasons;

b retrenchment due to a merger, consolidation, division or separation of the enterprise, or a transfer of the employer's assets to another employer;

c termination by operation of law (i.e., when the labour contract expires or when the task stated in the labour contract is completed);

d when the employer and employee agree to terminate the labour contract;

e when the employee is sentenced to serve a jail term, capital punishment, or is prevented from performing the job in accordance with a decision of the court;

f when the employee retires; or

g when the employee dies or is declared missing by a court.

Termination with cause happens when:

a the employee repeatedly fails to perform his or her work in accordance with the terms of his or her contract;

b the employee is ill and remains unable to work after having received treatment for a certain period of time;

c the employer must reduce the workforce after trying all measures to recover from an event of force majeure; and

d the employee fails to return to work within the prescribed time limit after a temporary suspension of labour contract performance.

Dismissal due to serious disciplinary violations happens when:

a the employee commits an act of theft, embezzlement, gambling, assault, use of drugs at the workplace, disclosure of trade or technology secrets, infringement of intellectual property rights of the employer, or commits other actions that are seriously detrimental to or threaten to cause serious detriment to the assets and interests of the employer;

b the employee who is disciplined by extension of the period before a wage increase recommits an offence during the period he or she is on trial or recommits an offence after he or she is disciplined in the form of removal from office; or

c the employee takes an aggregate of five days off in a month or 20 days off in a year without any proper reason.

The wrongful unilateral termination of a labour contract by an employer will result in the following consequences:

a the employer must accept the employee back to work in accordance with the signed labour contract and must pay wages, social insurance and health insurance for the period during which the employee did not work, plus at least two months' wages in accordance with the labour contract;

b if the employee does not wish to continue working, the employer must pay such employee, in addition to the compensation prescribed in (a), the severance allowance of half of one month's wage for each year of employment; or

c if the employer does not wish to accept the employee back to work and has the employee's consent, then, in addition to the compensation prescribed in (a) and the severance allowance in (b), the two parties may agree on additional compensation of at least two months' wages in accordance with the labour contract in order to terminate the labour contract.

Notably, the Labour Code 2012 is silent on the consequences of wrongful dismissal, which in fact was mentioned in the old Labour Code. Pursuant to the old Labour Code, where a competent body concludes that a disciplinary decision made by an employer is incorrect, the employer must withdraw such decision, apologise publicly and restore the honour and all material rights of the employee.

i Dismissal

As mentioned above, an employee can be dismissed due to serious disciplinary violations only on the grounds prescribed by law. In practice, some companies successfully specify certain other grounds for dismissal in their internal labour rules, which must be registered with the local labour authority.

There are strict statutory procedures for conducting dismissal procedures, for example, a formal meeting with the presence of the employer, employee, and trade union or employees' representatives must be convened and documented. The employer must consult with the trade union (if any) about the dismissal before or during the meeting. If the trade union disagrees with the dismissal, the employer must send a notice of the dismissal to the local labour authority. After 20 days from the receipt of the notice by the local labour authority, the employer may issue the decision on dismissal and send a copy of this decision to the local labour authority within 10 working days from the issuance date of the decision.

However, the employer must suspend the dismissal in the following circumstances:

a the employee is on sick leave or on any type of leave that is permitted by the employer;

b the employee is serving a temporary jail term;

c the investigation authority is inspecting the violation of the employee and the result has not been declared; or

d the employee is a female who: (1) has a child under one year old; (2) is pregnant; or (3) is on maternity leave.

In addition, the dismissal measure is not applicable to an employee who has lost his or her mental capacity or suffers similar mental illness while committing the breach of labour discipline.

Also, if the employer wishes to terminate or dismiss an official of a trade union, it must reach an agreement with the grassroots trade union or higher-level trade union. If no agreement is reached, the employer is required to report to the local labour authority and terminate the employment with such employee within 30 days from the date of reporting to the local labour authority.

Unlike other types of labour termination, an employee who is dismissed due to the serious violation of labour discipline is not entitled to any kind of allowance. However, due to the complexity in grounds, evidence and procedures of dismissal, in practice, many employers prefer to enter into a mutual termination agreement with the employee and are willing to pay an amount of money in order to reduce the risk of a lengthy dispute.

ii Redundancies

An employer can make an employee redundant due to technological changes such as changes in part or all of the equipment, machinery or technology processes, or changes in organisational structure, in cases of a merger, consolidation, dissolution of some departments or units, or where they face difficulty in economic conditions.

If such changes lead to a mass lay-off, the employer is required to form and implement a plan of labour utilisation, which must be reviewed by the trade union or representatives of the employees. This plan must identify:

a the number of employees who shall continue to be employed or be retrained in order to meet new working requirements;
b the number of retiring employees;
c the number of employees who shall be transferred to part-time jobs;
d the number of employees who shall be made redundant; and
e the method and financial resources required to implement the plan.

The termination of multiple employees on this basis can be implemented only after consultation with the grassroots trade union or employees' representatives and after the local labour authority has been served with a 30-day notice by the employer.

Prior notice to the redundant employees consequently is not required.

A redundant employee who has at least 12 full months of service shall be entitled to job-loss allowance, which is one month's salary for each year of service, not less than two months' salary. The length of service excludes months of unemployment insurance contribution. During the period of unemployment insurance contribution, the job-loss allowance shall be paid by the Social Insurance Fund, not by the employer.

XIII TRANSFER OF BUSINESS

Vietnamese law does not have a separate business transfer law that protects employees affected by a merger or acquisition. Consequently, the labour laws and enterprise laws provide separate provisions to deal with this issue.

According to the labour laws, the succeeding employer, in case of a merger, consolidation, division or separation, has the responsibility to continue performing the employment contract of current employees of the target company and to amend the

labour contracts accordingly. If such employer cannot employ all current employees, a labour utilisation plan covering the contents as described above must be formed and implemented. If any employee becomes unemployed, the job-loss allowance shall be paid by the succeeding employer.

If there is a transfer of the enterprise's asset ownership, the selling enterprise (not the purchasing enterprise) shall have responsibility for forming the plan of labour utilisation.

According to the enterprise laws, before entering into any restructuring arrangement, such as a merger, consolidation, division or separation, a plan of labour utilisation must be approved of by the directors of the employer. After the restructuring arrangement is completed, the succeeding companies shall take over all responsibilities of the merged or consolidated companies, including responsibilities ensuing from employment relationships. In case of division or separation, the divided or separated company and the dividing and separating company shall have joint and several liability for the employment relationship.

XIV OUTLOOK

The adoption of the Labour Code 2012 will cause a considerable change in the labour market of Vietnam. The new provisions on dismissal, labour outsourcing and validity of labour contracts may be the hot topics of 2013. Although Vietnam's traditional pro-employee spirit still stands, the Labour Code 2012 does address some practical needs of employees, for example, the obligation of an employee, whose job directly relates to business and technology secrets of the employer, to keep such secrets confidential, and the availability of labour outsource services. The Labour Code 2012 also provides some protective provisions in favour of female employees. For example, a female employee is now given the right to terminate the employment contract if she suffers sexual harassment in the workplace. (Under the old Labour Code (i.e., the Labour Code of 1994), sexual harassment was not considered a statutory ground for termination by an employee.) In order to terminate on this ground, the employee may terminate on only three days' prior notice. In addition, she is entitled to receive unemployment insurance paid by the state. As with other statutory grounds for termination, the employer may choose to factually dispute that harassment has, in fact, occurred and the employee would have the burden of proof.

It is anticipated that there will be approximately 21 decrees and circulars that will provide detailed guidance for implementation of the Labour Code 2012; thus, some of the provisions of the Labour Code 2012 may not be implemented, in practice, before the end of 2013.

Appendix 1

ABOUT THE AUTHORS

MICHAEL K LEE

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Michael K Lee is a partner and the head of the corporate and commercial team in the Vietnam offices of Tilleke & Gibbins. Lauded by *Chambers Asia* for his 'thorough approach', Michael counsels clients and manages cases on a wide range of corporate matters, including real estate, mergers and acquisitions, licensing, commercial transactions, regulatory affairs (particularly for the life sciences and high technology industries) and labour.

A registered foreign lawyer in Vietnam and an arbitrator for the Vietnam International Arbitration Centre, Michael has been practising in Vietnam since 2007, previously with Mayer Brown JSM. Also a licensed lawyer in California (1996), Texas (1997) and Colorado (1998), Michael has extensive experience litigating civil and criminal matters in the United States. He is fluent in English and Korean.

Michael has been identified as a leading lawyer in Vietnam in the areas of corporate and M&A (by *Chambers Asia-Pacific* and *PLC Which Lawyer?*), projects, infrastructure and energy (by *Chambers Asia*) and real estate (by *Asialaw Leading Lawyers*).

HUONG THI THANH NGUYEN

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Huong Thi Thanh Nguyen is an attorney-at-law practising in the firm's Vietnam offices. Huong represents international clients on mergers and acquisitions and in banking and finance matters.

Deeply knowledgeable on the opportunities and pitfalls inherent in investing in Vietnam, Huong collaborates with clients to achieve seamless market entry, successful market integration and sustainable market expansion. She also assists with the sale of entire businesses and the components thereof. In her banking and finance practice, she represents international financial institutions on licensing and establishment, ongoing regulatory compliance, financial instruments and investment in regional assets.

DOAN NGOC TRAN

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Doan Ngoc Tran is a trainee lawyer in the corporate and commercial team of the firm's Ho Chi Minh City office. Doan works under the supervision of partners and attorneys on corporate matters including drafting legal documents and handling licensing and post-licensing tasks, including investment certificates, enterprise registration certificates, representative office licences and tax declarations.

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