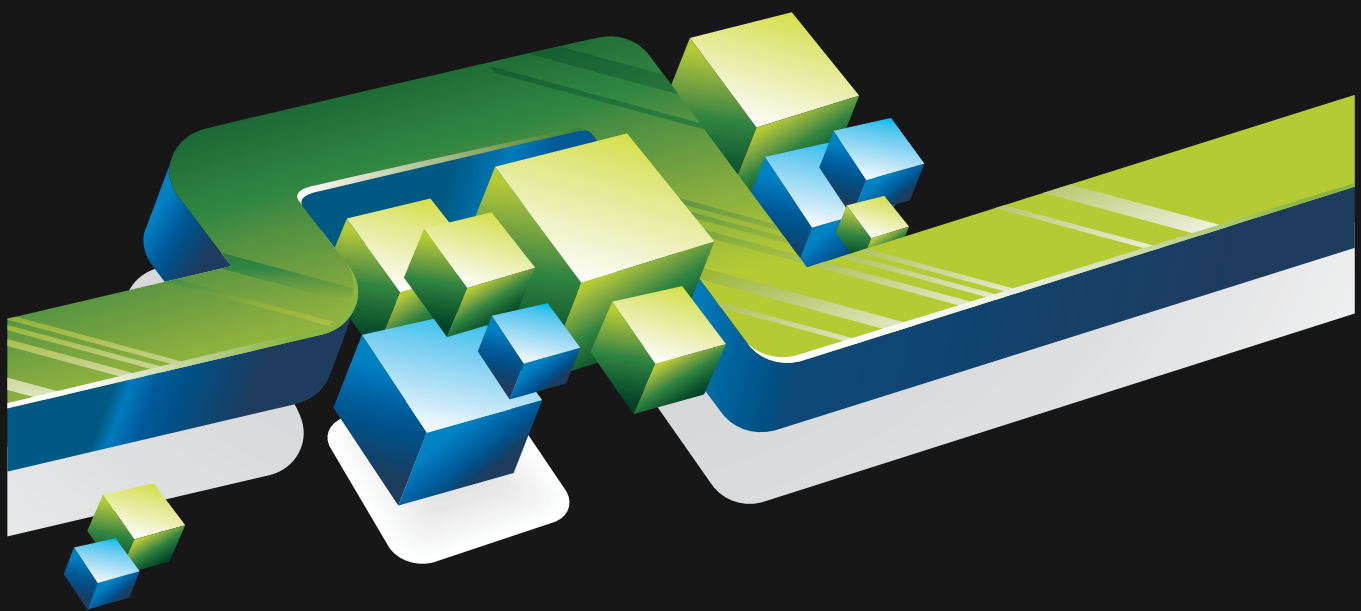
Tilleke & Gibbins

How to Hire and Fire in Vietnam

A guide to Vietnamese labor law



Overview

Labor Law

The core legislation that governs labor relations in Vietnam is the Labor Code, first passed by the National Assembly in 1994. The original Labor Code has since been superseded by the new Labor Code of 2012, which took effect on May 1, 2013, and introduced significant new developments relating to labor contracts, work hours, labor outsourcing, internal labor rules, and foreign employees. Employment is further governed by a large set of guiding decrees and circulars. A separate Law on Trade Unions, the latest version of which also came into force in 2013, governs the establishment and activities of trade unions. During the transition to the new laws, as the guiding legislation is updated and replaced, the interpretation and implementation of labor law may be inconsistent and may vary from authority to authority.

Vietnamese labor law is generally considered employee-friendly. The law only allows for two consecutive fixed-term labor contracts (of one to three years); thereafter, the next contract must be an indefinite-term contract. It is difficult to discipline or fire an employee without internal labor rules in writing. The internal labor rules must be registered with the local labor authority and communicated to the employees, and a trade union's opinion on the internal labor rules must be obtained prior to filing the rules with the labor authority. At-will termination of employees is not possible in Vietnam. Termination of employees must be based on statutory grounds and is subject to strict formalistic requirements and procedures.

This handbook is intended to provide you with a brief introduction on how to hire and fire in Vietnam, and includes special sections on foreign employees and trade unions. It should not be used as a substitute for case-specific advice.

Labor Contracts

Basic Rules

Do the Vietnamese labor laws apply to my company?

Vietnam's labor legislation applies to virtually all employers who have employees working in Vietnam under labor contracts, regardless of whether those employees are Vietnamese citizens or foreign nationals.

The labor legislation, however, does not apply to foreign nationals who are working in Vietnam via an internal company transfer under a foreign labor contract (e.g., cases where a foreign parent company assigns its employee to work at its Vietnam-based subsidiary or representative office).

Do I need to enter into labor contracts with my employees?

Yes, an employer must sign labor contracts with its employees before the employees start working for the employer. Labor contracts must be made in writing, with the exception of contracts for temporary work of less than three months, in which case an oral labor contract may be used.

What must be included in a labor contract?

A labor contract must contain the following main provisions:

- Work to be performed, job location, and term of contract;
- Wages (including rate, method and time of payment, allowances and other additional payments, and regime for wage increases and promotion);
- Working hours, rest breaks, and holidays;
- Personal protective equipment for the employee;
- Social and health insurance for the employee; and
- Training and skill improvement for the employee.

What kinds of protective covenants may I have in the labor contract?

Covenants on confidentiality and protection of intellectual property and business secrets are allowed via provisions in the labor contract or separate agreements.

The legality of non-solicitation and non-competition covenants is not directly addressed under the Labor Code or other labor legislation. Instead, the Civil Code may be applicable. Under the Civil Code, provisions on non-solicitation (of employees and customers) could potentially be enforceable. However, the spirit of the Labor Code strongly suggests that provisions on non-competition of any kind would not be allowed.

What types of labor contracts are allowed under Vietnamese law?

A labor contract may be one of the following types:

- **Indefinite-term labor contract.** Open-ended labor contract with no fixed term.
- **Definite-term labor contract.** Labor contract with fixed term of between 12 and 36 months. Definite-term contracts may only be renewed once. A second renewal automatically turns the contract into an indefinite-term contract.
- **Seasonal or specific-job labor contract**. Labor contract with duration of less than 12 months. The law explicitly prohibits employers and employees from entering into a seasonal or specific-job labor contract in respect of work which is regular and has a duration of 12 months or more, except to temporarily replace an employee who has taken leave of absence for temporary reasons, such as maternity leave, sick leave, or leave as the result of a work-related accident.

Is a probationary period allowed?

Yes, the Labor Code allows for a probationary period of up to 60 days for jobs that require high-level specialized or highly technical skills (e.g., jobs that require at least a college degree), 30 days for intermediate-level specialized or technical expertise, and 6 working days for other jobs. The employee's wage during the probationary period must be at least 85% of the full wage for the relevant position.

Either party may terminate the labor contract during the probationary period without giving advance notice, and without any requirement for compensation, if the probationary work does not satisfy agreed-upon requirements.

A separate probation contract may be entered into prior to entry into the labor contract.

Labor Outsourcing

Is labor outsourcing allowed in Vietnam?

Yes, under the Labor Code, labor outsourcing (i.e., the practice whereby a company contracts with a third party to provide services that might otherwise be handled in-house) is permitted in Vietnam. However, it is permitted only for certain types of jobs, and the term may not exceed 12 months. This limitation on duration is placed upon the outsourced employee and not the enterprise providing the outsourced employee; thus, it would not be possible for an employee to switch enterprises to circumvent the 12-month limitation. The law does not appear to prevent an employer from replacing the outsourced employee with another after 12 months.

The company using the outsourced employee must pay salary to the outsourced employee at least equal to the salary that the company pays its own employees who have the same professional qualifications and are doing the same job or a job of the same value.

Currently, labor outsourcing is restricted to the following types of jobs:

- Interpreters, translators, and stenographers
- Administrative assistants
- Receptionists
- Tour guides
- Sales support staff
- Project support staff
- Programmers of production machine systems
- Manufacturers/installers of broadcasting and telecommunications equipment
- Staff that operate, inspect, and/or repair construction machinery or electrical systems in manufacturing
- Cleaning and sanitation staff for buildings and factories
- Document editors
- Bodyguards and security guards
- Staff for marketing and customer care via telephone
- Financial and tax consultants
- Automotive mechanics
- Industrial scanners/drafters and interior decorators
- Drivers

Labor Discipline

Overview

What is "labor discipline"?

Labor discipline refers to the regulations for employee discipline, protection and confidentiality of the employer's technology and other property, and management of business and production. A company's labor discipline is laid out in a written document called the "internal labor rules," which may be mandatory for your workplace (see below).

Internal Labor Rules

Do I need internal labor rules?

Employers with 10 or more employees must have internal labor rules (ILRs) in writing, which must be registered with the local labor authority. Moreover, the 2012 Labor Code imposes an obligation on employers to consult the opinion of a trade union prior to issuing the ILRs. If no trade union exists at the company, the employer must consult a trade union at the district level (normally a quasi-government entity).

An employee who breaches the ILRs may, depending on the seriousness of the breach, be disciplined in accordance with the permitted disciplinary measures (see below) set out in the ILRs. It is important to be aware that an employer is normally prohibited from dealing with an employee for conduct in breach of labor discipline when such conduct is not explicitly stipulated in the ILRs.

What contents must the internal labor rules contain?

The ILRs are required to contain the following minimum contents:

- Working hours and rest breaks;
- Rules and order in the enterprise;
- Labor safety and hygiene in the workplace;
- Protection of assets, business secrets, and confidentiality of technology and intellectual property of the enterprise;
- Conduct by employees which constitutes a breach of labor rules; and
- Penalties imposed for breaches of the ILRs, and liability for damages.

Permitted Disciplinary Measures

What disciplinary measures are permitted?

The forms for dealing with breaches of labor discipline are limited to:

- Reprimand (oral or written);
- Deferral of wage increase for a maximum six months or demotion (i.e., the employee is relieved from his/her current position in the enterprise and demoted to the rank of an "ordinary" employee); and
- Dismissal.

The application of multiple forms of penalty for a single breach is prohibited. If an employee's act involves multiple breaches of labor discipline at the same time, then only the highest form of penalty corresponding to the most serious breach may be applied for all breaches.

Under what circumstances may I dismiss an employee?

An employee may be dismissed due to disciplinary violations only in the following cases:

- **Wrongful acts**
  - The employee commits an act of theft or embezzlement; discloses technology or business secrets of the employer; infringes the intellectual property rights of the employer; or commits an act of gambling, deliberate violence causing injury, or illegal drug use at the workplace; or
  - The employee is guilty of other conduct causing serious loss or damage or which threatens to cause particularly serious loss or damage to the property or interests of the employer.
- **Absence without leave.** The employee, of his or her own accord, takes an aggregate of 5 days off in one month or an aggregate of 20 days off in one year without proper reason or permission.
- **Recurrent offender.** The employee, while still being disciplined in the form of deferral of wage increase or demotion for a particular offense, recommits a second offense of the same type and nature as the first offense.

  The second offense must be committed within a certain time period depending on the type of disciplinary decision; the time period for employees who have been disciplined by deferral of wage increase is six months, and the time period for employees who have been demoted due to breach is three years.

  Upon the expiry of these time periods, and provided that a second offense is not committed, the employee is automatically cleared of all charges.

Disciplinary Procedures

How do I deal with a breach of labor discipline?

The following requirements must be met when dealing with a breach of labor discipline:

- The acts that constitute breaches of labor discipline and the consequences for those breaches must have been clearly set out in the ILRs;
- The employer must have evidence proving the employee's fault;
- The employer must conduct a disciplinary hearing and follow prescribed procedures, including properly notifying the employee of the allegations and the hearing;
- A trade union must be given notice of the hearing and be allowed to attend the hearing;
- The employee must be present and have the right to defend himself/herself or to employ a lawyer or another person to do so; and
- Minutes must be prepared after the disciplinary hearing.

What is the time limit for initiating disciplinary procedures against an employee?

A breach related to finance, assets, or disclosure of technological or business secrets of the employer must be dealt with within 12 months from the date the breach occurred (or, in practice, from the date of discovery of the breach). For all other breaches, the breach must be dealt with within 6 months from the date of the breach.

Termination

Legal Grounds

How can I terminate a labor contract?

At-will termination is not allowed in Vietnam. An employer may only terminate a labor contract under specific conditions as set out in the law, including:

- **Disciplinary hearing.** An employee may be dismissed due to serious disciplinary violations (see page 9) by way of an internal disciplinary hearing. Generally, terminations on this ground are not performance-based.
- **Unilateral termination by employee.** An employee working under a definite-term labor contract, or a seasonal or specific-job labor contract with duration of less than 12 months, may in certain cases unilaterally terminate a labor contract prior to its expiry. Such cases include but are not limited to the employee being assigned the incorrect job or workplace, not receiving wages as agreed, or being unable to work due to health or family issues. An employee working under an indefinite-term labor contract may unilaterally terminate the contract by giving 45 days' advance notice and no reason is needed.
- **Unilateral termination by employer.** An employer may unilaterally terminate a labor contract only under specific circumstances as set out by the law (see page 13).

- **Expiry of term.** An employer may terminate a labor contract when it expires, unless the employee is a part-time trade-union officer, in which case his or her labor contract is automatically extended until the expiry of the period of such office. A notice of termination must be provided to the employee at least 15 days prior to the date of expiry of a definite-term labor contract.
- **Completion of job.** A specific-job labor contract may be terminated when the job has been completed.
- **Mutual termination.** Both parties may agree to terminate the labor contract.
- **Retirement.** When the employee has satisfied the conditions of period of employment for social insurance contributions and reaches the age of pension entitlement (60 years old for male employees, 55 years old for female employees), the employment may be terminated.
- **Employer ceases operation.** Labor contracts may be terminated if the employer has decided to wind up its business and cease operations (or if an 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 deceased).
- **Death or incapacity.** Termination can occur if the employee dies or is declared by a court to have lost legal capacity for civil acts, or to be missing, or to be deceased.
- **Incarceration.** An employer may terminate the labor contract if 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.

Under what circumstances may I unilaterally terminate an employee?

In addition to dismissal pursuant to a disciplinary hearing, a labor contract may be unilaterally terminated in the following circumstances:

(a) The employee repeatedly fails to perform work as required under the labor contract and/or ILRs and the employee is provided two written warnings within one calendar month and still fails to remedy the situation.
(b) The employee is ill or injured and unable to work, despite treatment, for a period of 12 consecutive months in the case of an indefinite-term labor contract, 6 consecutive months in the case of a definite-term labor contract, and more than half the duration of the contract in the case of a seasonal or specific-job labor contract with a duration of less than 12 months.
(c) The employer is required to reduce the number of jobs due to a *force majeure* event.
(d) The employee fails to return to the workplace upon the expiry of the term of suspension of a labor contract, such as due to military service.

In addition to the “unilateral termination” set out above, an employer who must carry out redundancy due to merger, consolidation, division, or separation, because of corporate restructuring or change in technology, may terminate an employee provided that a "labor usage plan" has been adopted (see further on page 14).

In which cases may I not unilaterally terminate an employee?

Unilateral termination of a labor contract by the employer is illegal in the following circumstances:

- The employee is undergoing treatment for sickness or an occupational accident, unless the conditions in case (b) mentioned above are met;
- The employee is on leave (including annual leave, personal leave, parental leave, or any other type of leave agreed to by the employer);
- The termination is due to a female employee's marriage, pregnancy, or maternity leave, or because she is nursing a child under 12 months; or
- The termination is without legal cause or is in breach of the required notice period (see below) or other mandated procedures of the employer.

Notice Periods

How much notice must I give employees in cases of unilateral termination?

For unilateral termination by the employer based on items listed (a) through (d) on page 13, the following periods of advance notice must be provided to the employee:

- **Indefinite-term labor contract:** Minimum of 45 calendar days
- **Definite-term labor contract:** Minimum of 30 calendar days
- **Seasonal or specific-job labor contract:** Minimum of 3 calendar days

On a related note, there is no notice period for termination based on disciplinary hearing or redundancy. Termination based on disciplinary hearing, however, requires adherence to the strict formalities with respect to notice and conduct of the hearing, while termination based on redundancy requires the drafting of a "labor usage plan," the consultation with the trade union on the plan, and a waiting period of 30 working days after filing with the labor authorities prior to a dismissal notice to the affected employees.

Foreign Employees

Work Permits

When do foreign employees need work permits?

All foreign citizens working in Vietnam must have a work permit, regardless of the length of time they intend to work in Vietnam, unless exempted. Foreign workers exempted from work permits include, among others, capital-contributing members or owners of limited liability companies, members of the board of management of shareholding companies, and lawyers. The maximum term of work permits for foreign employees is two years.

How does a foreign employee qualify for a work permit?

To qualify for a work permit, a foreign employee must:

- Qualify as a manager, executive, expert, or technician under Vietnamese law;
- Undergo a health check; and
- Have a clean criminal record.

On a related note, employers (with certain exceptions) must annually report, in a "foreign labor usage plan," the positions for which they need/desire to employ foreign workers and explain why Vietnamese workers cannot be hired for each such position.

This annual foreign labor usage plan must be submitted to and approved by the Chairperson of the People's Committee in the province or city in which the employer's head office is located. If the plan is approved, the Chairperson will issue a letter of consent to the employer, a copy of which must be submitted together with the work permit application for each foreign worker.

Are there any other limitations on hiring foreign workers?

In general, no. However, in cases where foreign nationals work in Vietnam via an internal company transfer under a foreign labor contract (e.g., cases where a foreign parent company assigns its employee to work at its Vietnam-based subsidiary or representative office), the foreign national must have been employed by the transferring company for at least one year. Moreover, at least 20% of the total number of managers, executive directors, and experts working for such Vietnam-based entity must be Vietnamese citizens. However, each such entity is permitted to have a minimum of three managers, executive directors, and experts who are not Vietnamese.

It should be noted that the income that foreign employees earn from their work in Vietnam is subject to Vietnamese personal income tax, regardless of where the income is paid.

Trade Unions

Overview

What are the functions of trade unions?

There are two levels of trade unions under Vietnamese law:

- **Grassroots trade unions** (those formed within a particular company or organization by employees) whose functions include:
  - Providing guidance and advice on labor contracts;
  - Providing legal advice to employees on labor issues, social insurance, medical insurance, and other rights and interests of the employees;
  - Gathering the opinions/positions of employees on employment policies (such as ILRs, salary, and bonus) and communicating them to the employer;
  - Negotiating collective labor agreements and representing the employees in collective labor disputes or litigation; and
  - Participating in meetings for settlement of labor disputes and requesting state agencies and/or related agencies/organizations to settle labor disputes.

- **Directly superior trade unions** (supervisory "trade unions" designated to a particular city or jurisdiction which are normally government-controlled entities) whose functions include:

- Assisting grassroots trade unions with their functions and duties, disseminating information to the employees, and educating and raising the understanding of employees in regard to labor and trade union issues and regulations;
- Assuming the responsibilities of grassroots trade unions in companies and organizations that have not yet established a grassroots trade union; and
- Persuading employees to join trade unions and to establish a grassroots trade union in their enterprise, agency, or organization.

What obligations do employers have to trade unions?

While an employer is not obligated to have a trade union, it does have the responsibility to facilitate employees to establish or join trade unions if the employees so desire. Employers must guarantee operational conditions for trade unions. In addition, the Labor Code strictly prohibits employers from hindering or causing difficulty for employees to establish or join a trade union.

Additionally, the law requires trade union participation in the establishment of the company's ILRs; wage and bonus policies; during disciplinary proceedings; and for terminations based on redundancy due to corporate restructuring, changes of technology, and changes for economic reasons. If a grassroots trade union does not exist within the company, the relevant directly superior trade union will take up its role. Consequently, employers may consider encouraging the establishment of a trade union within the company in order to avoid an additional layer of government involvement and intervention into its regime of employee discipline.

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About

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In Vietnam, our high-caliber intellectual property practice is widely recognized as one of the best in the country, while our corporate and commercial practice has been highly ranked in commercial transactions and M&A, labor and employment, tech/media/telecom, and regulatory affairs by such surveys as *Chambers Asia Pacific, The Legal 500 Asia Pacific, Asialaw Profiles,* and *Asian Legal Business*.

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