
THE EMPLOYMENT LAW REVIEW

SIXTH EDITION

EDITOR
ERIKA C COLLINS

LAW BUSINESS RESEARCH

THE EMPLOYMENT LAW REVIEW

The Employment Law Review
Reproduced with permission from Law Business Research Ltd.

This article was first published in The Employment Law Review - Edition 6
(published in February 2015 – editor Erika C Collins).

For further information please email
Nick.Barette@lbresearch.com

THE EMPLOYMENT LAW REVIEW

Sixth Edition

Editor
ERIKA C COLLINS

LAW BUSINESS RESEARCH LTD

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

THE ASSET TRACING AND RECOVERY REVIEW

THE INTERNATIONAL INSOLVENCY REVIEW

THE OIL AND GAS LAW REVIEW

THE FRANCHISE LAW REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

THE SHIPPING LAW REVIEW

THE ACQUISITION AND LEVERAGED FINANCE REVIEW

THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW

PUBLISHER
Gideon Robertson

BUSINESS DEVELOPMENT MANAGER
Nick Barette

SENIOR ACCOUNT MANAGERS
Katherine Jablonowska, Thomas Lee

ACCOUNT MANAGER
Felicity Bown

PUBLISHING COORDINATOR
Lucy Brewer

MARKETING ASSISTANT
Dominique Destrée

EDITORIAL ASSISTANT
Shani Bans

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Timothy Beaver

SUBEDITOR
Anna Andreoli

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2015 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients.

Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of February 2015, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-909830-36-3

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ALI BUDIARDJO, NUGROHO, REKSODIPUTRO

ALRUD LAW FIRM

ARIAS, FÁBREGA & FÁBREGA

ATTORNEYS AT LAW BORENIUS

BAYKANIDEA LAW OFFICES

BOEKEL DE NERÉE

CASTEGNARO

CONSORTIUM RODRÍGUEZ, ARCHILA, CASTELLANOS,
SOLARES & AGUILAR, SC

CONSORTIUM TABOADA & ASSOCIATES

DAI-ICHI FUYO LAW OFFICE

DELOITTE ADVOKATFIRMA AS

DENTONS

ENSAFRICA

ESTUDIO GRAU ABOGADOS

FERRAIUOLI LLC

GEORGE Z GEORGIU & ASSOCIATES LLC

GIANNI, ORIGONI, GRIPPO, CAPPELLI & PARTNERS

GONZALEZ CALVILLO, SC

HAMILTON ADVOKATBYRÅ KB

HERBERT SMITH FREEHILLS

KIRK LARSEN & ASCANIUS

KOCHHAR & CO

KYRIAKIDES GEORGOPOULOS LAW FIRM

LAW FIRM ŠAFAR & PARTNERS, LTD

MATHESON

MATTOS FILHO, VEIGA FILHO, MARREY JR E QUIROGA ADVOGADOS

PERCHSTONE & GRAEYS

PROSKAUER ROSE LLP

SAGARDOY ABOGADOS

SAYENKO KHARENKO

SÉRVULO & ASSOCIADOS – SOCIEDADE DE ADVOGADOS, RL

SHERRARD KUZZ LLP

SIGUION REYNA, MONTECILLO & ONGSIAKO LAW OFFICE

SKRINE

SOŁTYSIŃSKI KAWECKI & SZLĘZAK

SBM LEGAL

TILLEKE & GIBBINS

TRIAI & TRIAI

URENDA, RENCORET, ORREGO Y DÖRR

VAN OLMEN & WYNANT

VANGARD

WALDER WYSS LTD

YOON & YANG LLC

CONTENTS

| | |
|---|---|
| Editor's Preface |ix |
| <i>Erika C Collins</i> | |
| Chapter 1 | EMPLOYMENT ISSUES IN CROSS-BORDER M&A TRANSACTIONS.....1 |
| <i>Erika C Collins and Michelle A Gyves</i> | |
| Chapter 2 | GLOBAL DIVERSITY AND INTERNATIONAL EMPLOYMENT.....9 |
| <i>Erika C Collins</i> | |
| Chapter 3 | SOCIAL MEDIA AND INTERNATIONAL EMPLOYMENT.....17 |
| <i>Erika C Collins and Jon L Dueltgen</i> | |
| Chapter 4 | AUSTRALIA.....26 |
| <i>Miles Bastick, Shivchand Jhinku and Kelly Xiao</i> | |
| Chapter 5 | BELGIUM.....43 |
| <i>Chris Van Olmen</i> | |
| Chapter 6 | BRAZIL.....59 |
| <i>Vilma Toshie Kutomi</i> | |
| Chapter 7 | CANADA.....82 |
| <i>Erin R Kuzz and Leah Simon</i> | |
| Chapter 8 | CHILE.....99 |
| <i>Sebastián Merino von Bernath and Roberto Lewin V</i> | |
| Chapter 9 | CHINA.....114 |
| <i>Erika C Collins and Ying Li</i> | |

| | |
|-------------------|--|
| Chapter 10 | CYPRUS133 <i>George Z Georgiou, Anna Praxitelous and Natasa Aplikiotou</i> |
| Chapter 11 | DENMARK 149 <i>Tommy Angermair</i> |
| Chapter 12 | FRANCE..... 165 <i>Yasmine Tarasewicz and Paul Romatet</i> |
| Chapter 13 | GERMANY..... 181 <i>Thomas Griebe and Jan-Ove Becker</i> |
| Chapter 14 | GIBRALTAR.....202 <i>Alan Buchanan and Joseph Gomez</i> |
| Chapter 15 | GREECE.....216 <i>Effie G Mitsopoulou and Ioanna C Kyriazi</i> |
| Chapter 16 | GUATEMALA233 <i>Lionel Francisco Aguilar Salguero</i> |
| Chapter 17 | HONG KONG.....240 <i>Jeremy Leifer</i> |
| Chapter 18 | INDIA.....252 <i>Manishi Pathak</i> |
| Chapter 19 | INDONESIA.....270 <i>Nafis Adwani and Indra Setiawan</i> |
| Chapter 20 | IRELAND286 <i>Bryan Dunne and Bláthnaid Evans</i> |
| Chapter 21 | ITALY.....306 <i>Raffaella Betti Berutto</i> |
| Chapter 22 | JAPAN.....320 <i>Shione Kinoshita, Shiho Azuma, Yuki Minato, Hideaki Saito, Ryo Miyashita, Keisuke Tomida and Tomoaki Ikeda</i> |

| | | |
|-------------------|--|-----|
| Chapter 23 | KOREA..... | 333 |
| | <i>Kwon Hoe Kim, Don K Mun and Young Min Kim</i> | |
| Chapter 24 | LATVIA | 346 |
| | <i>Ivo Maskalāns</i> | |
| Chapter 25 | LUXEMBOURG | 362 |
| | <i>Guy Castegnaro, Ariane Claverie, Céline Defay, Christophe Domingos, Laurence Chatenier and Lorraine Chéry</i> | |
| Chapter 26 | MALAYSIA | 385 |
| | <i>Siva Kumar Kanagasabai and Selvamalar Alagaratnam</i> | |
| Chapter 27 | MEXICO | 405 |
| | <i>Miguel Valle, Jorge Mondragón and Rafael Vallejo</i> | |
| Chapter 28 | NETHERLANDS..... | 424 |
| | <i>Eugenie Nunes and Afra Pepping</i> | |
| Chapter 29 | NEW ZEALAND | 448 |
| | <i>Bridget Smith and Tim Oldfield</i> | |
| Chapter 30 | NICARAGUA..... | 461 |
| | <i>Bertha Xiomara Ortega Castillo</i> | |
| Chapter 31 | NIGERIA..... | 471 |
| | <i>Olawale Adebambo, Folabi Kuti and Ifedayo Iroche</i> | |
| Chapter 32 | NORWAY | 488 |
| | <i>Gro Forsdal Helvik</i> | |
| Chapter 33 | PANAMA..... | 500 |
| | <i>Vivian Holness</i> | |
| Chapter 34 | PERU | 512 |
| | <i>José Burgos C</i> | |
| Chapter 35 | PHILIPPINES..... | 526 |
| | <i>Rolando Mario G Villonco, Rafael H E Khan and Carmina Marie R Panlilio</i> | |

| | | |
|-------------------|---|-----|
| Chapter 36 | POLAND.....540 <i>Roch Pałubicki and Karolina Nowotna</i> | 540 |
| Chapter 37 | PORTUGAL.....555 <i>Magda Sousa Gomes</i> | 555 |
| Chapter 38 | PUERTO RICO.....572 <i>Katherine González-Valentín, María Judith (Nani) Marchand-Sánchez, Rafael I Rodríguez-Nevarés, Luis O Rodríguez-López and Tatiana Leal-González</i> | 572 |
| Chapter 39 | RUSSIA.....586 <i>Irina Anyukhina</i> | 586 |
| Chapter 40 | SAUDI ARABIA608 <i>Angad T Husein, John M B Balouziyeh and Jonathan G Burns</i> | 608 |
| Chapter 41 | SLOVENIA.....623 <i>Vesna Šafar and Martin Šafar</i> | 623 |
| Chapter 42 | SOUTH AFRICA641 <i>Stuart Harrison, Brian Patterson and Zahida Ebrahim</i> | 641 |
| Chapter 43 | SPAIN658 <i>Iñigo Sagardoy de Simón and Gisella Alvarado Caycho</i> | 658 |
| Chapter 44 | SWEDEN677 <i>Erik Danhard</i> | 677 |
| Chapter 45 | SWITZERLAND.....690 <i>Ueli Sommer</i> | 690 |
| Chapter 46 | TURKEY.....705 <i>Serbülent Baykan and Hande Erdoğan</i> | 705 |
| Chapter 47 | UKRAINE.....719 <i>Svitlana Kheda</i> | 719 |
| Chapter 48 | UNITED ARAB EMIRATES.....733 <i>Ibrahim Elsadig</i> | 733 |

| | |
|-------------------|---|
| Chapter 49 | UNITED KINGDOM 743 <i>Daniel Ornstein and Peta-Anne Barrow</i> |
| Chapter 50 | UNITED STATES 757 <i>Allan S Bloom and Carolyn M Dellatore</i> |
| Chapter 51 | VIETNAM 771 <i>Michael K Lee, Annika Svanberg and Doan Ngoc Tran</i> |
| Appendix 1 | ABOUT THE AUTHORS 785 |
| Appendix 2 | CONTRIBUTING LAW FIRMS' CONTACT DETAILS 819 |

EDITOR'S PREFACE

It is hard to believe that we are now on our sixth edition of *The Employment Law Review*. When we published the first edition of this book six years ago, I noted my belief that a book of this sort was long overdue given the importance to multinational corporations of understanding and complying with the laws of the various jurisdictions in which they operate. It has given me great pleasure to see the past editions of this book used over the last several years for just this purpose – as a tool to aid practitioners and human resources professionals in identifying issues that may present challenges to their clients and companies. The various editions of this book have highlighted changes in the laws of many jurisdictions over the past few years, making even clearer the need for a consolidated and up-to-date reference guide of this sort.

Global diversity and inclusion initiatives remained a hot topic in 2014. Many companies have unrolled initiatives regarding ‘unconscious’ bias, which is addressed in the first general interest chapter on global diversity. Looking abroad, recent legal developments regarding gender and transgender recognition will affect multinational corporations both in terms of law and policy, as underscored by recent legal developments out of India.

Our second general interest chapter tracks another active year of mergers and acquisitions after a brief decline following the financial crisis. This chapter, which addresses employment issues in cross-border corporate transactions, along with the relevant country-specific chapters, will aid practitioners and human resources professionals in conducting due diligence and providing other employment-related support in connection with cross-border M&A deals.

The third general interest chapter covers the increasing trend of clients considering or revising company’s social media and mobile device management policies. In particular, there is an increase in the number of organisations that are moving toward ‘bring your own device’ programmes and this chapter addresses issues for consideration by multinational employers in rolling out policies of this sort. ‘Bring your own device’ issues remain a topic of concern because more and more jurisdictions have passed or are beginning to consider passing privacy legislation that places significant restrictions

on the processing of employee personal data. This chapter introduces practice pointers regarding monitoring of employee social media use at work as well as some steps to consider before making an employment decision based on information found on social media.

In addition to these three general-interest chapters, the sixth edition of *The Employment Law Review* includes 48 country-specific chapters. This edition has once again been the product of excellent collaboration. I wish to thank our publisher, particularly Gideon Robertson, Katherine Jablonowska, Adam Myers, Eve Ryle-Hodges and Shani Bans, for their hard work and continued support. I also wish to thank all of our contributors, as well as my associates, Jon Dueltgen and Courtney Bowman, for their efforts to bring this edition to fruition.

Erika C Collins

Proskauer Rose LLP

New York

February 2015

Chapter 51

VIETNAM

*Michael K Lee, Annika Svanberg and Doan Ngoc Tran*¹

I INTRODUCTION

Vietnam's Labour Code is the constitutional 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 National Assembly of Vietnam on 18 June 2012, and in force since 1 May 2013 (the 2012 Labour Code).

The 2012 Labour Code regulates minimum employment standards; rights and obligations of employers, employees, and organisations representing employers and employees in the employment relationship; other issues directly related to labour relationships; and the state management of employment. In addition to the 2012 Labour Code, 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 Law on Trade Unions 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.

For collective labour disputes, the competent authorities include labour conciliators, the chairperson of the People's Committee at the district level, and the

¹ Michael K Lee is a partner, Annika Svanberg is a registered foreign attorney and Doan Ngoc Tran is an attorney-at-law at Tilleke & Gibbins.

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 chairperson 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 chairperson 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, the National Assembly of Vietnam passed the 2012 Labour Code in June 2012, entering into force on 1 May 2013. The 2012 Labour Code has introduced significant new developments relating to, for example, the duration of maternity leave, labour discipline, labour contracts, wage during probationary period, work hours and labour outsourcing. During the past year, a number of guiding decrees have been issued, following the introduction of the 2012 Labour Code, including decrees on:

- a* minimum wage;
- b* strikes;
- c* labour disputes;
- d* working hours, rest breaks, and occupational safety and hygiene;
- e* labour contracts;
- f* trade unions;
- g* wages;
- h* labour outsourcing; and
- i* foreign nationals working in Vietnam.

In addition, a new trade union law (the Law on Trade Unions) was adopted in mid-2012 and entered into force on 1 January 2013.

III SIGNIFICANT CASES

In a recent employment termination dispute, the plaintiff, a foreign employee, was appointed as the managing director of a foreign-invested company in Vietnam 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, the management of the parent entity of the company decided to terminate the labour contract with the employee due to his poor performance. 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 had 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 local 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 Procedure 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* 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* the documents submitted showed that the employee had submitted a petition at the competent court of his nationality.

This 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

Before the official start of work, the employer and the employee must directly enter into a written labour contract. For temporary jobs with an employment term of less than three months, an oral labour contract is permissible. The employer may not keep the employee's original identification card and qualifications, nor may the employer collect cash or other assets from the employee to guarantee performance of the labour 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 2012 Labour Code classifies labour contracts into three types as follows:

- a* indefinite-term contract;
- b* definite-term contract with a fixed term 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 a '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 entered into.

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

A labour contract should contain the following primary contents:

- a* work to be performed, job location and term of contract;
- b* wages (including rate, method and time of payment, allowances and other additional payments, and regime for wage increase);
- c* working hours, rest breaks, and holidays;
- d* personal protective equipment for the employee;
- e* social and health insurance for the employee; and
- f* training and skill improvement for the employee.

A request of one party to amend the signed labour 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 2012 Labour Code, 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* work to be performed, job location and term of contract;
- b* wages (including rate, method and time of payment, allowances and other additional payments);
- c* working hours, rest breaks and holidays; and
- d* personal protective equipment for the employee.

For one recruited or employed position, only one period of probation is allowed, and a probationary period for seasonal contracts is not permissible. The probation length depends on the nature and complexity of the work, and must not exceed 60 calendar days for jobs that require high-level specialised or highly technical skills (e.g., jobs that require at least a university degree); 30 calendar days for intermediate-level specialised or technical expertise; and six business days for other jobs.

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 a labour 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, and without any requirement for compensation, if the probationary work does not satisfy the agreed-upon requirements.

iii Establishing a presence

It is legally unclear whether a foreign company without a 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 reporting requirements for employees with the labour authorities, 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 2012 Labour Code, an employer may sublease employees (in several limited job areas) through a licensed labour outsourcing enterprise. Under the 2006 Law on Vietnamese workers working overseas under contract, Vietnamese employees may work overseas for offshore companies under a labour supply contract signed between a licensed local company and the offshore company.

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, and health insurance if its employees are expatriates.

V RESTRICTIVE COVENANTS

In general, the validity of non-compete clauses in labour contracts that prevent employees from working for competitors or for themselves in the same industry as the employer for a prescribed duration after termination of the labour relationship is still in question. While there is no direct prohibition, non-compete clauses are likely to 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 labour contracts to gain as much protection as possible, despite the uncertainty in legality and enforceability. However, the general consensus is that the enforcement of confidentiality provisions and non-solicitation of customers and employees may survive the termination of an employment relationship and may be enforceable.

To prevent employees who are granted access to business and technology secrets from disclosing these secrets, the 2012 Labour Code 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; if 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 regular working hours is entitled to a break of at least 30 minutes, and 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. In every week, an employee is entitled to a break of at least 24 consecutive hours, or at least four days off per month where it is impossible for an employee to have weekly leave due to the work cycle.

ii Overtime

Overtime means a period of working time in addition to regular working hours as stipulated by law, in the collective labour agreement, or in the internal labour rules of the employers, or both. 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 unless compensatory rest periods for the time the employees were unable to take leave are available. 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, foreign nationals who enter 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 foreign nationals with expiring work permits may apply for a new work permit. The duration of a reissued work permit is, again, a maximum of two years.

Foreign nationals 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, expert, and technical positions for which Vietnamese workers are not sufficiently qualified are permitted to work in Vietnam. In addition, for internal transfer, the law requires the seconded or appointed foreign workers 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. Employers (with some

exceptions) must, in accordance with Decree 102/2013/ND-CP, report their demand for foreign workers in respect of positions for which qualified Vietnamese workers cannot be found. These reports must be sent annually to the chairperson of the local People's Committee for approval. The approval must be submitted along with the work permit application for each foreign worker.

Foreign workers who work without work permits or work with work permits that have expired may be deported from Vietnam. Employers employing foreign employees without work permits or with expired work permits are subject to an administrative fine. In addition, the violating employers may face suspension of operation from one to three months as a penalty in addition to the administrative fine.

VIII GLOBAL POLICIES

Written internal labour rules are legally required by the 2012 Labour Code 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 formed within the employer's organisation that acts for the rights and interests of the employees. If no such union exists, then consultation with the district-level trade union is required. 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. It is very difficult to legally discipline or dismiss an employee for wrongful conduct without properly registered internal labour rules.

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 the courts) only accept Vietnamese-language documents.

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 the 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. Legislation does not provide a clear answer as to the question of whether this contribution is paid by both members and non-members. The government trade union agencies' and labour authorities' position, however, appears to be that everyone pays to the trade union.

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 or telegraph may be sentenced to up to two years in prison.

iv Background checks

Background checks are generally allowed in Vietnam. The 2012 Labour Code, 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, as 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 on enumerated grounds 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, a labour contract may be terminated in the following circumstances:

- a* the labour contract expires;
- b* the task stated in the specific-job labour contract has been completed;
- c* the employer and employee mutually agree to terminate the labour contract;
- d* the employee retires;
- e* the employee is sentenced to serve a jail term, or is prevented from performing the job in accordance with a decision of the court;
- f* the employee dies or is declared missing by a court;

- g* the employer (if an individual) dies or is declared missing;
- h* the employer terminates its operation;
- i* the employee unilaterally terminates the labour contract;
- j* the employee is disciplined in the form of dismissal (see further on the conditions for dismissal below); or
- k* the employer unilaterally terminates the labour contract (see further on the conditions for unilateral termination by the employer below).

In addition, an employer who must carry out redundancy due to the merger, consolidation, division or separation of the enterprise, or due to transfer of the employer's assets to another employer; or because of corporate restructuring, change in technology or economic reasons, may terminate an employee provided that a 'labour usage plan' has been adopted (see further on redundancies below).

Dismissal due to serious disciplinary violations ((j), *supra*) 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.

An employer may unilaterally terminate an employee ((k), *supra*) in the following circumstances:

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

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 2012 Labour Code 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 was required to withdraw such decision, apologise publicly and restore the honour and all material rights of the employee. Other penalties for wrongful dismissal under the old Labour Code were similar to those listed above for wrongful termination.

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 about the dismissal before or during the meeting. If there is no grassroots trade union formed within the employer's organisation, the employer must consult with the district-level trade union. 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 under temporary custody or detention;
- 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:
- has a child under one year old;
 - is pregnant; or
 - 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 violation of labour discipline is not entitled to any kind of allowance. However, due to the burdensome procedures involved and the practical need for clear evidence of wrongdoing, 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

As mentioned above, 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, or 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 'labour usage plan', 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 labour 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

usage 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 'labour usage plan'.

According to the enterprise laws, before entering into any restructuring arrangement, such as a merger, consolidation, division or separation, a 'labour usage plan' must be approved 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 or separating company shall have joint and several liability for the employment relationship.

XIV OUTLOOK

The adoption of the 2012 Labour Code has caused a considerable change in the labour market of Vietnam. The new provisions on dismissal, labour outsourcing, work permits for foreign workers, and internal labour rules will continue to be hot topics.

A significant development is the bolstering of the involvement of the trade union in employment relations, in particular, when it comes to labour discipline. Under the old Labour Code, trade union participation did take place when trade unions existed within the organisation of the employer, but, if they did not exist within the organisation, then no further action was necessary. Under the 2012 Labour Code, if a trade union does not exist within the organisation of the employer, then the district-level trade union will take over what would have been the role of the trade union. The district-level trade union is a quasi-governmental organisation that is likely to inject more government involvement in the content and approval of the internal labour rules and in internal disciplinary proceedings, among other things.

Although Vietnam's traditional pro-labour spirit still stands, the 2012 Labour Code does address some practical needs of employers, 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 outsourcing services. The 2012 Labour Code also provides some protective provisions in favour of female employees. As with other statutory grounds for termination, the employer may choose to factually dispute that harassment has, in fact, occurred and the employee would bear the burden of proof.

Most key decrees and circulars have been released (e.g., decrees guiding the 2012 Labour Code's provisions on labour contracts, labour outsourcing, work permits, etc.).

Appendix 1

ABOUT THE AUTHORS

MICHAEL K LEE

Tilleke & Gibbins

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*).

ANNIKA SVANBERG

Tilleke & Gibbins

Annika Svanberg is a registered foreign attorney in the firm’s Ho Chi Minh City office, working with the firm’s corporate and commercial team. Annika represents international clients in various corporate and commercial matters. Before joining Tilleke & Gibbins, Annika was an associate at Bird & Bird, where she advised large multinational clients in the media, entertainment, and high-tech sectors on intellectual property and commercial matters. A native of Sweden, Annika earned an LLM from the University of Stockholm in 2010 and finished a second LLM at the University of British Columbia in Canada

in 2013. Annika is the first lawyer from Sweden to be registered as a foreign attorney in Vietnam.

DOAN NGOC TRAN

Tilleke & Gibbins

Doan Ngoc Tran is an attorney-at-law in the corporate and commercial team of the firm's Ho Chi Minh City office. Doan works under the supervision of partners and senior 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.

TILLEKE & GIBBINS

Suite 1206, Citilight Tower
45 Vo Thi Sau Street
Ho Chi Minh City
Vietnam
Tel: +84 8 3936 2068
Fax: +84 8 3936 2066
michael.l@tilleke.com
annika.s@tilleke.com
doan.t@tilleke.com
www.tilleke.com