

Employment and employee benefits in Vietnam: overview

Kien Trung Trinh, Tilleke & Gibbins

global.practicallaw.com/2-620-1483

SCOPE OF EMPLOYMENT REGULATION

1. Do the main laws that regulate the employment relationship apply to:

- Foreign nationals working in your jurisdiction?
- Nationals of your jurisdiction working abroad?

Laws applicable to foreign nationals

The main law regulating employment relationships in Vietnam is the 2012 Labour Code. For foreign nationals, there is also a set of implementing regulations, including Decree 11/2016/ND-CP, which mainly provides guidance on matters related to work permits for foreign workers in Vietnam.

The Labour Code explicitly states that it applies to foreign nationals working in Vietnam, and the general rule is that foreign nationals working in Vietnam must comply with the Vietnamese labour laws, unless an international treaty to which Vietnam is a party states otherwise. If an employment contract is signed with a Vietnam-based entity, the law of Vietnam must apply regardless of the choice of law by the parties.

The Vietnam labour legislation, however, does not apply to foreign nationals who are working in Vietnam through an internal company transfer under a foreign employment contract. That is, the legislation does not apply to cases where a foreign parent company temporarily assigns its employee to work at its Vietnam-based subsidiary or representative office (and the labour contract is signed with the parent company).

Laws applicable to nationals working abroad

Vietnamese nationals working abroad must comply with the laws of Vietnam (and the laws of the foreign country), unless an international treaty to which Vietnam is a party states otherwise.

EMPLOYMENT STATUS

2. Does the law distinguish between different categories of worker? If so, what are the requirements to fall into each category, the material differences in entitlement to statutory employment rights and are there any maximum time periods for which each category of worker can be engaged?

Categories of worker

Vietnam labour laws do not make a distinction between different categories of workers. The Labour Code, however, makes a distinction between certain classes of employees, such as junior workers, senior workers, disabled workers, and female employees, who are granted certain protections and additional statutory employment rights, such as additional rest breaks or shorter regular working hours.

An individual can also provide services to an enterprise or organisation in Vietnam as an independent contractor. The provision of services as an independent contractor, however, falls under the jurisdiction of the 2015 Civil Code and is generally not considered an employment relationship to which the labour laws apply. Consequently, an independent contractor is not entitled to any statutory employment rights under Vietnam law such as statutory leave (annual leave, sick leave, maternity leave, and unpaid leave), statutory insurance, severance or job-loss allowance upon termination of employment, and so on.

There is no legal provision regulating when an employer can or cannot use an employment contract or a service contract. However, if a contract contains the features more customarily found in an employment relationship (for example, the contract provides that the contractor is subject to the employer's working hours, or the contractor is subject to disciplinary actions provided under work rules for a breach of the work rules), the contract will be treated by the authorities as an employment contract even if it is referred to as a service contract. As a general rule, the use of a service contract for permanent and long-term work is not encouraged.

If an employee is misclassified and treated as an independent contractor, this act could be viewed by the labour authorities as a circumvention of employment-related requirements, such as contributions to statutorily required insurance for employees. The employer may be subject to a monetary fine and the employee's entitlements may have to be reinstated and paid.

Entitlement to statutory employment rights

See above, *Categories of worker*.

Time periods

See above, *Categories of worker*.

RECRUITMENT

3. Are any grants or incentives available for employing people? Does any information/paperwork need to be filed with the authorities or given to new employees when employing people?

Grants or incentives

There are no specific grants or incentives for employing people in Vietnam. The Labour Code, however, provides a general statement that the government will have incentive policies for employers who hire a significant number of female workers, disabled people or ethnic minorities.

Filings

As a general rule, an employment contract is effective from the date stated in the contract and there are no filing requirements to effectuate the labour relationship. However, the labour laws require that an employer, within 30 days from the date of its commencement of operation, must declare its use of employees to

the labour authority. Further reports on changes in the use of employees must be made every six months.

The employer is under an obligation to submit statutory insurance files to the relevant insurance authority for its employees.

There are also filing requirements as to the declaration, payment and finalisation of personal income tax under the Law on Personal Income Tax and its implementing provisions.

Before signing a labour contract, an employer must provide information to the employee on the:

- Work to be performed.
- Workplace.
- Working conditions.
- Working hours.
- Rest breaks.
- Conditions on occupational safety and hygiene.
- Rates of wages.
- Method of payment of wages.
- Social insurance and health insurance.
- Provisions on confidentiality of business secrets (if any).
- Other matters directly relevant to the signing of a labour contract which the employee needs to know.

No particular paperwork must be given to new employees apart from a written labour contract (subject to exceptions) (see *Question 7*).

BACKGROUND CHECKS

4. Are there any restrictions or prohibitions on carrying out background checks in relation to applicants?

Questions about an applicant's past, health and criminal record are permissible in Vietnam. By law, the employee must provide information for the employer about their full name, gender, residence, educational background, vocational skills, health condition and other issues directly related to the labour contract execution requested by the employer.

An applicant must submit a health certificate to his/her employer, along with other documents required by law.

Although not provided by law, as a matter of practice, a background check by a third party is permissible if the scope of the check is restricted to the verification of information provided by the applicant. It is advisable that applicants be notified of background checks conducted by a third party.

PERMISSION TO WORK

5. What prior approvals do foreign nationals require to work in your country? What information/paperwork needs to be kept or filed with the authorities when they start work?

Except for definite exemptions as set out by law, foreign nationals working in Vietnam must have a work permit in order to work in Vietnam. In addition, a visa/resident card is also required for foreign nationals entering Vietnam to work.

There are no quotas that apply or preferences given to nationals from certain jurisdictions.

Visa

Procedure for obtaining approval. In order to obtain a visa to work in Vietnam, there must be an invitation letter issued by a Vietnamese sponsor inviting the foreign employee to come to Vietnam to work. The sponsor must be a Vietnam-based entity. There are different types of work visas available with slightly different filing requirements. In general, the following information/paperwork must be filed with the Immigration Office:

- Visa application (in standard form).
- Copy of passport, which must have at least six months of validity remaining, and photos of the foreign national.
- Copies of documents certifying the legal status of the Vietnamese sponsor.

Cost. The cost for a visa to work in Vietnam depends on the type and term of the visa and ranges from US\$25 to US\$155.

Time frame. The time frame for obtaining a visa to work in Vietnam varies depending on the type of work visa applied for, and ranges from five to eight working days. Visas cannot be renewed once expired, but new visas can be applied for if necessary. In most cases, the employee must physically leave the country in order to obtain the new visa.

Sanctions. Different levels of monetary fines are imposed on foreign nationals breaching the regulations on entry and exit. For example, foreign nationals entering Vietnam and practising or engaging in other activities without permission from the relevant authority can be subject to a fine of between VND15 million and VND20 million.

Permits

Procedure for obtaining approval. The employer applies for the work permit through the submission of an application file to the local labour authority. The application file must include the following:

- A written request for a work permit in the prescribed form.
- A health certificate.
- A clean criminal record.
- Documents certifying that the foreign employee qualifies as a manager, executive expert or technician under Vietnamese law (for example, a transcript of academic records).
- Two colour photos of the employee.
- A copy of the employee's passport.
- Other documents related to the employee on a case-by-case basis.
- Approval for employment of foreign workers issued by the chairman of the provincial People's Committee.

Cost. VND400,000.

Time frame. The application file for a work permit must be submitted by the employer to the local labour authority at least 15 business days prior to the date the foreign employee is to commence his or her work in Vietnam. The labour authority must issue the work permit within seven business days on receipt of a complete application file. The maximum term of work permits for foreign employees is two years. Foreign nationals with expiring work permits can apply for a new work permit. The duration of a reissued work permit is, again, a maximum of two years.

Sanctions. By law, a foreign employee who does not have the required permit to work in Vietnam will be deported, and the employer will be subject to an administrative fine. In addition, the violating employer can face a suspension of operation for a period of one to three months.

Preferences and filing requirements

There are no quotas that apply or preferences given to nationals from certain other jurisdictions.

Regarding filing requirements, at least 30 days before the proposed date of use of expatriate employees, the employer (except for contractors) must submit an explanation on the use of expatriate employees to the provincial labour authority for approval.

Within five working days from the date of signing of the labour contract with the employer, the employer must send a copy of the contract to the labour authority which issues the work permit.

The employer must make quarterly reports on the use of expatriate employees to the labour authority.

RESTRICTIONS ON MANAGERS AND DIRECTORS

6. Are there any restrictions on who can be a manager or company director?

Age restrictions

A "minor", defined in the 2015 Civil Code as a person who is under 18 years of age, cannot be a manager or company director.

Nationality restrictions

There are no restrictions as to the nationality of managers or company directors under Vietnamese law. However, there are requirements as to residency. Specifically, an enterprise must ensure that at least one legal representative resides in Vietnam. If an enterprise has only one legal representative, that person must reside in Vietnam and must, upon leaving Vietnam, authorise in writing another person to exercise the rights and perform the obligations of the legal representative. In this case, the legal representative will remain responsible for the exercise and performance of the authorised rights and obligations.

Other restrictions

The 2014 Law on Enterprises sets out a number of additional restrictions and requirements as to who can manage an enterprise. For example, a manager or company director must have a clean criminal record, must not have participated in compulsory drug rehabilitation, or otherwise be prohibited from conducting business, assuming certain positions or doing certain work related to business pursuant to a court decision. The manager or company director must also have professional qualifications and experience in business administration of the company (unless the charter requires otherwise).

REGULATION OF THE EMPLOYMENT RELATIONSHIP

7. How is the employment relationship governed and regulated?

Written employment contract

Employees can be classified into the following three types, based on the terms of their contracts:

- Employees working under indefinite-term employment contracts (that is, open-ended contracts).
- Employees working under definite-term (fixed-term) employment contracts between 12 months and 36 months in duration.
- Employees working under seasonal or specific-job employment contracts with terms of less than 12 months.

When a definite-term contract or a specific-job contract expires, but the employee continues working, the parties can sign a new fixed-

term contract. If they fail to do so, the contract will automatically convert into an indefinite-term contract (for a definite-term contract) or a definite-term contract of 24 months (for a specific-job contract) by operation of law.

Only two terms of a fixed-term contract are allowed. On the expiry of the second term, an indefinite-term contract must be entered into, unless the contract is terminated without renewal. Similar to the scenario above, if the employee continues working after the expiry of two fixed terms, the contract will automatically convert to an indefinite-term contract.

Employment contracts must be made in writing, with the exception of contracts for temporary work of less than three months, in which case an oral employment contract can be used. An employment contract must contain the following main provisions:

- Work to be performed, job location and term of the 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.
- Training and skills improvement for the employee.

Local employment contracts must be made in the Vietnamese language or in dual languages (for example, Vietnamese and English).

An employment contract must be entered into directly with the company that uses the employees, and not the group company.

Implied terms

The concept of implied terms in employment contracts is not recognised under Vietnamese labour laws. However, the conditions for terminating an employment contract are strictly regulated by Vietnamese law and can be (but are not required to be) stated in the employment contract.

Collective agreements

Employers must implement and comply with a collective labour agreement (CLA). A CLA is binding on the employer when it has been signed by the employer and the representative of the labour collective following a collective bargaining session during which the labour collective has voted in favour of the CLA with a simple majority. The effective date of the CLA is the date it is signed by the employer and the representative of the labour collective, or another date as agreed upon by the parties and recorded in the CLA.

Vietnam's labour laws acknowledge sector-specific agreements, known as industry collective labour agreements (ICLA). Enterprises in an industry for which there is an ICLA are encouraged (but not required) to implement such an agreement.

8. What are the main points to consider if an employer wants to unilaterally change the terms and conditions of employment?

An employer cannot unilaterally change the terms and conditions set out in the employment contract. An employer who wishes to amend or supplement the terms of an already signed employment contract must notify the employee at least three working days before the term in question is amended or added and obtain the employee's consent to the amendment or additions in question. Any amendments or additions to an employment contract must be made in an addendum to the employment contract, or by the parties entering into a new employment contract. If the parties fail to reach

an agreement on the new terms of the contract, the signed employment contract must continue to be performed.

MINIMUM WAGE

9. Is there a national (or regional) minimum wage?

A decree issued by the government provides a minimum wage/salary applicable to all employers, including enterprises, co-operatives, farms, households, individuals and other organisations hiring employees under employment contracts from time to time.

Currently, there are four regional minimum salary levels applicable to employers, ranging from VND2,760,000 (the lowest level) to VND3,980,000 (the highest level) per month, depending on the locality.

Employers are required to pay a salary to their employees which is not lower than the minimum salary level applicable in their region for untrained workers doing the simplest tasks. For trained workers, the salary must be at least 7% higher than the regional minimum salary.

There is no mandatory salary payment method. It will be subject to the agreement between the parties, provided that payment is made directly (to the employee), on time and in full.

RESTRICTIONS ON WORKING TIME

10. Are there restrictions on working hours? Can an employee opt out on either an individual or collective basis?

Working hours

There is a restriction on the maximum regular working hours in Vietnam and the parties (employee, union and employer) cannot waive this restriction by an individual agreement or collective labour agreement. The regular working hours cannot exceed eight hours per day, 48 hours per week for employees working under normal working conditions or six hours per day for employees working in extremely heavy, hazardous, or toxic working conditions.

Working hours, however, can be set on an hourly, daily or weekly basis, depending on the employer's needs. If the employer sets working hours on a weekly basis, regular working hours of up to ten hours per day are permitted, provided that the total hours do not exceed 48 hours per week.

Rest breaks

Employees who work for eight consecutive hours (in normal working conditions) or six consecutive hours (in heavy/hazardous/toxic working conditions) are entitled to a rest break of at least 30 minutes which is included in the working hours. When working at night (from 10pm to 6am of the following day), the employee is entitled to take at least 45 minutes of rest breaks which are included in the working hours.

Shift workers

Vietnamese labour law allows the employer, based on its own production requirements, to arrange for employees to work in shifts. However, the legal requirements on working hours, rest breaks, overtime, and so on, must be complied with. Additionally, the employer must arrange for the employees to take a break of at least 12 hours before moving to a different shift.

HOLIDAY ENTITLEMENT

11. Is there a minimum paid holiday entitlement?

Minimum paid holiday entitlement

By law, employees working in normal working conditions are entitled to a minimum of 12 days of paid annual leave, exclusive of public holidays. Employees working in heavy, hazardous or toxic working conditions are entitled to a minimum of 14 annual leave days. Employees working in extremely heavy, hazardous or toxic working conditions are entitled to a minimum of 16 annual leave days. An employee must be given one additional annual leave day for every five years of consecutive service for an employer.

Public holidays

At present, there are a total of ten public holidays with full salary payment for employees in Vietnam. If any of the public holidays falls on a weekend, the employees are entitled to take the next weekday off. In addition to these public holidays, an expatriate employee is also entitled to one day off for the traditional new year and another day for the national day of his or her country.

ILLNESS AND INJURY OF EMPLOYEES

12. What rights do employees have to time off in the case of illness or injury? Are they entitled to sick pay during this time off? Who pays the sick pay and, if the employer, can it recover any of the cost from the government?

Entitlement to paid time off

Vietnamese employees are entitled to paid sick leave. The maximum number of paid sick leave days within a year, calculated according to working days and excluding public holidays and weekends, is as follows:

- For employees working under normal working conditions:
 - 30 days if they have paid social insurance premiums for less than 15 years;
 - 40 days if they have paid social insurance premiums for 15 years to less than 30 years; and
 - 60 days if they have paid social insurance premiums for 30 years or more.
- For employees working in heavy, hazardous or toxic occupations or jobs on the list promulgated by the Ministry of Labour and the Ministry of Health, or working regularly in specified regions:
 - 40 days, if they have paid social insurance premiums for less than 15 years;
 - 50 days if they have paid social insurance premiums for 15 years to less than 30 years; and
 - 70 days if they have paid social insurance premiums for 30 years or more.

Sick pay is covered by the social insurance fund, not by the employer (applicable to Vietnamese employees only).

Vietnamese employees entitled to sick pay are entitled to 75% of their salary or remuneration on which social insurance premiums were based in the month preceding their leave.

Vietnamese employees infected with a disease on the list of diseases requiring long-term treatment, as promulgated by the Ministry of Health, are entitled to the following paid sick leave regime:

- A maximum of 180 days in a year, including public holidays and weekends.

- Employees still needing treatment after 180 days continue to be entitled to the paid sick leave regime at a lower level (45% to 65% of their salary or remuneration as defined above).

Sick leave entitlement for expatriate employees is subject to the agreement between the employer and the expatriate employee.

Entitlement to unpaid time off

An employee is entitled to a one-day leave without pay on the death of a grandparent or sibling, or to attend a wedding of the employee's parent or sibling. Any additional unpaid time off is subject to the agreement between the employer and the employee.

Recovery of sick pay from the state

Not applicable.

STATUTORY RIGHTS OF PARENTS AND CARERS

13. What are the statutory rights of employees who are:

- **Parents (including maternity, paternity, surrogacy, adoption and parental rights, where applicable)?**
- **Carers (including those of disabled children and adult dependants)?**

Maternity rights

A female employee (working in normal working conditions) is entitled to six months of maternity leave. If she gives birth to more than one child at one time, she is entitled to take an additional one month of leave for every additional child calculated from the second child onwards.

For each month under the maternity leave regime, employees who are Vietnamese nationals are entitled to 100% of their average monthly salary or remuneration on which social insurance premiums were based for the six months preceding their leave (monthly allowance). However, the maximum salary or remuneration during maternity leave is capped at 20 times the base salary, equivalent to VND27.8 million from 1 July 2018.

The payment for maternity leave of Vietnamese employees is covered by the social insurance fund. The payment for maternity leave of expatriate employees is subject to the agreement between the employer and the employee.

Paternity rights

A male employee whose wife gives birth naturally is entitled to take five days of paternity leave. If his wife gives birth by caesarean section, he is entitled to take seven days of paternity leave. If his wife naturally gives birth to twins, he is entitled to take 10 days of paternity leave. If his wife gives birth to twins by caesarean section, he is entitled to take 14 days of paternity leave. If his wife gives birth to more than two children at one time, he is entitled to take an additional three days of leave for every additional child calculated from the third child onwards.

For each leave day, the employee must be paid a pro-rated amount of the monthly allowance by the social insurance fund (applicable to Vietnamese employees only). The payment for paternity leave of expatriate employees is subject to the agreement between the employer and the employee.

Surrogacy rights

A surrogate mother is entitled to the maternity regime until transferring the baby to the mother under a surrogacy arrangement, but for no longer than six months. If the time from the delivery day to the transferring day is less than 60 days, the surrogate mother is still entitled to the maternity regime for a full 60 days, including public holidays and weekends.

A mother under a surrogacy arrangement is entitled to the maternity regime from the time she receives the baby until the child is six months old.

Adoption rights

Any employee adopting a baby under six months old is entitled to take leave under the maternity regime until the child is six months old. If both mother and father qualify for the maternity/paternity regime, only one of them is entitled to the regime. The employee is entitled to the monthly allowance for each month of leave under the regime paid by the social insurance fund (applicable to Vietnamese employees only). Where the number of days is not sufficient to form a month, the pay for each day will be a pro-rated amount.

Parental rights

Parents are entitled to paid leave to care for their sick children. The maximum period of entitlement to the regime within a year, for each child, is 20 working days if the sick child is under three years of age, and a maximum of 15 working days if the sick child is from three years to seven years of age.

The pay for employees during their leave for taking care of their sick children is calculated in the same way as their own sick pay and covered by the social insurance fund (see *Question 12*), and applicable to Vietnamese employees only.

Carers' rights

Parents are granted paid leave to care for their sick children (see *above, Parental rights*). The law also allows employees to take three days of personal leave with full pay on the death of a parent, parent-in-law, spouse or child.

CONTINUOUS PERIODS OF EMPLOYMENT

14. Does a period of continuous employment create any statutory rights for employees? If an employee is transferred to a new entity, does that employee retain their period of continuous employment? If so, on what type of transfer?

Statutory rights created

An employee is given one additional annual leave day for every five consecutive years working for an employer.

Consequences of a transfer of employee

The succeeding employer is responsible for continuing to use the employees in the case of a merger, consolidation, division or separation of an enterprise or co-operative. In this case, the employees will retain their period of continuous employment as if there had been no transfer. If the preceding employer and the employees choose to terminate their contracts and settle all outstanding rights and obligations under the existing contracts, and the employees enter into new contracts with the succeeding employer, a new employment relationship will start with the new employer.

If all the employees are not used, a labour usage plan must be formulated (see *Question 24*).

FIXED TERM, PART-TIME AND AGENCY WORKERS

15. To what extent are temporary and agency workers entitled to the same rights and benefits as permanent employees? To what extent are part-time workers

entitled to the same rights and benefits as full-time workers?

Temporary workers

In Vietnam, temporary workers would be equivalent to "seasonal/specific-job" employees, that is, employees working under seasonal or specific-job employment contracts with terms of less than 12 months (see *Question 7*). As a general rule, seasonal/specific job employees are entitled to receive the same wages, and have the same rights and obligations as full-time employees, and are entitled to the same opportunities, treatment, and working conditions as full-time employees.

It is prohibited to sign a seasonal or specific-job employment contract for a term of less than 12 months 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 military service, is on maternity leave or sick leave, is on leave as the result of a work-related accident, or is on leave for other temporary reasons.

Fixed-term workers include seasonal/specific-job employees working under seasonal or specific-job employment contracts with terms of less than 12 months and employees working under definite-term contracts of between 12 months and 36 months. Only two terms of a fixed-term contract may be entered into. Upon expiry of the second term, an indefinite-term contract must be entered into. Because employees working under fixed-term contracts are entitled to the same rights and benefits as those working under indefinite-term contracts, any unilateral termination of employment must be with cause, and subject to the procedures provided for by the law.

Agency workers

The outsourcing of employees is only allowed for 17 types of jobs on a specific list promulgated by the government. Agency workers have the right to be paid the same wage as the wage of an employee of the subleasing employer with the same professional qualifications and doing the same job or a job of the same value, and must be provided with similar labour conditions to the employees of the subleasing employer.

Part-time workers

Part-time employees are entitled to receive the same wages, and have the same rights and obligations as full-time employees, and are entitled to the same opportunities, treatment and working conditions as full-time employees.

For the consequences for misclassifying workers as "temporary" or "independent contractors" rather than "employees", see *Question 2*.

In Vietnam, all employees must have contracts with the company for whom they are providing services, and not with another member of the group.

DATA PROTECTION

16. Are there any requirements protecting employee privacy or personal data? If so, what are an employer's obligations?

Employees' data protection rights

There is no law specifically regulating the personal data of employees in Vietnam, nor protecting employee privacy. Vietnamese law generally requires consent from an individual if their personal information is collected, processed, used or stored in any way, and this general rule will apply to the collection, processing, using or storage of personal data of employees.

In each case, consent must be obtained directly from the person whose data is to be used. Therefore, consent must be obtained directly from the employee.

Employers' data protection obligations

There is no law specifically regulating employers' data protection obligations in Vietnam. In general, the employer must obtain the prior consent of the employee for the collection, processing, use or storage of the employee's information. In addition to the consent of the employee, if personal data is collected, processed and used in a network environment, the employers collecting, processing and using the personal data of the data subject must:

- Notify the data subject of the form, scope, place and purpose of the collection, processing and use of his or her personal information.
- Use the collected personal data for proper purposes and store such information only for a certain period as stipulated by law or as agreed upon by the two parties.
- Take the necessary managerial or technical measures to ensure that the personal information is not lost, stolen, disclosed, modified or destroyed.
- Immediately take the necessary measures on receipt of a request from the data subject for re-examination, correction or cancellation of personal data, and not supply or use relevant personal data until such information is corrected.

DISCRIMINATION AND HARASSMENT

17. What protection do employees have from discrimination or harassment, and on what grounds?

Protection from discrimination

Discrimination on the basis of gender, race, skin colour, social class, beliefs, religion, HIV infection, or disability and sexual harassment are strictly prohibited under the Labour Code. However, the law does not provide any specific guidelines on what protections employees can have from discrimination or sexual harassment. In general, when there are grounds to suggest that an employer's decisions or behaviour have breached the labour law and infringed an employee's legal rights and interests, the employee can make a claim or a "denunciation" to the employer or the labour inspectors to protect their rights and interests.

To make a labour complaint, an employee must first follow three steps:

- Step one: the employee must lodge a complaint directly with the employer within 180 days from the date of the action, and the employer must settle the complaint within 30 to 45 days, depending on the complexity of the case.
- Step two: if the employee does not agree with the decision of the complaint settlement by the employer, or the complaint has not been settled within the stipulated time, the employee can lodge a complaint with the Chief Inspector of the Department of Labour – Invalids and Social Affairs where the employer's head office is located. This must be done within 30 days from the end date of the time for the complaint settlement, or the date the employee receives the first decision on the complaint settlement. The authority must settle a complaint within 45 to 60 days, depending on the complexity of the case.
- Step three: if the employee does not agree with the second decision of the complaint settlement, the employee can take the case to the court.

To make a labour denunciation, the employee must submit a petition and evidence related to the labour denunciation directly to the Chief Inspector of the Department of Labour, Invalids and Social Affairs where the employer's head office is located.

Under the Law on Denunciation, the denouncer (the employee) or their relatives can request the grassroots trade union or the labour management agencies where the employer's head office is located

to apply measures of protection to the employee or their relatives if there is evidence that the denunciations could cause harm to the employee. Where there is evidence that the employee's request is legitimate, those who are settling denunciations can apply the following protection measures:

- Request the employer to terminate the violation, restore positions, employment, earnings and other legitimate interests from the job to the protected person.
- Propose the competent authorities handle the case according to the law.

Protection from harassment

See above, *Protection from discrimination*.

WHISTLEBLOWERS

18. Do whistleblowers have any protection?

Vietnamese labour laws do not provide any particular policies or protection relating to whistleblowers.

TERMINATION OF EMPLOYMENT

19. What rights do employees have when their employment contract is terminated?

Notice periods

For unilateral termination (when permitted by law), employers must provide advance notice to the employees within a minimum statutory time limit. Employees who resign are also required to give advance notice to their employers within a minimum statutory time limit. In both cases, the relevant time limits are 45 days in advance for indefinite-term employment contracts, 30 days for definite-term (fixed-term) employment contracts, and three working days for seasonal or specific-job employment contracts with durations of less than 12 months.

Severance payments

Vietnamese labour law requires employers to make severance payments to terminated employees who had been regularly working for the employer for 12 months or more. The severance allowance is equal to one half of one month's wage for each year of employment. Salary for the purpose of calculating the severance allowance is the average salary under the employment contract for the six months immediately preceding the termination of the employment contract.

No severance allowance is required by law if:

- At the time of the termination, the employee has worked for the company for less than 12 months.
- The employee illegally and unilaterally terminates his or her employment contract.
- The employee is dismissed for breaching the company's internal labour rules.
- The employee retires on a pension.

If contributions to the unemployment insurance fund were made for the benefit of the employee, employers are not required to pay severance for the duration of time that the employees participated in the unemployment insurance fund.

Procedural requirements for dismissal

Dismissal is a way of dealing with a breach of "labour discipline". The Vietnamese labour laws define "labour discipline" as the rules governing compliance with time, technology, and the management of business and production, as set out in the employer's internal labour rules (see *Question 20*). Therefore, dismissal procedures

must comply with the internal labour rules and the labour laws of Vietnam, and follow a sequence to deal with a breach of labour discipline. The procedure must include the following steps:

- Sending written notices to required attendees.
- Holding a meeting to deal with the breach of labour discipline.
- Issuing minutes of the meeting.
- Issuing a decision dealing with the breach of labour discipline.

There is no regulation on the consequences if the procedural requirements are not followed. See *Question 23*.

20. What protection do employees have against dismissal? Are there any specific categories of protected employees?

Protection against dismissal

Dismissal is a disciplinary action imposed for a breach of "labour discipline" (see *Question 19*) and is only permitted in a few limited cases, as set out in the labour laws of Vietnam and recorded in the employer's internal labour rules, discussed below. Dismissal means the termination of the employment contract. Dismissal is highly regulated by the labour laws of Vietnam and can only be imposed in the following cases:

- An employee commits an act of theft, embezzlement, gambling or deliberate violence causing injury; uses drugs at the workplace; discloses technology or business secrets or infringes intellectual property rights of the employer; or is guilty of conduct causing serious loss and damage or which threatens to cause particularly serious loss and damage to the property or interests of the employer (the serious loss and damage must be defined in the employer's internal labour regulations/work rules).
- An employee is disciplined through a deferral of a wage increase and then commits a second offence before the initial disciplinary measure has been absolved; or an employee was disciplined in the form of a demotion and thereafter committed a repeated offence (such as where an employee recommits a breach for which he or she has already been punished and for which the disciplinary action record has not yet been removed).
- An employee of his or her own accord takes an aggregate of five days off in one month or an aggregate 20 days off in one year without proper reasons. Cases deemed to be "proper reasons" include a natural disaster, fire, illness of the employee or a relative (as certified by a competent medical consulting or treating establishment), and other cases prescribed in the internal labour rules.

The employer must follow strict procedures for dismissal. Otherwise, the dismissal will be challenged by the court. Under the new Penal Code, an unlawful dismissal of an employee or the use of threats to cause the resignation of an employee can lead to criminal liability.

Protected employees

Female employees cannot be dismissed for reasons of marriage, pregnancy, maternity leave or nursing a child under 12 months.

If an employer wishes to dismiss an employee who is a part-time trade union officer, the employer must obtain written agreement from the executive committee of the grassroots trade union or from the executive committee of the directly superior trade union. If the parties are unable to reach an agreement, the two parties must report to the competent authority. The employer only has the right to make a decision, and must be legally liable for such a decision, after 30 days have expired from the date of notification to the local state authority for labour.

If there is a disagreement with the employer's decision, the executive committee of the grassroots trade union and the employee have the

right to request the resolution of the labour dispute in accordance with the sequence and procedures stipulated by law.

REDUNDANCY/LAYOFF

21. How are redundancies/layoffs defined, and what rules apply on redundancies/layoffs? Are there special rules relating to collective redundancies?

Definition of redundancy/layoff

There is no definition of redundancies/layoffs in the labour law.

Procedural requirements

An employer can make employees redundant due to:

- Technological changes such as changes in part or all of the equipment, machinery or technology processes.
- Changes in organisational structure, in cases of a merger, consolidation or cessation of operation of one or several departments or units, or where the employer faces difficulty in economic conditions.

If these changes lead to the termination of two or more employees, the employer, in conjunction with the grassroots trade union, is required to form and implement a "labour usage plan". The termination of two or more employees on a layoff basis can be implemented only after consultation with the grassroots trade union and after the provincial labour authority has been served with a 30-day notice.

Redundancy/layoff pay

The employer must pay a job-loss allowance for a retrenched employee who had regularly worked for the employer for at least 12 full months. The job-loss allowance is equal to one month's salary for each year of service for the employer, but not less than two months' salary. The length of service for the purpose of calculating a job-loss allowance excludes months when the employee participated in unemployment insurance. For this period, the job-loss allowance is paid by the Social Insurance Fund, not by the employer. Salary for the purpose of calculating a job-loss allowance is the average salary under the employment contract for the six months immediately preceding the job loss.

Collective redundancies

The law does not define "collective redundancies". Rather, when two or more employees become redundant due to organisational or technological changes, or economic reasons, the procedures mentioned above must be followed (see above, *Procedural requirements*).

EMPLOYEE REPRESENTATION AND CONSULTATION

22. Are employees entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? What does consultation require? Is employee consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?

Management representation

Employees are represented by the executive committee of the grassroots trade union (the trade union within the company) or the executive committee of the trade union at the directly superior level if a grassroots trade union has not yet been established within the company.

There is no legislation specifically mandating that employees are entitled to management representation (such as on the board of

directors) although the law recognises employees' rights to participate in management in accordance with the internal rules of the employer.

Consultation

Employees have the right to request and participate in discussions with the employer, to implement democratic regulations and to be consulted at workplaces in order to protect the employees' lawful rights and interests. The employer must consult with the trade union in the following cases:

- When formulating and implementing plans on activities ensuring occupational safety and hygiene.
- When retrenching many employees.
- When formulating a labour usage plan.
- When formulating pay scale, payroll and work limits.
- When deciding on a reward scheme.
- When formulating the internal labour rules.
- When temporarily suspending an employee from work.

Major transactions

There is no legislation requiring employees' consultation or consent for major transactions such as acquisitions, disposals or joint ventures. Employees are only entitled to be notified of the final decision of these major transactions.

Where there has been a transfer of ownership, or of the right to manage or use an enterprise, or where an enterprise merges, consolidates, divides or separates, the succeeding employer and the representative of the labour collective will rely on the labour usage plan to:

- Consider the continuance of its performance, or its amendment, or an addition to the old collective labour agreement.
- Conduct collective bargaining in order to sign a new collective labour agreement.

23. What remedies are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

Remedies

An employer who fails to comply with its consultation duties will be subject to administrative sanctions. A fine between VND20 million to VND40 million will be imposed on an employer for failing to consult with the trade union when unilaterally terminating a labour contract, transferring an employee to another job or dismissing an employee who is a part-time trade union member.

Employee action

There are no provisions in the labour law specifically providing measures that an employee can take to prevent any proposals going ahead. However, in general, under Vietnamese law, an employee or trade union can complain about an employer's decisions to the competent labour authority, or sue the employer in the competent court, to declare an employer's decision void for failing to comply with the procedures required by the law.

CONSEQUENCES OF A BUSINESS TRANSFER

24. Is there any statutory protection of employees on a business transfer?

Automatic transfer of employees

On merger, consolidation, division or separation of an enterprise, the succeeding employer is responsible for continuing to employ the current employees. However, if the succeeding employer is unable to employ all current employees, the succeeding employer must prepare and implement a labour usage plan listing the number of employees who will continue their employment with the succeeding employer and the number of employees whose labour contracts will be terminated, among other things. A trade union or employee representative must participate in the formulation of this labour usage plan.

When employees are terminated, a job loss allowance must be paid.

Protection against dismissal

As dismissal in Vietnam is only recognised as a penalty for a breach of "labour discipline" (see *Question 19*) in a few narrow cases as set out in the labour laws of Vietnam and recorded in the employer's internal labour rules, it does not apply on the transfer of a business. For the protections provided against mass layoffs, see *Question 20*.

Harmonisation of employment terms

There is no legal provision on the harmonisation of employment terms. As a matter of practice, the employees and the new employer (the transferee) can choose to enter into new employment contracts with new terms and conditions, or amend the existing employment contracts with the relevant changes as agreed by the parties.

EMPLOYER AND PARENT COMPANY LIABILITY

25. Are there any circumstances in which:

- An employer can be liable for the acts of its employees?
 - A parent company can be liable for the acts of a subsidiary company's employees?
-

Employer liability

An employer will be liable for the acts of its employees when the employees perform their duties as delegated by the employer. Specifically, under the 2015 Civil Code, a legal entity must compensate for any damage caused by anyone who was performing duties assigned to them by the entity. If a legal entity has compensated for any damage, it has the right to demand that the person at fault for the damage reimburse it an amount of money in accordance with the law.

Parent company liability

A parent company is not liable for the acts of a subsidiary company's employees in Vietnam, as it is considered an independent legal entity that does not employ the employees.

EMPLOYER INSOLVENCY

26. What rights do employees have on the insolvency of their employer? Is there a state fund which guarantees repayment of certain employment debts?

Employee rights on insolvency

Under the 2014 Bankruptcy Law, employees and the grassroots trade union have the right to lodge a petition for the bankruptcy of an employer if the employer fails to pay salary and other debts to the employees within three months after they are due. Where an

enterprise is dissolved or declared bankrupt, there must be priority payment of wages, severance allowances, social insurance and health insurance, job loss insurance and other interests of the employees in accordance with the collective labour agreement and signed employment contracts.

State guarantee fund

There is no state guarantee fund available in Vietnam.

HEALTH AND SAFETY OBLIGATIONS

27. What are an employer's obligations regarding the health and safety of its employees?

An employer must comply with the law on occupational safety and hygiene. The employer must rely on standards, national technical regulations and local technical regulations on occupational safety and hygiene in order to formulate their own internal rules and working procedures to ensure occupational safety and hygiene as appropriate for each type of machinery, equipment and workplace. The Labour Code also regulates in detail the employer's obligations for work-related accidents and occupational diseases and the prevention of these.

In general, the obligations of employers for occupational safety and hygiene work include ensuring a safe and hygienic work environment, providing necessary safety training and instruction, and conducting regular inspections of workplace conditions.

Employers must provide health insurance for their employees, and must provide regular health checks.

TAXATION OF EMPLOYMENT INCOME

28. What is the basis of taxation of employment income for:

- Foreign nationals working in your jurisdiction?
 - Nationals of your jurisdiction working abroad?
-

Vietnam income tax law sets out the obligations of income taxpayers in terms of resident or non-resident status, regardless of nationality. Therefore, the basis of taxation of employment income applies equally to foreign nationals working in Vietnam or nationals working abroad.

A resident is a person who satisfies at least one of the two following conditions:

- Spends at least 183 days in Vietnam within one calendar year or within a consecutive 12-month period from the date of first entry into Vietnam.
- Has a "regular residential location" in Vietnam, meaning that the person has either a residential location for which permanent residence has been registered under the law on residence, or a leased residence under the law on residential housing with a lease term of at least 90 days.

A non-resident is a person who does not satisfy the conditions above.

Foreign nationals/nationals

For resident status. Taxable income from salaries or wages is the total income that a taxpayer receives within any tax calculation period from the following sources:

- Salaries or wages and items in the nature of salaries or wages.
- Allowances and subsidies (excluding stipulated allowances and subsidies in specified circumstances, such as allowances and subsidies for people with certain achievements, for national defence and security, for toxicity and danger applicable to

workplaces with toxic or dangerous elements, one-off payments on retirement, and so on).

The time for calculating taxable income from salaries or wages is the time when the income-paying entity pays such income to the taxpayer or when the taxpayer receives such income.

Assessable income from salaries or wages is calculated as the total taxable income from salaries or wages less any contributions to social insurance, health insurance, professional indemnity insurance (in cases where such insurance is compulsory), voluntary pension funds, and any deductions for family circumstances and contributions to charitable and humanitarian funds.

For non-resident status. Taxable income from salaries or wages is the entire monetary salaries or wages that a non-resident receives from doing work in Vietnam, irrespective of the location where the income is paid.

Non-resident status is subject to a flat income tax rate of 20%.

Nationals working abroad

This is the same as for foreign nationals.

29. What is the rate of taxation on employment income? Are any social security contributions or similar taxes levied on employers and/or employees?

Rate of taxation on employment income

The tax rates are progressive, based on the employee's monthly salary. The scale of the progressive tax rates on each portion of income is as follows:

- Up to VND5 million: 5%.
- Above VND5 million to VND10 million: 10%.
- Above VND10 million to VND18 million: 15%.
- Above VND18 million to VND32 million: 20%.
- Above VND32 million to VND52 million: 25%.
- Above VND52 million to VND80 million: 30%.
- Above VND80 million: 35%.

Social security contributions

By law, employers and employees are required to contribute to the social, health and unemployment insurance funds. The employers' and employees' contributions are calculated as a percentage of the employee's base salary, as follows:

- Social insurance: employers: 17.5%; employees: 8%.
- Health insurance: employers: 3%; employees: 1.5%.
- Unemployment insurance: employers and employees: 1%.

BONUSES

30. Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded, whether generally or in particular sectors?

Normally, a bonus clause is agreed to in the relevant employment contract. There are no restrictions or guidelines on bonuses. An employer can issue bonus regulations to be notified to its employees subject to consultation with the trade union. It is common in Vietnam to offer a 13th month salary bonus across all sectors.

INTELLECTUAL PROPERTY (IP)

31. If employees create IP rights in the course of their employment, who owns the rights?

The employer owns the rights provided that this is specifically provided for by the relevant employment contracts with the employees.

RESTRAINT OF TRADE

32. Is it possible to restrict an employee's activities during employment and after termination? If so, in what circumstances can this be done? Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Restriction of activities

While it is possible to restrict an employee's activities during employment, any restriction after termination will not be enforceable as this will infringe the employee's right to work as provided for by the Constitution and the labour laws of Vietnam.

A non-competition clause in the employee's employment contract is possible during the employment period.

Post-employment restrictive covenants

Confidentiality obligations can survive the termination of the employment contract if so agreed by the parties. A non-competition clause will not be enforceable (see above, *Restriction of activities*). A non-solicitation clause will be difficult to enforce due to the burden of proof and unfamiliarity of Vietnamese courts with this type of claim.

RELOCATION OF EMPLOYEES

33. Can employers include mobility clauses in employment contracts, or take any other measures, to ensure that employees are obliged to relocate?

There is no law provision providing for mobility clauses and their scope. As a matter of practice, employers always include mobility clauses in employment contracts. Whether or not a relocation allowance or similar payment or any assistance must be made to the employee relocating will depend on the parties' agreement.

PROPOSALS FOR REFORM

34. Are there any proposals to reform employment law in your jurisdiction?

As Vietnam has signed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership Agreement (CPTPP) – formerly known as the Trans-Pacific Partnership (TPP), before the withdrawal of the United States from the agreement – and the National Assembly is expected to ratify it, there is an agenda for amending the Labour Code to bring it in line with Vietnam's commitments under the CPTPP. It is expected that the process of revising the Labour Code will commence in 2018, but there is currently no information regarding the changes that will be made.

Regarding social insurance contributions, pursuant to the 2016 Social Insurance Law, starting from 1 August 2018, expatriate employees with a work permit/licence/certificate to work in Vietnam issued by a competent state agency will also be able to participate in the statutory social insurance. Currently, these employees are not subject to the statutory social insurance.

The Ministry of Labour, Invalids and Social Affairs is drafting a decree guiding the participation of expatriate employees in the statutory social insurance.

ONLINE RESOURCES

Ministry of Labour, Invalids and Social Affairs (MOLISA)

W www.molisa.gov.vn

Description. Official website of the Ministry of Labour, Invalids and Social Affairs. Legal documents in Vietnamese are quite up to date; English translations are infrequently updated.

Official Government Portal

W www.chinhphu.vn

Description. Official website of the Government of Vietnam. Legal documents in Vietnamese are quite up to date; only a limited number of English translations are available.

Thu Vien Phap Luat (Law Library)

W thuvienphapluat.vn

Description. Unofficial source of legal documents in Vietnamese and English. English translations are updated more frequently than on the government websites. Some content requires a paid subscription.

Practical Law Contributor profile



Kien Trung Trinh, Partner

Tilleke & Gibbins

T +84 24 3772 5567

F +84 24 3772 5568

E kien.tt@tilleke.com

W www.tilleke.com

Professional qualifications. Lawyer practising certificate, Ministry of Justice of Vietnam, 2004; LLB, Hanoi Law University

Areas of practice. Corporate services; commercial transactions and M&A; employment; regulatory affairs; transportation and logistics.

Non-professional qualifications. BEc, Hanoi Foreign Trade University

Recent transactions

- Advised a global pharmaceutical company on all aspects of doing business in Vietnam, including employment termination and labour disciplinary procedures.
- Advised an international technology company on operating a representative office in Vietnam, including advising on the scope of work of a representative office, employment matters, tax matters and government filing requirements.
- Advised a leading high-tech company on HR matters, including drafting labour contracts, registering new staff members, preparing documents for employment termination and registering staff resignations.
- Advised clients on the role of the trade union in the representation of employees' interests and employers' obligations to consult with the trade union.

Languages. Vietnamese, English

Professional associations/memberships. Hanoi Bar Association.

Publications

- *International Employment Law, Vietnam chapter, Center for International Legal Studies.*
- *How to Hire and Fire, Vietnam chapter, Multilaw.*
- *Practical Law Company Doing Business In...Global Guide.*
- *Practical Law Company Agricultural Law Global Guide.*