
CHAMBERS GLOBAL PRACTICE GUIDES

Employment 2023

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**Vietnam: Law & Practice
and Trends & Developments**

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LE & TRAN

VIETNAM



Law and Practice

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LE & TRAN was founded in 2011 upon the principles of integrity, diligence and intellectual rigour. After nearly a decade of upholding its core values, its formidable attorneys have worked hard and smart to earn a prestigious position in the legal industry, both nationally and internationally. One of the core practice areas at Le & Tran is labour and employment. The firm's strength is based upon its top-tier labour lawyers with years of knowledge in the field and experience in handling a wide array of employ-

ment matters, ranging from regulatory compliance to wrongful termination. In addition, the firm pursues a uniquely multidisciplinary and holistic approach to clients' issues, spotting potential problems that are not specifically employment-related. With years of experience in litigation and arbitration, Le & Tran's labour lawyers are highly skilled at identifying labour law issues and recommending the necessary steps to take before the issues become seriously damaging or costly.

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1. Employment Terms

1.1 Employee Status

Vietnamese labour law does not provide legal distinctions between blue-collar and white-collar workers.

In general, the law does not make any legal distinction between different categories of workers, except for employees and apprentices. The 2019 Labour Code also now defines “employees” more expansively and states that an “employee” is a person who works for an employer under an agreement, and is paid, managed and supervised by the employer. Therefore, companies must now take particular care when drafting contracts with independent contractors or other types of workers whom they do not intend to employ as regular employees, as these categories of workers may now be considered to be “employees” if the business closely manages or supervises their work.

The 2019 Labour Code also contains specific provisions for certain classes of employees (such as minor employees, elderly employees, disabled employees and female employees) who are granted certain protections and additional statutory employment rights, such as additional rest breaks or shorter regular working hours.

1.2 Employment Contracts

Types of Employment Contracts

The 2019 Labour Code removes the concept of “seasonal employment contracts” having a term of less than 12 months. Accordingly, there exist two types of employment contracts under the 2019 Labour Code: indefinite term contracts and definite term contracts (ie, contracts having a term of 36 months or less).

Definite term contracts may generally only be renewed once. After the expiry of a renewed definite term contract, in most cases the contract will become an indefinite term contract if the employee continues working for the employer, regardless of the agreement of the parties. However, the 2019 Labour Code does specify certain cases in which definite term contracts can be renewed multiple times, including contracts with elderly employees, foreign employees, officers of labour representative organisations and directors of companies having state-owned capital.

Contracts Required

An employer must sign written employment contracts with its employees before the employees start working for the employer.

Contents of Employment Contracts

Parties are generally free to negotiate and enter into their own employment contracts, provided that the terms are not less favourable than those prescribed by law, eg, in relation to minimum annual leave and maternity leave entitlements.

An employment contract must contain the following main provisions:

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

1.3 Working Hours

Normal Working Hours

Normal working hours of employees in Vietnam must not exceed 8 hours in a day and 48 hours in a week. This means that the employer can require that employees work 8 hours a day for 6 days a week.

The law does not prohibit the company from entering into flexible working arrangements with its employees, but the working hours must not exceed the prescribed limit.

Part-time Contracts

Under the 2019 Labour Code, a part-time employee is an employee who works for less than the usual daily, weekly or monthly working hours as prescribed above, or in the collective bargaining agreement (CBA) or internal labour regulations (ILR) of the company.

The employee may negotiate part-time employment with the employer when entering into an employment contract. The law does not set out a different set of required contents for part-time contracts and therefore, the contents of part-time contracts shall follow the requirements for normal employment contracts as explained in **1.2 Employment Contracts**. Part-time employees have equal entitlements, rights, obligations and opportunities as a full-time employee, and are to receive the same treatment.

Overtime Regulations

Vietnam implements strict regulations on overtime. The 2019 Labour Code increased the cap on overtime working hours for employees from 30 hours to 40 hours per month. However, similarly to the 2012 Labour Code, it retains the annual overtime cap of 200 hours in normal situations, though this can be increased up to 300 hours in certain special circumstances. In addi-

tion, the 2019 Labour Code has expanded the circumstances in which a 300-hour cap is permitted. These circumstances now include:

- manufacturing and processing for export of electrical devices and processing of salt products; and
- work that demands workers with high-level technical and professional skills the current labour market cannot meet.

1.4 Compensation

Minimum wage requirements

Statutory minimum wages are the minimum wages of employees who do the simplest jobs in normal working conditions that are sufficient to support themselves and their families, and are appropriate for socio-economic development.

Statutory minimum wages per month or per hour vary by region. Currently, according to Decree 38/2022/ND-CP of the government, the minimum monthly salary in Regions I to IV is VND4,680,000, VND4,160,000, VND3,640,000 and VND3,250,000 respectively. Moreover, the minimum hourly salary is also set for Regions I to IV as follows: VND22,500, VND20,000, VND17,500 and VND15,600. Employers are required to pay salaries to their employees which are not lower than the minimum salary level applicable in their region.

Bonuses

A bonus is the amount of money awarded by the employer to the employee based on the annual business performance and the amount of work performed by the employee. The employer possesses the sole discretion to determine this amount. Unless the company has committed to pay its employees these amounts, they are not statutory payments from the company to its employees. Normally, where a bonus payment

applies, its terms will be agreed in a bonus clause contained in the relevant employment contract or CBA, or in the employer's own financial or bonus policy. There are no specific restrictions or guidelines on bonuses. However, an employer can only deduct bonus payments (as a deductible expense) from its corporate income tax liability where the terms of the relevant bonus have been included in a relevant document.

An employer can issue its own internal bonus policy, which will then be announced to employees subject to consultation with the employee representative organisation (if any). It is also subject to a dialogue in a workplace session, which involves a discussion between all the employees' representatives and the employer's representatives.

Generally, it is common in Vietnam to offer a 13th-month salary bonus, often called a Tet bonus, to all employees across all sectors. However, it is not legally required if not committed to by the employer.

1.5 Other Employment Terms

Vacation and Vacation Pay

By law, employees working under normal working conditions are entitled to a minimum of 12 days of paid annual leave, exclusive of public holidays. In addition, employees who are minors or who are working under heavy, hazardous or toxic working conditions are entitled to a minimum of 14 days of paid annual leave, exclusive of public holidays. Furthermore, employees working under extremely heavy, hazardous or toxic working conditions are entitled to a minimum of 16 days of paid annual leave, exclusive of public holidays. Employees must also be given one additional day of paid annual leave for every five years of consecutive service for

an employer, and there is no cap on these additional leave days.

At present, there are a total of 11 statutory public holidays in Vietnam for which employees receive their normal pay entitlement. If any of the public holidays falls on a weekend, employees are entitled to take the next weekday off. In addition to these public holidays, expatriate employees are also entitled to one paid day off for their traditional new year, and another paid day off for the national day of their country.

Confidentiality and Non-disparagement Requirements

Currently, if an employee's job is directly related to business secrets or technological know-how as prescribed by law, the employer has the right to sign a written agreement with the employee on the content and duration of the protection of the business secret or technological know-how, and on the compensation obligation in case of a violation by the employee. However, the law does not currently provide for a non-disparagement requirement in the employer-employee relationship.

These requirements are not statutory and, to be enforceable, must be made a contractual requirement by written agreements signed between the company and its employees.

2. Restrictive Covenants

2.1 Non-competes

From a labour law perspective, the existence of a non-competition clause obstructs the working rights of employees and interferes with the rule of "labour freedom". Specifically, Article 10.1 of the 2019 Labour Code provides the right of the worker "to work for any employer and in any

place which is not prohibited by the law”, while Article 19.1 also states that “the employee has the right to engage in employment contracts with several employers, but must ensure the fulfilment of the agreed contract terms”. As such, if a non-competition clause is created, it means that the employees would be obligated to waive their legitimate rights.

The 2019 Labour Code regulates the relationships between the employer and employees that arise from the employment contract. Thus, where a non-competition clause is contained in the employment contract (either in a provision or an appendix of the employment contract), the content of such a non-competition clause often violates the principles provided in Article 15.2 of the 2019 Labour Code which entitles the employees to the “freedom to enter into an employment contract which is not contrary to the law, the collective labour agreement and social morality”.

To strengthen the validity and decrease the possibility of a non-competition clause being rejected by the court in case of disputes, we recommend that the non-competition terms are drafted in accordance with the principles below.

- There should be a separation of the non-competition clause from the employment contract between the employer and the employee. This means there should be a separate agreement created which is independent from the employment contract.
- The period of validity and scope of application of the non-competition clause should be limited to a reasonable time and scope, eg, six months.
- Contents of the non-competition clause need to strike a reasonable balance between the rights and obligations of both parties. It is

likely that the court would more easily accept the non-competition clause if it indicates an arms-length civil transaction, meaning an easily definable equitable balance between rights and obligations of both parties (whereby the rights of one party are the obligations of the other party, and vice versa).

- On the part of the employee, there should be a clear consent to forgo their rights for a reasonable time period. On the part of the employer, there should be reasonable compensation offered for the benefit of having the employee abstain from using their rights (this may be an amount of money or a share of profits, depending on the agreement between both parties). It would be advisable to avoid a situation where the court would consider the non-competition clause as a unilateral imposition of the employer’s will on the employee (who is always considered as a disadvantaged party in their relationship with the employer under Vietnamese law).
- Finally, the non-competition agreement should contain a note concerning the penalties for a violation of the terms by the employee. Instead of completely prohibiting the employee from freely working for a third party (and there should not be a complete permanent prohibition), the employer should consider a monetary penalty or a fine for a violation of the non-competition agreement in order to (a) give colour to the non-competition clause as a civil transaction between both parties, thus helping to avoid having the case being considered as a violation of the regulations under the labour law (ie, violating the employee’s freedom to work), (b) establish a basis to request that the employee compensate the company when their violation of the non-competition clause leads to a dispute (a fine for violation would be more effective than a request for compensation due to the

requirement to prove the actual damages caused to the party requesting compensation), and (c) to reinforce the consequences for the employee if they violate the non-competition clause.

2.2 Non-solicits

Vietnamese law does not regulate non-solicitation clauses signed with the company's employees and customers. A non-solicitation clause should also follow the principles set out above for non-competition clauses.

However, please note that a non-solicitation clause will be difficult to enforce in practice, due to the burden of proof and the unfamiliarity of the Vietnamese courts with this type of clause.

3. Data Privacy

3.1 Data Privacy Law and Employment

Vietnamese laws do not provide for a separate framework governing data privacy in an employment context, but data privacy provisions are provided under various laws – mainly the Civil Code, the Law on Protection of Consumer's Rights, the Law on Cyber Information Security, the Law on Cybersecurity, and decrees and circulars for implementation of these laws (including but not limited to the new Decree 13/2023/ND-CP on personal data protection).

General data security requires any party to obtain the respective individual's consent if their personal information is collected, processed, used or stored in any way. Consequently, this requirement will equally apply to employers when handling their employees' personal data (ie, the employer must obtain the employee's direct consent). In addition to obtaining the above consent from employees regarding their

personal data, there are certain general obligations and standards that employers must adhere to when collecting, processing and using the personal data of the subject (ie, the employee). These rules are predominantly rooted in the Vietnamese data privacy laws mentioned above.

4. Foreign Workers

4.1 Limitations on Foreign Workers

Generally, expatriate employees working for more than three months require a work permit to work in Vietnam, except in limited exempted cases (eg, board members of shareholding companies having the capital contribution of at least VND3 billion).

The employer is responsible for obtaining the work permit for the foreign employee, which is tied to one specific position with that specific employer only. If any content in the work permit changes (eg, through a change of work position or employer), a new work permit is required. Each work permit has a maximum term of 24 months and can be reissued for subsequent terms at the employer's request.

Under Vietnam's commitments to the World Trade Organization, if a foreign invested company routinely transfers expatriate managers in and out of Vietnam, at least 20% of the total number of the managers, executive directors and experts of the company must be Vietnamese citizens. However, each foreign invested company will be allowed to have at least three foreign managers, executive directors and experts in Vietnam. Further, the employer is required to have a training plan and specific apprenticeship agreements to train Vietnamese employees to eventually replace foreign employees.

4.2 Registration Requirements for Foreign Workers

Employers seeking to hire a foreign employee must submit a written request for approval to hire a foreign worker to the labour authority at least 15 days prior to the start date of employment. Once approval is received, the employer may then apply for a work permit from the labour authority. A number of documents must be submitted by the employer, including the work permit application form; a police or criminal clearance certificate, no less than six months old; copies of relevant qualifications and degrees and/or proof of years of relevant experience; a copy of the employee's valid passport; two recent passport photos; a certificate of health from an approved hospital in Vietnam or the employee's home country; the approval from the committee that allows employment of foreign workers; and the business registration certificate.

Under Decree 152/2020/ND-CP, as recently amended by Decree 70/2023/ND-CP, foreigners must have work experience "suitable with the job position that the foreigners intend to work in Vietnam". For experts, they must hold a bachelor's degree or higher, or an equivalent degree, and have "at least three years of work experience suitable with the job position that the foreigners intend to work in Vietnam". For technical workers, they must have been trained in a technical field or another major for at least one year and "have worked for at least three years suitable with the job position that the foreigners intend to work in Vietnam".

Notably, from 1 January 2024, before submitting the written request for approval to hire a foreign worker to the labour authority, the employer will have to additionally announce the recruitment of Vietnamese workers for positions expected

to recruit foreign workers on the Governmental portal, which will be launched in the near future.

5. New Work

5.1 Mobile Work

The 2019 Labour Code and its guiding regulations do not provide for mobile work. However, the employment contract must specifically identify the workplace, defined under the law as "the location where an employee works under agreement or as assigned by the employer".

It is advisable for companies to include specific details concerning remote work locations in their employment contracts. Additionally, regulations on working hours, employee responsibilities related to maintaining a safe working environment, and compulsory measures regarding issues such as data privacy and social security should also be added to these contracts to mitigate risks for the company.

5.2 Sabbaticals

Vietnamese labour law does not set out a specific regime for sabbatical leave. This kind of leave, as well as the employee's benefits (eg, salary, period of leave), shall be subject to agreement between the company and its employees.

In Vietnam, a period of sabbatical leave can be created in the form of a suspension of an employment contract under Article 30 of the 2019 Labour Code, where the employee shall not receive the salary and benefits specified in the employment contract, unless otherwise agreed by both parties or prescribed by law.

5.3 Other New Manifestations

Due to the rise of the home office and the mobile working platform as a result of the recent Cov-

id-19 pandemic, many companies have begun reducing their workspaces and office areas to reduce rental and energy costs. When employees no longer work in the office every day, the workstations and rooms can be shared by different staff, ie, desk sharing.

As a result, several legal implications for occupational health and safety, data protection, and other factors need to be taken seriously into account. The desk sharing concept requires the creation and communication of regulations governing mobile work, especially when working from home. Dialogue with employees regarding the preparation and implementation of such regulations is recommended.

6. Collective Relations

6.1 Unions

In Vietnam, the “trade union” was the only organisation solely dedicated to protecting employees’ legitimate rights and interests from the implementation of the first Labour Code in 1994 until the Labour Code of 2012 was enacted (which changed the nomenclature but not the fundamental purpose of the trade union).

The main advantage of a trade union is to harmonise and stabilise the labour relations between the company and its employees. The trade union shall, among other things, participate in the establishment of and supervise the implementation of CBAs, salary scales and tables, labour norms and salary payment regulations, bonus payment regulations, ILRs, and democracy regulations at the company. Additionally, it is to establish dialogue and cooperate with the company to build harmonious and progressive labour relations at the company.

Under the 2012 Law on Trade Unions, roles of the trade union include the following:

- representing and protecting the legitimate and proper rights and interests of the employees, including but not limited to:
 - (a) guiding and advising the employees on their rights and obligations upon concluding or performing employment contracts with the employer;
 - (b) representing the employees in the negotiation, conclusion and supervision of the implementation of CBAs;
 - (c) working with the employer to formulate and supervise the implementation of salary scales and tables, labour norms, salary payment regulations, bonus payment regulations, and ILRs;
- participating in state management and eco-social management;
- submitting law or ordinance projects and proposals for the development of law and policy;
- participating in meetings, sessions and conferences of concerned agencies and organisations at the same level to discuss and decide on matters related to the rights and obligations of the employees;
- participating in the inspection, examination and supervision of the activities of agencies, organisations and companies (this includes participating in and co-operating with competent state agencies’ actions to inspect, examine and supervise the implementation of regimes, policies or laws on labour, trade unions, officials and civil servants, public employees, social insurance, health insurance and other regimes, policies and laws related to the rights and obligations of the employees, and also includes a responsibility to investigate labour accidents and occupational diseases);
- mobilising and educating the employees; and

- developing trade union members and the trade union.

By and large, this means that the trade union is involved in all regulations, aspects or matters related to the employees' rights, interests, obligations and liabilities in labour relations with the employer.

Vietnamese law sets out a stringent and lengthy process for the employees to initiate a lawful strike, which includes consultation with the trade union about: agreement/disagreement with the strike; the start time, location and scope of the strike; and the demands of the employees. Before and during the strike, approval from the court of the legality of the strike may be required upon the request of the trade union or the employer, in which case the court will consider all statutory factors to decide whether the strike is legal or not.

It is advisable that companies establish a Grassroots Trade Union (for an explanation of this terminology, see **6.2 Employee Representative Bodies**) to assist in harmonising the labour relationship between the company and its employees and obtaining information about the expectations and opinions of the employees, in order to take appropriate actions. In our experience, when a conflict arises between the employer and its employees, the Grassroots Trade Union will usually play an active role in settling the conflict, understanding the employees' concerns and advising the employees in accordance with the law.

Unlike in some European countries and most states of the United States of America, trade unions in Vietnam are not entitled to participate in management decisions and presently have no right to be informed about the economic perfor-

mance of the company. In Vietnamese practice, the trade union would normally intervene in the labour relationship between the company and its employees at the request of any employee who is a member of the union, at the request of the company itself (to consult its opinions as prescribed under the law), or when any action contrary to labour law reaches its attention and the trade union is required by law to step in. However, companies in Vietnam are not required by law to invite the trade union into their business meetings to collect opinions, nor to inform the trade union about business information, such as strategic planning or the profit and loss distribution of the company.

6.2 Employee Representative Bodies

Under the 2012 Labour Code, the term referring to trade unions was changed to "representative organisation of grassroots-level employees". However, the essence of this organisation did not change and was defined as "the executive committee of a grassroots trade union or the executive committee of the immediate upper-level trade union in a non-unionised company". As such, it could be said that it was old wine in a new bottle.

The 2019 Labour Code revised the term to "employees' representative organisations at the grassroots level", comprising the Grassroots Trade Union and employees' organisations at all companies. Specifically, Article 3.3 of the 2019 Labour Code stipulates: "The employees' representative organisations at the grassroots level means an internal organisation voluntarily established by employees of an employer which protects the employees' legitimate rights and interests in labour relations through collective bargaining or other methods prescribed by labour laws. The employees' representative organisations at the grassroots level comprise

the grassroots trade union and the employees' organisation at company-level."

6.3 Collective Bargaining Agreements

If requested by the majority of employees in the company, the employer and the company's trade union shall enter into negotiations for a collective bargaining agreement (CBA) setting out the parties' agreement on the working conditions and the parties' rights and obligations. The CBA must be registered with the labour authority.

In practice, the main purpose of having a CBA in place is to record the employment benefits that are applied to the majority of employees, so that such benefits can be considered as expenses of the company when calculating corporate income tax.

7. Termination

7.1 Grounds for Termination

Vietnamese labour legislation is generally considered to be "pro-employee". As such, it is imperative that companies prepare and devise a termination plan in compliance with the laws to avoid any potential disputes in court. This plan should be prepared and standardised prior to the termination of the employment relationship.

In brief, Vietnamese labour law sets out four acceptable methods of employment termination, which include (i) automatic termination, (ii) mutual separation, (iii) termination by the company (including unilateral termination by the company, retrenchment, and dismissal), and (iv) unilateral termination by the employee. Different procedures will follow, depending on the grounds for termination of the employment contract.

In cases of retrenchment (which leads to collective redundancies), the law provides for a termination procedure if the employee becomes redundant as a result of "organisational restructuring, technological change or economic reasons". This process involves substantial detailed requirements in order for the termination to be considered lawful, including but not limited to a labour usage plan formulation and notification of the labour authorities. The retrenchment may be challenged by the court for any technical non-compliance with the retrenchment procedures. The retrenchment package may include job-loss pay and other contractual benefits.

7.2 Notice Periods

Depending on the termination grounds, different notice periods, formalities and termination packages shall apply.

Automatic Termination

An employment contract may be automatically terminated upon the expiration of the contract term or the employee's completion of the agreed job. No notice period is required. The company may be required to provide severance pay to the employee if the service term is at least 12 months (if not covered by unemployment insurance).

Mutual Separation

The law respects mutual termination of employment between the parties. In such a case, the notice period is negotiated and agreed by the company and its employees, as set out in the termination agreement. At the company's discretion, the final compensation package for the employee may consist of severance pay, contractual benefits and monetary support.

Termination by the Company

- Unilateral termination by the company – the company has the ability to unilaterally terminate the employment contract if it can produce sufficient evidence to support the legal justification of its termination decision. Furthermore, the company is absolutely required to ensure that the employee receives a prior termination notice of 30 days, 45 days, 90 days or 120 days, corresponding to the specific contract type, job position and the nature of the business. The final compensation package may include severance pay and other contractual benefits.
- Retrenchment – as discussed in **7.1 Grounds for Termination**, this process must fulfil substantial detailed requirements in order to be considered lawful, including but not limited to a labour usage plan formulation and notification of the labour authorities. The retrenchment package may include job-loss pay and other contractual benefits.
- Dismissal – the company may dismiss an employee who has committed an offence specified by the law, an ILR or an employment contract. Labour law requires companies to strictly comply with numerous requirements before the dismissal may be considered lawful. If an employee is dismissed in this fashion, no final compensation package is required and the employee may also be obligated to compensate the company and a third party (if any) according to the law.

Unilateral Termination by the Employee

An employee may, without proving a plausible cause, unilaterally terminate the employment contract by serving prior notice to the company. Similar to unilateral termination by the company, the notice period depends on the specific contract type, job position and the nature of the

business. However, it should be noted that there are exemptions from the prior notice obligation in cases of sexual harassment or when the employee reaches the statutory retirement age.

7.3 Dismissal for (Serious) Cause Grounds for Dismissal

Under the law, an employee who commits any of the below offences may be subject to dismissal:

- theft, embezzlement, gambling, deliberate violence causing injury, or use of drugs at the workplace;
- disclosure of technology or business secrets, infringement of intellectual property rights of the employer, actions which cause serious loss and damage or which threaten to cause particularly serious loss and damage to the property or interests of the employer, or sexual harassment at the workplace as defined in the ILR;
- being disciplined in the form of demotion or deferral of a salary increase, and then committing the same offence during the period before the initial disciplinary measure has expired; or
- absence without leave for a total period of five days in 30 days, or for a total period of 20 days in 365 days from the first day they fail to go to work without legitimate reasons.

Procedures for Dismissal

The 2019 Labour Code prescribes a stringent process for dismissal of an employee. When the company has a valid cause for dismissal, it is required to strictly follow the dismissal procedures set out by the law. Any technical failure in complying with the stringent dismissal process may subject the company's dismissal decision to the risk of the being challenged by the courts, which are normally pro-employee in practice.

Below is a summary of the steps that the company would need to follow:

- Step 1 – When detecting an employee’s violation of labor discipline at the time of the violation, the company shall make a record of the violation and notify either the employee’s representative organisation at the workplace of which the employee is a member, or the legal representative of an employee who is under 15 years old. In cases where the employer detects a violation of labour discipline after the violation has occurred, the company must collect evidence to prove the breach committed by the employee.
- Step 2 – The company sets up a committee for the disciplinary meeting, which normally includes the legal representative of the company, human resources personnel and the manager of the employee.
- Step 3 – The company sends the notification of the disciplinary meeting to the employee and to the employee’s representative organisation at the workplace of which the employee is a member, at least five working days before the disciplinary meeting. In case one of the required participants cannot attend the meeting at the time and location in the notice, the employee and the employer must negotiate to change the meeting time and location. In case the two parties cannot reach an agreement, the employer will have the prevailing right to decide the time and place of the meeting.
- Step 4 – The company organises the disciplinary meeting. The disciplinary meeting can only be conducted in the presence of required participants, including the disciplinary committee, the representative of the employee’s representative organisation at the workplace of which the employee is a member, the employee, witnesses (if any) and lawyers (if

any). In case one of the required participants cannot attend the meeting at the time and location in the notice, the employee and the employer must negotiate to change the meeting time and location. In case the two parties cannot reach an agreement, the employer will have the prevailing right to decide the time and place of the meeting. In such cases, if any of the required participants is absent, the disciplinary meeting can still be proceeded.

- Step 5 – The company issues the dismissal decision and sends the decision to all participants. The dismissal decision must be issued within the statute of limitations, ie, six months from the date the breach occurred.

7.4 Termination Agreements

Termination agreements are permissible. Given the stringent process and formalities required for an employer to terminate an employment contract with an employee, in practice Vietnamese employers often try to achieve termination by mutual agreement in order to reduce risks of future claims by the employee.

The law allows the employee and the employer to mutually agree to terminate the employment contract; therefore, there are no specific procedures, formalities and requirements that are legally required to be followed.

A termination agreement usually covers the following key contents: the compensation package for the termination, the termination date, and the rights and responsibilities of both the company and the employee (including the confidentiality and non-disparagement undertakings of the employee, and return of property).

7.5 Protected Categories of Employee

Dismissal is a disciplinary action where an employment contract is terminated for a breach

of “labour discipline” 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 employment rules.

Female employees cannot be dismissed for reasons that concern marriage, pregnancy, maternity leave or nursing a child under 12 months of age. Male employees also enjoy protection from dismissal while they are on paternity leave or raising a child under 12 months of age. An employer is also prohibited from dismissing an employee who is:

- taking leave due to illness or convalescence;
- taking other leave with the employer’s consent;
- being held in temporary custody or detention (without formal charges having been made); or
- awaiting the results of an investigation conducted by a state agency (such as a criminal investigation).

If an employer wishes to dismiss an employee who is a part-time trade union officer, the employer must obtain a written agreement on the dismissal from either:

- the executive committee of the Grassroots Trade Union; or
- the executive committee of the directly superior trade union.

If the employer and the relevant trade union are unable to reach an agreement on the dismissal, the two parties must report this failure to agree to the local labour management authority. Only the employer has the right to make the decision concerning the dismissal, and will be legally liable for that decision, which can be taken after 30 days have expired from the date of the noti-

fication of the failure to reach an agreement to the local labour management authority. If the employee and the executive committee of the relevant trade union disagree with the employer’s decision on the dismissal, they have a right to request the resolution of the labour dispute in court in accordance with the procedures stipulated by law.

8. Disputes

8.1 Wrongful Dismissal

Grounds for a Wrongful Dismissal Claim

Employees in Vietnam are entitled to initiate a wrongful dismissal claim if their employer terminates them without a valid reason or in a manner not in accordance with the required process under the labour laws. The grounds for a wrongful dismissal claim will depend on the employer’s reason for terminating the employee. Examples include:

- Unilateral termination by the company—the employer fails to provide sufficient evidence to support the legal justification of its termination decision or fails to provide a prior termination notice according to the specific contract type, job position and nature of the business.
- Retrenchment—the employer fails to demonstrate that the retrenchment is genuine, or fails to adhere to the retrenchment process outlined by the law. To lawfully invoke retrenchment, for instance, the employer must develop a labour utilisation plan and notify the labour authorities. If this process is not followed properly, the retrenchment will likely be considered unlawful.
- Dismissal—the employer fails to demonstrate that the employee committed a violation specified by law, the ILR or the employment

contract. In addition, the employer fails to comply with the required process for the dismissal to be deemed lawful. For instance, the employer fails to conduct disciplinary hearings in accordance with legal requirements and fails to ensure that all required parties are aware of the disciplinary hearing prior to its occurrence.

Consequences of the Claim

If successful, the employee would be entitled to the following:

- salary and social insurance, health insurance, and unemployment insurance premiums for the days the employee was unable to work, plus an amount at least equal to two months' salary stated in the employment contract;
- reinstatement to work under the signed employment contract;
- severance pay if the employee chooses not to return to work; and
- at least two months of additional pay, if the employer does not wish to reinstate the employee and the employee agrees.

8.2 Anti-discrimination

Grounds for Anti-discrimination Claims

According to Article 3.8 of the 2019 Labour Code, employees can file claims for discrimination-related damages if their right to equal treatment in their employment or career opportunities is violated based upon:

- race, skin colour, national origin or social origin, nationality, gender, age, pregnancy, marital status, religion, beliefs, political views, physical disability or family responsibility;
- HIV infection status; or
- their actions of establishing, joining, or operating a trade union organisation or an employee organisation at a company.

Burden of Proof

When initiating such claims, the employee who has been discriminated against must prove the following factors.

The first is the existence of discrimination, which can be determined by identifying the following main elements:

- the employee experienced less favourable treatment;
- the less favourable treatment was based on differences in the above grounds;
- the less favourable treatment was not based on the nature of the job requirements; and
- the less favourable treatment was not the act of employment sustainment or protection for vulnerable employees.

The second is that such discrimination, exclusion or preference adversely affects the employee's equal status in employment or career opportunities.

Applicable Relief

In such claims, the employee can seek relief such as compensation for the loss or damages incurred as a result of the discrimination, and also request an apology from the employer for their discriminatory actions.

8.3 Digitalisation

Guidelines on Virtual Hearings

After the Covid-19 outbreak in Vietnam, on 12 November 2021, the National Assembly of Vietnam issued Resolution 33/2021/QH15 on the organisation of virtual hearings (Resolution 33) for resolving court cases with "simple facts and nature, and clear evidence", including labour disputes (except for cases involving state secrets).

On 11 December 2021, Joint Circular 05/2021/TTLT-TANDTC-VKSNDTC-BCA-BQP-BTP on guiding the implementation of the virtual hearings (Joint Circular 05) was issued in order to better implement Resolution 33. Joint Circular 05 provided more specific guidelines for conducting virtual hearings, including:

- general requirements of technological equipment;
- details of the authority and responsibilities of competent authorities when planning virtual hearings;
- guidelines concerning participants in the trial – which are similar to those for normal hearings;
- rules of conduct for virtual hearings; and
- procedures for handling disruptions during the trial.

Issues and Challenges in Organizing Virtual Hearings

Overall, Joint Circular 05 provides a more comprehensive guide for organising virtual hearings in accordance with Resolution 33's principles. However, the current legal framework for virtual hearings is still too broad and has encountered numerous practical challenges. Some prevalent issues include:

- the lack of a clear and unified criterion to determine if a case has sufficiently “simple facts and nature, and clear evidence” to be suitable for virtual hearings (this is up to the discretion of each court managing the case);
- difficulties in adequately and synchronously equipping the court system with the necessary apparatus; and
- concerns regarding information security and confidentiality.

Our Experience

A case from our experience of participating in virtual hearings in September 2022 involved parties who reached a settlement and asked the court to approve their agreement with a valid judgement. We represented the defendant, who joined the trial in Ho Chi Minh Court; the plaintiff, who resided near Thu Duc District, joined the trial in Thu Duc District Court. Even though the process applied to this case was quite simple, it took the court 1.5 hours to technically prepare. Furthermore, during the hearings, the connections were sometimes so sluggish that the parties could not hear each other clearly. Despite these issues, we believe that, in the long run, virtual hearings will ultimately supplant traditional courts, whose technology and infrastructure will be enhanced.

9. Dispute Resolution

9.1 Litigation

Specialised Employment Forums

Before bringing the case to court, the disputing parties may bring their case to the labour conciliation council and labour arbitration council.

Labour conciliation council

Except for certain labour disputes, such as wrongful termination, compensation, severance pay and social insurance, where the parties may bring their case directly to court, the labour case must be settled through the conciliation procedures conducted by the labour conciliation council prior to being brought to the labour arbitration council or the courts for resolution. The process is as follows:

- Within seven working days after receiving a request for labour dispute settlement, a

labour conciliation council must be formed to settle the dispute.

- Within 30 days after being formed, the labour conciliation council must issue a decision on dispute settlement and send it to the disputing parties.
- If the time limit expires but the labour conciliation council has not yet been formed, or the labour conciliation council fails to issue a decision on dispute settlement, the disputing parties may request dispute settlement by a court.
- If either party fails to implement the dispute settlement decision issued by the labour conciliation council, the parties may request dispute settlement by a court.

Even if the parties are not required to bring their case to the labour conciliation council (as in the cases stated above), in our experience, the court is likely to request that the parties undergo mediation via the labour conciliation council before requesting that the court resolve their case. Therefore, in labour disputes, it is strongly advised to seek mediation through the labour conciliation council before bringing the dispute to court.

Labour arbitration council

The disputing parties have the right to request that the labour arbitration council resolve the dispute through non-binding arbitration. When asking the labour arbitration council to resolve a dispute, parties may not simultaneously ask the court to settle the matter. The procedure for labour arbitration is as follows:

- The labour arbitration council must be established within seven working days of receiving the request for dispute settlement.
- Within 30 days of the date of establishment of the labour arbitration council, the labour arbi-

tration council shall render a decision regarding the resolution of the dispute and forward it to the disputing parties.

- If the labour arbitration council has not been established within five days from the date of receipt of the application, if the labour arbitration council has not rendered a decision to resolve the dispute within 30 days of the date of its establishment, the parties have the right to request that the court settle the dispute.
- In the event that one of the parties fails to comply with the labour arbitration council's decision to resolve the dispute, the parties have the right to request that the court resolve the matter.

As stated, the decision of the labour arbitration council is not final and binding on the parties and the labour arbitration council is not a required procedure under the labour laws. Therefore, according to our litigation experience, to save time and cost, the parties should bypass this employment forum and go directly to court to obtain a resolution.

Collective Labour Disputes

Under the labour laws of Vietnam, a collective labour dispute covers disputes between representative organisations of employees and the employer over differences in the interpretation and implementation of the CBA, ILR and other lawful agreements.

Individual Labour Disputes

Other kinds of labour/employment disputes are considered individual labour disputes. The Code of Civil Procedure of Vietnam currently does not set a legal framework for class action civil claims in general, or for class action labour claims involving individual labour disputes in particular.

Each employee with a similar dispute with the same employer may ask the court to consolidate their case with those of other employees with concurrent cases. However, the court has complete discretion as to whether or not the cases should be merged. Consequently, class action-style lawsuits (or consolidated individual labour disputes) are uncommon in practice.

9.2 Alternative Dispute Resolution Commercial Arbitration

The court resolves labour disputes in Vietnam through mediation by a qualified mediator or authority, or through agreements between the employee and employer. Current Vietnamese labour law does not recognise commercial arbitration as a valid method for resolving labour disputes. Consequently, the question of whether a labour dispute can be resolved through commercial arbitration arises.

It should be noted that the labour conciliation council must be distinguished from commercial arbitration. The labour conciliation council is established by the state of Vietnam in accordance with the labour laws, while commercial arbitration involves a civil organisation to which Vietnam has delegated the authority to conduct judicial hearings to resolve commercial disputes between the parties. Under Vietnamese laws, only the labour conciliation council and the courts are authorised to settle labour disputes.

Pre-dispute Commercial Arbitration

Nonetheless, if the draft of Precedent No. 12 in the year 2023, which is based on Decision No. 755/2018/QD-PQTT, is approved, it will establish a precedent allowing arbitration to resolve cases involving certain areas of labour disputes, such as non-disclosure and non-competition agree-

ments. In particular, the draft of Precedent No. 12 for the year 2023 states: “In this case, the court shall determine the dispute regarding the non-disclosure agreement and non-competition agreement between the parties as an agreement independent of the employment contract, within the jurisdiction of arbitration.”

The legal framework for answering the question of whether pre-dispute commercial arbitration agreements are enforceable will depend on whether the draft of Precedent No. 12 in the year 2023 is approved or not.

9.3 Costs

An employee/employer who prevails will not be awarded attorney fees and other legal costs. The Vietnamese court system does not recognise the awarding of attorney’s fees and legal costs to the victorious party, except in cases involving infringement of intellectual property rights, in which case the laws permit the winning party to claim attorney’s fees and legal costs from the losing party.

To avoid non-compliance, which may result in compensation for employees and, in some cases, affect the employer’s reputation, employers must be thoroughly aware of the terms of labour laws on substantive and procedural issues. Failing to comply with the labour law, and even missing a minor step, may pose significant risks to the employer.

Trends and Developments

Contributed by:

Stephen Le Hoang Chuong, Trang Le and Benjamin (Hong) Truong
LE & TRAN

LE & TRAN was founded in 2011 upon the principles of integrity, diligence and intellectual rigour. After nearly a decade of upholding its core values, its formidable attorneys have worked hard and smart to earn a prestigious position in the legal industry, both nationally and internationally. One of the core practice areas at Le & Tran is labour and employment. The firm's strength is based upon its top-tier labour lawyers with years of knowledge in the field and experience in handling a wide array of employ-

ment matters, ranging from regulatory compliance to wrongful termination. In addition, the firm pursues a uniquely multidisciplinary and holistic approach to clients' issues, spotting potential problems that are not specifically employment-related. With years of experience in litigation and arbitration, Le & Tran's labour lawyers are highly skilled at identifying labour law issues and recommending the necessary steps to take before the issues become seriously damaging or costly.

Authors



Stephen Le Hoang Chuong is a senior trial lawyer and founder of Le & Tran. Stephen's mindset centres around critical thinking and business ethics, which form the core of defending his clients'

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Contributed by: Stephen Le Hoang Chuong, Trang Le and Benjamin (Hong) Truong, **LE & TRAN**



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Labour Contracts and Service Contracts

Under the 2019 Labour Code, a contract, regardless of how it is labelled, will be considered a labour contract if it contemplates an employment relationship in which one party works and receives a salary and is subject to the other party's management and supervision. These provisions are designed to curtail a common practice in Vietnam of employers entering into service agreements with their employees in order to argue that their relationship is not governed by the stringent requirements of the Vietnamese labour law.

Sometimes in a labour dispute, a critical question arises as to whether a contract signed between the company and an individual is an employment or service contract. To answer this, the contractual relationship between the parties, the applicable legal grounds and other practical issues must be examined.

Labour contracts and service contracts under the relevant laws and regulations

The applicable provisions under the 2019 Labor Code are as follows:

- Article 13.1: "A labour contract is an agreement between an employee and an employer on the remunerated work, wage, working conditions, rights and obligations of each party in the labour relation. An agreement with a title other than "labour contract" is also considered a labour contract if it sets out the remunerated work and wage, as well as the management, administration and supervision by one party of another."
- Article 3.5: "Labour relations shall mean the social relations arising from hiring, using labour, and payment of wages between an employer and an employee, their representative organisations, and competent authorities.

Labour relations include individual labour relations and collective labour relations."

- Article 3.1: "Employee shall mean a person who works for an employer under an agreement, is paid a wage and is managed, controlled and supervised by the employer."

For the laws and regulations with regard to a service contract:

- Article 513 of the 2015 Civil Code stipulates: "A service contract is an agreement between parties whereby a service provider performs a task for a service user, and the service user must pay a service fee to the service provider."
- Article 3.9 of the 2005 Commercial Law provides: "Provision of services means a commercial activity whereby one party (hereinafter referred to as the "service provider") is obliged to provide services to another party and receives payment; and whereby the party using the services (hereinafter referred to as the "client") is obliged to make payment to the service provider and to use the services as agreed."

From the above regulations, it can be seen that the definitions of "labour contract" and "service contract" are quite similar and frequently difficult to distinguish (ie, both are an agreement between the parties, and the employee/service provider receives a payment).

Practical (public policy) issues of signing service contracts with individuals Loss of employee protection and unemployment

There are significant consequences should a contract be labelled a service contract rather than a labor contract. If individuals engage in service contracts instead of labor contracts with

a company, such individuals shall not be considered “employees”. As a result, they will not be entitled to several employee fundamental rights and interests such as a minimum wage, working-rest time and overtime wages.

Another major issue is that if signing service contracts with individuals is allowed without restrictions, companies may take the view that the term of a service contract is at their discretion, and unilaterally terminate the contract at any time, without taking any legal responsibility under the labour law. Consequently, the employees’ legitimate rights and interests will not be protected, leading to unemployment without safety net provisions (such as severance allowances and job-loss allowances). This may result in widespread social issues caused by unemployment.

Loss of income to the state budget and social welfare

Social insurance premiums on companies are income sources that relieve the burden on the state budget and are intended to enhance social welfare. Some companies sign service contracts with individuals, instead of labour contracts, to evade paying the premiums on insurance for their employees. As such, this will reduce overall insurance funds and seriously affect the state budget as well as the execution of the state’s social security regime.

Moreover, the average worker wage rate in Vietnam is very low. As such, if the insurance regimes are not complied with as provided by the law, employees will likely encounter significant financial difficulties when their working capacity is reduced or is lost.

For instance, employees who are working under a service contract will not receive compensation

or allowances from the insurance fund when losing their job, getting sick, taking maternity leave, being involved in labour accidents or suffering occupational diseases. Other impacts on the worker include, but are not limited to, pensions when reaching retirement age and other allowances.

Misperception that complying with requirements of personal income tax (PIT) payments results in the state’s recognition that a service contract has been created

Many companies incorrectly believe that if they fulfil their obligations under PIT withholding, and the tax agencies accept these taxes, contracts with their employees will be deemed service contracts instead of a labour contracts.

This state of affairs is mainly due to the fact that the governmental administrative agencies of Vietnam, such as tax, labour and insurance agencies, have separate and distinct areas of authority that most of the times do not overlap or coordinate with each other. Therefore, if an individual or a company wishes to pay tax, the tax agencies always welcome the payment without making any determination as to whether there is any violation of the labour law or other non-tax regulation.

At the moment, there are many companies that have signed service contracts with individuals that are not in accordance with the law. However, these companies have yet to be inspected or audited by the authorities (which does not signify that the state will ignore these companies in the future). This results in a false belief by many (primarily domestic) companies that the state authorities have accepted the signing of their service contracts through tax payments and, consequently, other companies follow suit.

To illustrate and highlight this issue, the Official Letter No.1019/TCT-TNCN of the General Department of Taxation, dated 25 March 2015, states that the income incurred from contracts signed with individuals (without prior registration of the individual's business) will be seen as income incurred from a salary/wage. Therefore, there is a high likelihood that the relationship between companies and individuals without business registration will be considered a labour relationship.

The court's determination of whether the relationship is a labour contract or service contract

When a labour dispute occurs, the court will consider the following legal grounds and practical issues to determine whether the contract between the company and the individual is a labour contract or service contract. Two key legal grounds to determine whether a service contract shall be deemed a labour contract are laid out below.

Employees are subject to the management, administration and supervision of the company

One of the most notable and basic differences between the contracts is that employees are always "subject to the management, administration and supervision of the employers", which is not necessarily the case for a service provider.

In some cases, however, the service provider still has a duty to accept similar conditions (based upon the contract language and service type). Thus, it may be difficult to distinguish between the service provider's obligations and those of individuals "subject to the management, administration and supervision of the employer" in a labour relationship.

Individuals who do not register their businesses often do not have a right to provide services

According to the 2005 Commercial Law, the provision of services for profit-making purposes is a commercial activity that must comply with the 2005 Commercial Law and other relevant laws. Under Article 2.3 of the 2005 Commercial Law, individuals ("traders") who conduct commercial activities must register their businesses, except for "individuals who conduct commercial activities independently and regularly without having to register their business"; the criteria for the latter are listed in Decree No. 39/2007/ND-CP. Therefore, most unregistered individuals are not deemed "traders".

Of note, in general terms, companies who are in need of workers do not typically hire individuals to regularly provide the small types of services mentioned in Decree 39/2007/ND-CP, but rather will hire individuals to perform activities requiring a certain profession or qualification. In these cases, individuals must register their business to be allowed to have the performance of these services classified as a commercial activity instead of an employer-employee relationship.

Conclusion

For companies to lawfully sign service contracts with individuals, these individuals should register their business as required by the law. If a company enters a service contract with an individual without a registered business, it will most likely be considered a violation of the law's regulations and will be considered a labour contract.

Retrenchment

Retrenchment due to labour restructuring is very common in today's business. However, this can result in many lawsuits filed by the employees against the company arguing that the restructur-

ing was unlawful and the company had illegally unilaterally terminated the labour contracts.

Under the 2019 Labor Code, an employer is able to classify employees as redundant where there are any of the following:

- technological changes that have occurred at the level of the employer (such as changes to all (or part) of the equipment, machinery or technological processes that are used by the employer);
- changes to the employer's organisational structure (for example, where there is a merger, a consolidation or a cessation of the operation of one (or several) department(s) or unit(s), or where the employer is facing difficult economic conditions); or
- economic reasons, which are defined as an economic crisis or changes in legal or state policies which require the employer to reorganise their structure.

Retrenchment of employees is only permitted in limited circumstances and the retrenchment process is complicated and time-consuming. Additionally, Vietnamese labour law and labour authorities tend to favour employees, who are considered the weaker party in a labor relationship. Therefore, Vietnamese courts can be very technical in labour disputes and any minor failure to strictly comply with all the formalities in the retrenchment process may render the entire process invalid. Below are three mistakes that companies often make during the restructuring process which will often result in losing the lawsuit.

Failure to prove the existence of actual changes to the organisational structure

“Change of organisational structure or technology” is generally defined under the law to include the following events:

- changes of organisational structure, re-organisation of labor;
- a change to part or all of the machinery, equipment or technological processes; and
- a change of product or product structure resulting in lower employment needs.

However, the law and its guiding regulations do not set out any detailed definition of the above terms and there is a lack of specific guidance on the criteria and methods that would verify qualifying cases. Further, experience in actual cases has shown that proving “changes to organisational structure” is not a simple process.

From our experience, Vietnam labour authorities and courts often take the view that a “change in organisational structure” means a merger or dissolution of a number of divisions/sections within the employer's organisation. They often do not consider reduction of the labour force within a division/section as organisational restructuring and take the view that to fall under the definition, the restructure must be a structural change in the employer's organisation which affects a division or section as a whole.

An illustration would be Appellate Judgement No.14/2017/LD-PT of the People's Court of Binh Duong Province, dated 25 September 2017, relating to a dispute involving the unilateral termination of a labour contract between Ms Le Thi C (the employee – plaintiff) and Company N (the employer – defendant). Company N argued that “the company terminated the labour contract with Ms C due to its difficulties

in production and business which caused the company to downsize its business and lay off workers”. To verify these claims by Company N, the employee requested the court to collect the following evidence: (i) a list of employees of Company N covered by social insurance and changes to such lists, (ii) the quantity of goods exported by Company N into other countries, before and after the point in time Company N terminated the labour contract, and (iii) verification of the financial reports of Company N with the Tax Department of Binh Duong Province. As requested, the court collected the evidence, and in the end, ruled as follows:

“For the appeal request by the representative of the plaintiff that requested the Appeals Court to collect evidence, which is the list of employees of Company N covered by social insurance and changes to such lists (increase/decrease in number of listed employees), [...] *from August 2015 to March 2016, the number of employees of Company N decreased from 173 employees to 132 employees, and no increase was recorded.*

[...] *From April 2015 to July 2015, the defendant exported three containers of goods per month; from August 2015 to March 2016, the defendant exported two containers of goods per month (except for December 2015 in which the defendant exported three containers of goods because this was the last month of the year).*

[...] *On the other hand, the evidence collected from the Customs Department and the Social Insurance Authority of Binh Duong Province is sufficient to conclude that from August 2015 to March or April 2016, the defendant downsized its production, reduced the quantity of exported goods, and proceeded with labour restructuring. Therefore, it is not necessary to collect fur-*

ther evidence from the Tax Department of Binh Duong Province [...].”

The above case shows that in order to use “restructuring” as the cause for labor contract termination, companies must prove both the “necessity” and “actuality” of the restructuring. To sum up:

- Company N was required to prove the *need* to carry out a restructuring and lay-off of workers on the grounds that “the company faces difficulties in production and business, which results in the company downsizing its business and laying off workers”, which is evidenced by the decline in the quantity of goods exported.
- Company N was also required to show that the number of employees actually decreased from 173 employees to 132 employees, and that it did not recruit any new ones.

It should be noted that there are some companies that utilise sham “restructuring” to terminate labour contracts with employees. For example, a company may dissolve one of its functional departments to lay off the employees of such department. Afterward, the company establishes a new department under a new name with the same function as the dissolved one. In such cases, it will not be considered a valid “restructuring” under the law.

Failure to prove formal consultation with the executive committee of the grassroots trade union

The failure to follow the procedure of formal consultation with the executive committee of the Grassroots Trade Union is an important step that may lead to a company’s unilateral termination being invalidated by the courts. According to Judgement No.15/2018/LD-PT of the People’s

Court of Ca Mau Province, although Company C successfully proved that it had made actual changes to its organisational structure and workforce organisation, Company C lost the lawsuit because it did not hold a meeting to consult with the executive committee of the Grassroots Trade Union during the creation of the labor utilisation plan. This resulted in the documents signed and stamped by the president of the Grassroots Trade Union becoming invalid because it did not represent the opinions of the executive committee of the Grassroots Trade Union. Specifically:

“[...] Therefore, when creating the restructuring plan, the company strictly followed the correct process, ie, holding a meeting with the executive committee of the Grassroots Trade Union on 9 May 2016 to approve the restructuring plan. However, *when creating the labor utilisation plan (which is the more important step), there was no document proving that the company met and consulted with the collective labour representative organisation at the grassroots level.*

[...]

Although the labor utilisation plan and the list of laid-off employees had the signature of Ms Tham (the president of the Grassroots Trade Union) and stamp of the executive committee of the Grassroots Trade Union, there were no meeting minutes recording that the executive committee of the Grassroots Trade Union took part in making the labour utilisation plan.[...]

In the hearing, the company claimed that after finishing the meeting with managers, heads of departments and units on 16 May 2016, the company gave the list of employees to be laid off to Ms Tham to get her signature. The company further argued that Ms Tham having signed said list proved that the company consulted with

the executive committee of the Grassroots Trade Union. However, on the contrary, it showed that *the management board of the company decided everything by themselves, and Ms Tham’s signature was a formality only and did not represent the opinion of the executive committee of the Grassroots Trade Union who protect the legitimate rights of the involved employees.[...]*”

This problem is not confined only to Company C; it is a widespread practice for several other companies to informally consult with the executive committee of the Grassroots Trade Union. The mistake made by Company C resulted in Mr Nguyen Thanh S and other laid-off employees filing lawsuits against Company C, and Company C was forced to reinstate these employees and provide significant compensation.

Failure to notify the state labour management authority at the provincial level of laying off numerous employees

Under Article 44.3 of the 2012 Labour Code, if restructuring results in the laying-off of numerous employees, the employer must notify the state labour management authority at the provincial level of such lay-offs at least 30 days in advance. This notification obligation is ambiguous and often leads to legal disputes.

Returning to the above-mentioned case between Ms Le Thi C and Company N adjudicated by the court, when laying off Ms Le Thi C, Company N sent an official letter to the Department of Labour – Invalids and Social Affairs of Binh Duong Province to request guidance on lay-off procedure and relevant regulations. Ms Le Thi C considered this letter as a consultation document, not a notification as required by law, so she claimed that Company N did not fulfil its notification obligation. However, the Court con-

cluded that Company N did fulfil its notification obligation. Specifically:

“[...] The contents of Official Letter No.01.15/CV-LD, dated 21 July 2015, and the Decision on Labour Reorganisation, dated 21 July 2015 and sent on 22 July 2015 by the defendant to the Department of Labour – Invalids and Social Affairs of Binh Duong Province, stated that: ‘... now, by this letter, Company N presents the lay-offs in Company N due to downsizing its production and business to the Department of Labour – Invalids and Social Affairs of Binh Duong Province; the expected number of laid-off employees are as follows... the above are the expected number of laid-off employees to meet the company’s current and upcoming production scale, and the company looks forward to the esteemed body’s consideration and specific guidance on necessary procedures and regulations regarding our lay-offs, at the earliest date’. Thus, *the contents of the letter provided the provincial labour management authority with the reasons, the expected number of laid-off employees and a request for guidance on procedures and regulations related to the lay-offs. [...] So there were no specific guidelines on the compulsory contents of a notice to the state labour management authority at the provincial level when making changes to organisational structure and technology similar to the ones enumerated by Article 7 of the aforesaid circular.*”

As such, the grounds for the court in recognising the letter of Company N as a proper notice in compliance with the law were: (1) at the time of the incident, there were no specific regulations on the compulsory contents of the notice, and (2) the contents of the letter by Company N did include some basic information about the reasons and the expected number of laid-off employees that were sufficient to serve as a notice of lay-offs due to restructuring.

This precedent shows that there is still a possibility that a restructuring process will be considered illegal and the company will lose a lawsuit because of the incomplete and inappropriate contents of a notice to the state labour management authority.

A notice should include the following information: (i) name and address of the employer and its legal representative; (ii) the total number of employees and the number of laid-off employees; (iii) the reason for the lay-offs; (iv) the timing of the lay-offs; and (v) the amount of job-loss allowance.

Conclusion

The above highlights some of the factors for companies to consider when undergoing retrenchment that involves the termination of employees. It is strongly advised that competent legal counsel be retained in order to ensure that all the regulatory requirements are met.

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