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Employment law in Vietnam – an overview

Inside

Introduction

Over the past few decades, Vietnam has moved from a centrally-based economy to one with significant market features. During this period, the economy has experienced rapid growth, driven primarily by the manufacturing and agriculture sectors. Today, Vietnam is widely regarded as an attractive place to invest. This in-brief provides a snapshot of some of the key aspects of employment law in Vietnam.

Our Hong Kong office coordinates employment and immigration/global mobility support across the Asia Pacific region (including Vietnam). This publication provides general guidance only: expert advice should be sought in relation to particular circumstances. Our Hong Kong office can source Vietnamese advice through its links with local firms in Vietnam.

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The employment law landscape

Vietnam has a civil law system which has evolved to include some common law elements. For example, the Supreme Court has recently issued a resolution to the effect that precedents will be followed in Vietnamese courts.

Vietnamese employment law is very prescriptive and generally very employee-friendly. For example, "at-will" termination of employment is not possible. Terminations must be based on statutory grounds, and are subject to strict formal requirements and procedures.

The core law regulating the employment relationship is the Labour Code ("Code"). This was first passed by the National Assembly (the national legislative body) in 1994 and the original Code has since been replaced by a new Code which took effect in 2013. Employment is further governed by a range of government regulations, decrees and circulars. On November 2019, the National Assembly adopted a further updated New Labour Code after an amendment process lasting nearly four years. The New Labour Code will take effect from 1 January 2021.

Commencing employment

Types of employment

Three types of contract are possible: an indefinite term labour contract; a definite term labour contract of between 12 and 36 months; or temporary contracts of fewer than 12 months (generally for a particular assignment or seasonal work). Definite term contracts may be renewed only once, and a second renewal automatically turns the contract into an indefinite term one. Employment can be full-time or part-time.

"Dispatch" or agency type arrangements (sometimes referred to as 'labour leasing') are only permitted for a limited number of specified roles and only for up to 12 months. Like in other countries across Asia, this area is highly regulated.

Under the New Labour Code, there are only two types of employment contracts: definite term labour contracts, with terms of 36 months or less; and indefinite term labour contracts.

Definite term contracts may generally only be renewed once. After 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 what the parties agree. The New 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 enterprises with State-owned capital.

The employment contract

Parties are generally free to negotiate their own terms in employment contracts, provided that mandatory terms as required by the Code are included and the contract does not include any terms less favourable than those prescribed by law.

An employer must enter into a contract with the employee before the start of their formal employment. Contracts must generally be made in writing except for temporary work of less than three months (in which case an oral contract may be used). Although it is no longer compulsory, it is recommended that the contract is in Vietnamese. However, if the employee is not a Vietnamese national, then the contract may be dual language (i.e. Vietnamese and English).

Probationary periods of up to 60 days are allowed for jobs that require high-level specialised or highly technical skills (e.g. roles that require at least a tertiary degree), or up to 30 days for intermediate-level specialised or technical expertise. For other roles a probationary period can only last up to six working days. Employees may be paid a reduced wage during the probationary period, but this must be at least 85% of the full wages for the relevant position. Either party may terminate the contract during the probationary period.

Under the New Labour Code, contracts must generally be made in writing. Oral contracts can be used for definite term labour contracts of less than one month, except for few circumstances stipulated under law.

Under the new regime, employers and employees can now sign a separate probation agreement or include a probation clause in labour contracts. In addition, the probationary period applied to managerial positions of enterprises can now reach 180 days.

Internal labour rules

In addition to the employment contract, employers with 10 or more employees must have written internal labour rules ("ILRs") in place. ILRs govern matters such as working hours, rest periods and disciplinary processes. An employer is required to consult with the trade union over the contents of ILRs before finalising them. The ILRs must be registered with the local labour authority.

Under the New Labour Code, all employers shall have ILRs in place and the ILRs shall be consulted with the trade union before it is notified to the employees and publicised at the company's workplace. Only employers with 10 or more employees must have written ILRs and register such ILRs with the local labour authority.

Key minimum employment rights

Leave

Employees who have worked for twelve months for an employer are entitled to at least 12 paid annual leave days (and employees working in specified working conditions, such as in a hazardous working environment, may be entitled to additional annual leave). Under the new regime, employees working in extremely heavy, hazardous or toxic working conditions are entitled to at least 16 annual leave days. Employees receive one additional paid leave day for each additional five years they work for an employer. Employees who have worked for fewer than 12 months for the employer are entitled to one leave day for each month of work.

Allowance payments for different types of leave - including sick leave, maternity leave, and benefits such as pension - are made out of a compulsory Social Insurance Fund ("SI Fund") into which both the employer and employee must contribute (see the next section "Wages and social insurance"). Employers are not obliged to directly pay employees their salary during such periods.

However, it is nevertheless reasonably common for parties to agree to treat an employee's sick days as any remaining annual leave, meaning that the employee may be paid both from the Fund and by the employer during the period of sick leave.

The level of sick leave entitlements varies depending on how long the employee has contributed to the Fund, and sick leave is paid at 75% of full pay. The maximum sick leave entitlements are currently: 30 days per year if the employee has contributed to the SI Fund for less than 15 years; 40 days per year if the employee has contributed to the Fund for between 15 years and 30 years; and 60 days per year if the employee has contributed to the Fund 30 or more years. Employees working in specified working conditions, such as in a hazardous working environment, may be entitled to additional sick leave.

A pregnant employee is normally entitled to take six months' paid maternity leave. Where an employee gives birth to more than one child at one time, she is entitled to take an additional 30 days' paid leave for each additional child. A male employee is entitled to five days' paternity leave if his partner gives birth naturally, or seven days if the birth is by caesarian section (with three extra days for each additional child).

Working time

The maximum working hours are normally eight hours per day or 48 hours per week. There are also various compulsory daily and weekly rest periods and breaks.

Wages and social insurance

The Code provides for a minimum wage which differs depending on the location of the employment. Both employees and employers are required to contribute to the SI Fund, healthcare insurance fund and unemployment insurance fund at statutory rates. These are currently: 17.5% of salary for employers and 8% of salary for employees for the SI Fund; 3% of salary for employers and 1.5% of salary for employees for healthcare insurance; and 1% of salary for employers and 1% of salary for employees for unemployment insurance. As noted above, allowances for matters such as sick leave, maternity leave and pensions will be paid out of the SI fund.

In addition, from 1 July 2016, employers are required to contribute to the Insurance Fund for Labour Accident and Occupational Disease.

Terminating employment

Termination of employment is strictly regulated. "At will" termination is not permitted. Given the difficulties associated with terminating employment, it is common for parties to agree mutually to terminate employment.

An employer is restricted by law in the sanctions it can issue for disciplinary offences. It may only issue a "reprimand" (warning), a pay freeze for up to six months, demotion or dismissal.

Grounds on which employers can terminate for disciplinary reasons are set out under law and include matters such as theft or embezzlement, deliberate violence causing injury and absence without leave. Strict statutory disciplinary procedures must be followed in order to effect a lawful dismissal (for example, regarding the notice and conduct of the disciplinary hearing).

In addition to dismissal following a disciplinary process, an employer may unilaterally terminate employment for reasons such as the employee being ill or injured or unable to work (despite treatment) for a period of 12 consecutive months where the employee has an indefinite term contract. In these cases, an employer must give at least 45 days' notice to an employee on an indefinite term contract. Employers must also generally pay severance to employees who have worked for them for 12 months or more (broadly half a month's pay for each completed year of employment), unless both parties have contributed to the unemployment insurance fund.

Termination on the grounds of redundancy is possible. Employers seeking to make redundancies of two or more employees are required to draft a "labour usage plan", consult with the trade union on the plan, and file the plan with the local labour authority. Each redundant employee who has worked for the employer for 12 months or more is entitled to a

redundancy allowance equating to at least two months' pay. Under the new regime, regardless the number of employees terminated on the grounds of redundancy, the above process shall be followed.

An employee's employment may be terminated on the grounds of retirement when he or she reaches the age of pension entitlement (under the New Labour Code this will be gradually increased to 62 years old for males and 60 for females). Additionally, employees doing heavy, hazardous or dangerous works or extremely heavy, hazardous or dangerous works may retire at a younger age, but shall not be more than 5 years earlier than the retirement age of employees working in normal labour conditions.

Discrimination

Employees have the right to work without being discriminated against on the basis of their gender, nationality, social class, beliefs, religion, race, skin colour, disability or HIV infection. Moreover, employers are strictly prohibited from discriminatory behaviour toward female employees or conduct that degrades female employees' dignity and honour. Employers are required to apply the principle of gender equality in relation to matters such as recruitment and pay increases.

From 1 January 2021, an employee will have the right to terminate his or her labour contract without prior notice for several regulated cases including amongst others if he or she is sexually harassed in the workplace.

Protecting the business

The default position is that clauses that attempt to restrict the future activities of an employee are unenforceable, although the validity of restrictive covenants remains relatively untested in the Vietnamese courts. Despite this, it is fairly common for employers to include such clauses for senior employees.

In practice, there have been cases where the courts refuse to enforce non-compete agreement. However, we have also seen a case where the non-compete agreement was enforced by arbitration tribunal in Vietnam, such case is recognized based on the ground that the non-compete agreement was signed as a separate and standalone civil transaction between the parties.

Resolving disputes

Vietnam's court system features a conciliation stage, whereby Labour Conciliators (appointed by the District Department of Labour) and Labour Arbitration Councils (consisting of State officers in charge of labour issues and representatives of a trade union) conduct statutory conciliation of either individual or collective disputes. If conciliation fails to settle the dispute, it would be brought to the specialised Labour Court of the People's Court. In certain disputes, parties may bring cases directly to the courts without first pursuing conciliation.

An employee generally has one year from the date of dismissal or the cause of the dispute to bring a claim before the court.

Employee representation

There are two levels of trade unions under Vietnamese law: "grassroots" trade unions (those formed within a particular company or organization by employees) and "directly superior" trade unions (supervisory unions designated to a particular city or jurisdiction which are normally government-controlled entities).

The main function of a trade union is to represent and protect employees' legal rights and interests. This means that most decisions relating to employee benefits should involve the trade union representative, such as execution of a collective agreement, as well as decisions regarding discipline and redundancy. Trade union participation is also required in the establishment of a company's ILRs.

Any act that obstructs the establishment and activities of a trade union is strictly prohibited. If a grassroots trade union does not exist within the company, the relevant directly superior trade union will take up its role. Consequently, employers may consider encouraging the establishment of a trade union within the company in order to avoid an additional layer of government involvement and intervention into its regime of employee discipline.

While an employer is not required to establish a trade union, it must facilitate the ability of employees to establish or join trade unions if they so desire.

Under the New Labour Code, the definition of employee representative organizations at grassroots level has been revised to include trade unions at grassroots level and employee organizations at companies. As a result, in case there is no employee representative organization at grassroots level, employers are no longer required to consult with the intermediate upper level trade union before issuing internal regulations related to employees' rights and benefits, e.g. internal labour regulations, salary schemes, performance management policies.

Business transfers

The general position is that employment contracts may be transferred to the buyer where there is the sale of assets or a business although the new employer has a fair degree of freedom to harmonise terms and conditions.

Under the New Labour Code, it is unclear whether employees are permitted to be transferred as a result of the sale of assets or a business. The New Labour Code provides that if the asset transfer affects a large number of employees, employers are required to draft a "labour usage plan" in accordance with law. There is no clear requirement that the buyer must continue performance of the labour contracts with the employees.

Data protection

There is no consolidated law on data protection although various different laws provide for basic principles - such as that an individual's right to privacy will be respected and protected by law, and the collection and disclosure of an individual's personal data must only occur with their consent. Infringement of data protection laws may lead to administrative fines or in some instances even criminal sanctions. A new cybersecurity law which contains, amongst other obligations, data localisation requirements, will take effect in 2019 and apply to domestic and foreign enterprises who provide cyberspace services.

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