

EMPLOYMENT LAW UPDATE

NEW LABOUR CODE IN VIETNAM

On 18 June 2012, after many drafts and much discussion, the long-awaited revised Labour Code has been passed by the National Assembly (***New Labour Code***). The New Labour Code will come into effect from 1 May 2013, together with about 21 new implementing decrees and circulars to be issued in the next few months. In this legal update we report on the most notable changes to the New Labour Code.

Labour Contracts

Prohibited activities on the execution and implementation of labour contracts

In a move to provide greater protection to employees, Article 20 of the New Labour Code provides two further prohibited activities applicable to employers when they execute and implement labour contracts which are:

- keeping originals of identification documents, professional degrees or certificates of employees; and
- requiring employees to implement guarantees (in money or in property) for the implementation of their labour contracts.

Specifying labour contract contents where the employment directly relates to technology or business secrets

In recognition of the growing need for and significance of protection of business secrets, Article 23 of the New Labour Code particularly provides that where the employment directly relates to technology or business secrets of the employer, an employer can negotiate in writing with an employee to put in place protection to guard technology and business secrets including compensation in case of violation by the employee.

In practice, this will allow an employer to draw up specific contractual restrictions to protect its intellectual property, where this amounts to a technology or business secret.

Adjustment to the duration of probationary periods and a considerable rise in the probationary period wage limit

The current Labour Code (**Current Labour Code**), which will be repealed by the New Labour Code as from 1 May 2013, provides that a probationary period may not exceed 60 days in respect of employment which requires 'specialised or highly technical skills', or 30 days in respect of other employment. This regulation, however, can lead in practice to arbitrary and inconsistent application attributable to the unclear meaning of the term 'specialised or highly technical skills'.

According to Article 27 of the New Labour Code, the trial period duration is determined by reference to the level of professional qualification required to carry out the work. Therefore, the probationary period may not exceed 60 days for work requiring a college level qualification or above; 30 days maximum for employment requiring vocational intermediate and professional intermediate level qualifications and technical and professional workers; and not exceeding 6 days for other cases.

With respect to wages during the probationary period, probationary employees may find good news in Article 28 of the New Labour Code because it increases the minimum wage applicable to the probationary period from a minimum of 70 per cent currently to a minimum of 85 per cent of the wage for the relevant job.

Determination and consequence of invalid labour contracts

To ensure the legal compliance of labour contracts, Section 4 of Chapter III of the New Labour Code inserts particular cases where a labour contract shall be held entirely invalid, which are as follows:

- all contents of a labour contract are contrary to law;
- the person signing the labour contract was not fully authorised;
- the works included in the labour contract are prohibited by law; or
- the labour contract obstructs or prevents an employee from participation in a trade union.

A labour contract shall be partially invalid where some of its contents infringe the law, but such contents do not affect the other parts of the contract.

Please note that for employers being an organisation, its legal representative is the person fully authorised to enter into the labour contracts. Therefore, the second limb could unintentionally cause otherwise valid labour contracts to be held invalid and care should be taken to ensure that only fully authorised persons (other than the legal representative) are entitled to sign employment contracts on behalf of an employer.

We note that not only the court, which is always entitled to announce a contract invalid, but also the labour inspectors are provided with the rights to announce a labour contract invalid by the New Labour Code. Where a contract is held to be entirely invalid, the rights, obligations and interests of the employee shall be settled in accordance with the law. However, for a partial invalid labour contract, the invalid parts of the contract must be amended to make them conform with the relevant collective labour agreement or with the labour law.

Termination of Labour Contracts

Unilateral termination of labour contracts

Article 38 of the New Labour Code has made considerable changes to the situations in which an employer can unilaterally terminate a labour contract. Whilst it removes the case permitting unilateral termination where an employee is disciplined in the form of dismissal (but see below for changes to the regulations on dismissal) and the termination of operation of the employer being an organisation, the New Labour Code

supplements a new case when employee does not present him/herself in the work place within fifteen (15) days after a labour contract suspension period has been terminated, except as otherwise agreed between the parties.

However, the New Labour Code is unclear as to whether or not the parties may agree upon a period shorter than fifteen (15) days for the employee to present themselves.

Loss of work due to restructuring or “economic reason”

Under Article 44 of the New Labour Code, where there exists organisational restructuring, technological changes or, a new case, “economic reason” that affects the employment of many employees, an employer must establish and implement a labour usage plan as prescribed in the New Labour Code. If the employer cannot continue to employ the employees under this labour usage plan, it is permitted to terminate their employment unilaterally, but the employer must pay to the employees who have been employed for at least 12 months an allowance for loss of work equivalent to the aggregate amount of one month's wages for each year of employment, excluding any period during which the employee participated in unemployment insurance and any period for which the employers calculate to pay severance allowance (if any), but should not be less than two months' wages in total.

In comparison with the Current Labour Code, the wording of the New Labour Code seems to be quite confusing as it could be interpreted into either of the following two scenarios: (i) the right to terminate the employment of an employee due to a restructuring event will only apply if such event affects “many” employees; or (ii) the restructuring plan is only required to be drafted if the termination due to a restructuring event involved “many” employees.

Furthermore, the prescribed labour usage plan provided for in the New Labour Code sets out a stricter compliance regime for an employer when applying this regulation. However, on the other hand, with the addition of the ambiguous ground of “economic reason”, employers may be able to use the provisions of this regulation to widen the previously limited circumstances in which they could terminate employees' employment when restricting businesses or in times of economic distress.

Wages

Changes in the calculation of wages for overtime worked at night

According to the Current Labour Code and its implementing regulations, an employee working overtime at night, apart from the daytime overtime wage rate (at least 150%, 200% or 300% of wage applied to ordinary working time), is entitled to a supplemented wage rate calculated by multiplying the daytime overtime wage rate (at least 150%, 200% or 300% of wage applied to ordinary working time) and night time wage rate (at least 30% of wage applied to daytime) together. However, pursuant to Article 97 of the New Labour Code, an employee working overtime at night shall be entitled to the day-time overtime wage rate (at least 150%, 200% or 300% of the wage applied to ordinary working time), the night time wage rate (at least 30% of the wage applied to ordinary working time) and a further rate of at least 20% of the daytime wage. Given the complexity of this new calculation method, we await further clarification from implementing documents and we will keep you abreast of material developments with respect to this issue.

Work and Rest Time

Increasing the maximum additional working hours

Under Article 106 of the New Labour Code, a new regulation states that while additional working hours may not exceed 30 hours per month, the maximum additional working hours in special cases (as prescribed by the Government) may not exceed 300 hours per year.

Notably, Article 107 of the New Labour Code provides that in the following cases, an employer has the right to demand employees to work overtime and the employees may not refuse. These are:

- when the nation is in a state of war or in a state of emergency; or
- in order to prevent or to repair assets or deal with fatal loss, or incoming danger in an emergency situation that occurred or will definitely occur such as serious accidents, fire, flood, storm, earthquake, epidemic or other disasters.

Public holidays

Good news for all employees is to be found in the Article 115 of the New Labour Code which states that the annual Tet public holidays will increase from four (4) days to five (5) days, bringing the total number of public holidays to ten days per annum.

Moreover, foreign employees are entitled to enjoy two additional days off on their traditional new year's holiday and National Day. Employers with international employees should consider establishing policies requiring notification of such international holidays in order to track and manage their obligations in this regard. However, if their traditional new year's holiday and/or National Day coincides with a normal weekly day off, unlike Vietnamese employees, foreign employees shall not be entitled to take the subsequent business day in lieu. Employers may wish to take these provisions into account when determining annual leave entitlements for foreign employees.

Increasing maternity leave

Under Article 157 of the New Labour Code, the maternity leave period applied in normal circumstances shall be extended from four (4) months to six (6) months. As the extended maternity leave represents an increase of 50% on the former regulatory requirements, employers' temporary staff replacement plans should be given further consideration to prevent employment shortages.

Labour Discipline

Reducing penalties in cases of labour discipline violations

Article 125 of the New Labour Code no longer contains the penalty for transfer to another position with a lower wage for a maximum period of six months. Therefore, the applicable penalties for labour discipline violations under the New Labour Code are:

- reprimand;
- deferral of a wage increase for a maximum period of six months or removal from office; and
- dismissal.

Supplementing the activities resulting in a dismissal penalty

A dismissal penalty may only be applied where specifically provided for in the labour codes. The New Labour Code supplements the activities for which a dismissal penalty shall apply. Under Article 126 of the New Labour Code, dismissal may be applied as a means of penalty in the following circumstances:

- where an employee commits an act of theft, embezzlement, gambling, assault and inflicting injury, *using drugs in the workplace, disclosure of business, technology or intellectual property secrets, or other conduct* which causes serious damage or *which threatens to cause particularly serious damage* to the assets or well-being of the enterprise;
- where an employee who is disciplined by means of a deferral of a wage increase re-commits an offence during the period when he is on probation or re-commits an offence after he has been disciplined in the form of removal from office; and

- where an employee takes an aggregate of five (5) days off in one month or an aggregate of twenty (20) days off in one year without proper authorisation.

Labour Safety

Periodic medical examinations for employees

In order to ensure employers' compliance with prescribed periodic medical examinations for employees, Article 152 of the New Labour Code directly implements a regulation, which is currently stipulated in implementing documents of the Current Labour Code, that employers must organise an annual medical examination for employees, including vocational trainees and trainee practitioners and biannual medical examinations for persons doing hard, hazardous, dangerous jobs; junior employees¹ and senior employees².

Labour Subletting

Labour subletting - A new legal term

A labour sublease contract is a new legal concept in Vietnam first introduced by the New Labour Code, but which will be familiar to employers in other jurisdictions who are used to hiring temporary agency employees to cover short term labour needs.

A labour sublease means assigning an employee recruited by the labour sublessor to work for, and be subject to the management of, the labour sublessee, however, the labour relationship between the employee and the labour sublessor remains intact and no employment relationship is created between the employee and the labour sublessee (i.e. end user entity). This means that the sublessor has to implement rights and obligations of an employer towards the employee and vice versa.

Pursuant to the New Labour Code, the business of labour subleasing is a conditional business activity and may only be applied for certain types of employment. For businesses, this can be a highly useful means of responding to short term labour requirements, but without having to undertake the responsibilities attached to taking on employees directly. It also permits businesses to take on staff with particular skillsets, again without the associated labour recruitment costs and responsibilities.

Rights and responsibilities of the parties to a labour sublease

According to Article 56 of the New Labour Code, the rights and responsibilities of an enterprise engaging in labour sublease activities shall be as follows:

- providing qualified employees in accordance with the requirements of the labour sublessee;
- informing employees as to the contents of the labour sublease contract;
- executing labour contracts with employees in accordance with the provisions of the New Labour Code;
- notifying the labour sublessee of the resumes of employees or specific requirements of employees (if any);
- responsibility for paying wages, wages for public holidays, annual leave, termination payments, severance allowances, social insurance, health insurance and unemployment insurance for employees according to the provisions of the law;
- paying the sublease employee wages at a level not lower than the wage of an employee of the enterprise receiving the sublease employee who is at the same level and carries out identical or

¹ Employees under the age of eighteen (18) years.

² Employees over the age of sixty (60) years in the case of males, and fifty-five (55) years in the case of females.

similar work;

- preparing records indicating the number of sublease employees, enterprises receiving the sublease employees, sublease fees and reporting to the provincial labour agencies; and
- dealing with breaches of labour rules for a sublease employee violating labour discipline, where the enterprise receiving the sublease employee returns such employee because of a violation of labour discipline.

According to Article 57 of the New Labour Code, rights and responsibilities of a labour sublessee shall be as follows:

- guiding sublease employees through internal labour regulations and other regulations of such enterprise;
- not discriminating against sublease employees in comparison with employees engaged by the sublessee, in respect of labour conditions;
- reaching an agreement with sublease employees if such enterprise mobilises sublease employees to work at night or work overtime which is out of scope of the labour sublease agreement;
- not to transfer sublease employees to another employer;
- reaching an agreement with a sublease employee and the labour sublessor if the sublessee officially recruits the employee, where the labour contract between the sublease employee and a labour sublessor has not expired;
- returning to the labour sublessor sublease employees who do not satisfy the agreed requirements; and
- providing evidence of violations of labour discipline by a sublease employee in order for the labour sublessor to deal with any breaches of labour rules.

Pursuant to Article 58 of the New Labour Code, the rights and responsibilities of a sublease employee shall be as follows:

- performing the works agreed under the labour contracts signed with the labour sublessor;
- abiding by instructions, internal regulations, labour discipline and complying with the collective labour agreement of the labour sublessee;
- entitlement to receive wages not lower than the wages of an employee of the enterprise receiving the sublease employee at the same level and conducting identical or similar work;
- complaining to the labour sublessor in the event that the labour sublessee violates the provisions of the labour sublease contract;
- exercising the right to terminate unilaterally the labour contract with the labour sublessor as prescribed in Article 37 of the New Labour Code; and
- entitlement to reach an agreement to sign a labour contract with the labour sublessee after the expiration of the labour contract with the labour sublessor, or after legally performing the right to unilaterally terminate the labour contract with the labour sublessor.

Foreign Employees

New condition for recruiting foreign employees

All foreign enterprises employing foreigners should note that compared with the Current Labour Code,

Article 170 of the New Labour Code adds one more condition which a foreign enterprise must satisfy in order to recruit foreign employees. Prior to recruitment, foreign enterprises should explain their need to hire a foreign worker and they must receive an approval in writing from the relevant authority prior to engagement.

However, the definition of 'foreign enterprise' will have to be clarified by further implementing legislation as to whether or not it will also include 'foreign invested enterprise'.

Reducing the maximum duration of a work permit

It is also noted that pursuant to Article 173 of the New Labour Code, the duration of a work permit for a foreign worker is has been reduced from a maximum of 36 months to a maximum of 24 months.

Other issues

Particular regulations on domestic servants

Given the specific characteristics of the labour relationship of domestic servants, Section 5 of Chapter XI of the New Labour Code includes a separate section dealing with employees who are domestic servants. According to the New Labour Code, an employer must execute a written labour contract with a domestic servant containing the prescribed information set out in the Labour Code. Under the new legislation, either party may unilaterally terminate this labour contract provided that 15 days prior notice must be given.

Allowing employers temporarily to cease enterprise operations during strikes

Under Article 214.3 of the New Labour Code, the definition of "temporary cessation of enterprise" is a new one under which an employer is entitled to cease operations during an employee strike in order to protect its property, to prevent extremists or agitators from taking advantage of the strike in order to sabotage the enterprise or because of the lack of employees to operate business activities.

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