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Vietnam

EMPLOYMENT & LABOUR LAW

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This country-specific Q&A provides an overview of employment & labour law laws and regulations applicable in Vietnam.

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VIETNAM
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1. What measures have been put in place to protect employees or avoid redundancies during the coronavirus pandemic?

To set the scene, Vietnam's current Labour Code was finalised on 20 November 2019 – a month before COVID-19 started in China – and took effect from 1 January 2021. For this reason, the Labour Code does not contain provisions to address the labour issues which have arisen due to the pandemic.

It is also worth noting that Vietnam's labour regulations tend to favour the rights of employees over their employers. With this pro-employee principle in mind, the Labour Code offers various legal measures and tools to safeguard the legitimate rights and benefits of workers. These measures remained in force during the pandemic. In general, an employer cannot use the pandemic as a justification for mass redundancies without the consent of the staff in question or without reporting to the labour authorities. Below are some of the main strategies that an employer can opt for in cases of mass redundancies:

- **Temporary contract suspension**

An employer can consider temporarily suspending the labour contracts and postponing the salaries of their employees during this period of suspension. However, this requires the consent of the workers concerned before the measure can be applied.

- **Work suspension due to a dangerous epidemic**

The Labour Code allows an employer to require their employee to stop working due to some special, specific reasons. These include natural disasters, fire, dangerous epidemics, or an economic depression. The pandemic can be regarded as a dangerous epidemic and, therefore, an employer can invoke this provision. As a result, the employer is entitled to suspend the work of their employee, provided that both sides can agree on the new wage to be paid during the period of suspension. Under the Labour Code, this new salary must meet the following conditions:

- During the first 14 working days, it must not be lower than the applicable regional minimum wage as stipulated by the Government. For context, in 2021, the applicable regional minimum wage was around USD 135 – USD 195 per month;
- After the first 14 working days, it is subject to the parties' agreement.

- **Retrenchment**

In response to pandemic-induced difficulties, an employer can lay off multiple staff members without their consent on the grounds of changes in organisational structure, technology, or products; an economic depression; or changes in government policies. However, in practice, this measure is neither simple nor straightforward to implement. This is because the Labour Code sets out very strict procedures and requirements for the employer to validate the redundancies. These include:

- Providing evidence of the existence of the ground and its relationship to the demand for lay-offs;
- formulating a comprehensive labour-usage plan;
- consulting employee representatives through a workplace dialogue process;
- offering the affected staff new positions and, only after this offer has been rejected, including these workers in the to-be-laid-off list of the labour-usage plan; and
- sending a 30-day advance notice to the provincial People's Committee and affected employees.
- **Unilateral termination**

An employer has the right to *unilaterally* terminate a labour contract with an employee due to the pandemic

or other force majeure events following a change in government policies to prevent the spread of COVID-19. However, this measure cannot be applied to certain kinds of workers. Exceptions include staff receiving medical treatment or those on maternity leave.

Like retrenchment, to be able to exercise the right of unilateral termination, it must be shown that:

- the employer has taken all necessary measures to mitigate the negative impacts of the pandemic or other force majeure events to their business, which ultimately turned out to be unsuccessful; and
- lay-offs or a reduction in the workforce is the only option for the employer to save their business.

Furthermore, advance notice to the affected worker is required.

In short, employers have to meet a wide range of conditions to reduce their workforce in compliance with the law. To strengthen the rules set out in the Labour Code during the pandemic, the labour authorities of Vietnam also issued various official letters to guide employers. These included Official Letter No. 1064/LDTBXHQHLDTL dated 25 March 2020. Issued during the first wave outbreak, which began on 23 January 2020, it guided the payment of wages and benefits for employees during work suspension due to COVID-19. Meanwhile, Official Letter No. 2844/LDTBXH-PC dated 25 August 2021, issued during the fourth wave outbreak, addressed certain concerns around the implementation of labour policies.

Further to the above regulations, which remain in place to protect workers against dismissal or mass redundancies, the Government has also issued new policies to provide financial support to both companies and their staff. For example, according to Resolution No. 116/NQ-CP of the Government dated 24 September 2021 and Decision No. 28/2021/QD-TTg of the Prime Minister dated 1 October 2021:

- any employee (excluding those working in government agencies) participating in Unemployment Insurance as of 30 September 2021 will be granted a financial package from VND 1.8 million (around USD 80) to VND 3.3 million (around USD 150) subject to the duration of his or her Unemployment Insurance contribution without Unemployment Allowance payment;
- any employer (excluding government agencies) that participated in Unemployment Insurance before 1 October 2021 will not have to contribute to the Unemployment Insurance Fund from 1 October 2021 to 30 September 2022.

2. Following the covid-19 pandemic, have new employee rights or protections been introduced in respect of flexible or remote working arrangements?

No new regulations have been issued to validate remote working arrangements. However, from time to time during the pandemic, the Government did issue some policies which encouraged companies to adopt 'hybrid' working. For instance, these included reducing the number of staff in offices or factories to one-third or half of the usual workforce to enable social distancing in the workplace.

3. Does an employer need a reason in order to lawfully terminate an employment relationship? If so, state what reasons are lawful in your jurisdiction?

According to the Labour Code, a cause is mandatory to constitute a lawful labour termination. Below are the reasons set out in the Labour Code:

- The labour contract expires or the work set out therein is completed;
- The employee is imprisoned, dies, is expelled, etc.;
- A mutual labour termination agreement with the employee is concluded;
- The employer terminates its operation or does not have a legal representative or a legally authorised representative;
- The employee is disciplined in the form of a dismissal;
- The employee unilaterally terminates their labour contract;
- The employer unilaterally terminates the labour contract with the staff member based on objective reasons or due to a fault on the part of the worker, i.e.:
    - The employee repeatedly fails to meet KPIs as set out in their labour contract or the employer's performance review policy/performance improvement plan ("**PIP**") (the PIP must go through a consultation with employee representatives through a workplace dialogue process before it is issued);

- The employee becomes ill and remains unable to work after receiving treatment for 12 consecutive months (in the case of an indefinite-term labour contract), or six consecutive months (for a definite-term contract of between 12 and 36 months), or more than half the duration of the contract in the case of a definite-term contract of fewer than 12 months;
- The employer is forced to reduce their operations after unsuccessfully trying all measures to recover from a natural disaster, fire, dangerous epidemic, hostility, relocation or downsizing as requested by a competent authority;
- The employee fails to attend the workplace after the period of a labour contract suspension has expired;
- The employee has reached the retirement age, unless otherwise agreed;
- The employee arbitrarily leaves their job without a satisfactory explanation for a period of at least five consecutive working days; and
- The employee provided untruthful statutory information when entering into a labour contract and this fact adversely affected their recruitment;
- The employer retrenches or is under a change of control;
- The foreign employee's work permit expires.

4. What, if any, additional considerations apply if large numbers of dismissals (redundancies) are planned? How many employees need to be affected for the additional considerations to apply?

For mass redundancies, the employer has to meet the conditions of both legal causes and procedures to validate these terminations (see Questions 1 and 8 for more details). There are no additional considerations applied in this case, other than the mandatory severance allowance or job loss allowance which the employer must pay to their affected staff members.

5. What, if any, additional considerations apply if a worker's employment is terminated in the context of a business sale?

Similar to our answer in Question 4, there are no additional considerations applied in this case.

6. What, if any, is the minimum notice period to terminate employment? Are there any categories of employee who typically have a contractual notice entitlement in excess of the minimum period?

According to the Labour Code, the minimum notice period varies depending on the type of labour contract. In general, the following notice periods are required:

- 45 days for an indefinite-term labour contract;
- 30 days for a definite-term contract of 12 to 36 months;
- 3 working days for a definite-term contract of fewer than 12 months.

There are no particular categories of employee who typically have a contractual notice entitlement greater than these minimum periods.

7. Is it possible to pay monies out to a worker to end the employment relationship instead of giving notice?

According to the Labour Code, an employer must comply with the minimum notice period before terminating a labour contract with an employee, except where no prior notice period is required. Non-compliance can result in the termination being declared null and void by an adjudicating court. In this case, the court might require the employer to pay wages to the employee for the days for which advance notice was not provided.

Pay in lieu of notice is not recognised by the Labour Code and its guiding regulations. For this to be applied, the employer should obtain written consent from the employee in the form of a mutual labour termination agreement.

8. Can an employer require a worker to be on garden leave, that is, continue to employ and pay a worker during his notice period but require him to stay at home and

not participate in any work?

The Labour Code is silent in this regard. Therefore, to put someone on garden leave, the employer should obtain their written consent in the form of a mutual labour termination agreement.

9. Does an employer have to follow a prescribed procedure to achieve an effective termination of the employment relationship? If yes, describe the requirements of that procedure or procedures.

Yes. Subject to the cause of labour termination, an employer must follow a strict procedure as set out in the Labour Code to validate the labour termination. In particular:

- **Unilateral termination with an employee:**
  - Legal causes/grounds: Please refer to Question 3 above.
  - Advance notice:
    - Where the employee becomes ill and remains unable to work after having received treatment for a certain period subject to the kind of labour contract (except for special jobs such as enterprise managers as defined by Vietnamese law, aircrew members, aircraft maintenance technicians, aviation repairmen, flight coordinators, etc.): three working days, regardless of the kind of labour contract in place.
  - For other grounds:
    - An indefinite-term labour contract: 120 days (for the special jobs mentioned above) or 45 days (for other jobs);
    - A definite-term contract of between 12 and 36 months: 120 days (for the special jobs mentioned above) or 30 days (for other jobs);
    - A definite-term contract of fewer than 12 months: a quarter of the duration of the contract (for the special jobs mentioned above) or three working days (for other jobs).
  - Protected employees: An employer is not allowed to unilaterally terminate labour contracts with certain types of employees (e.g. those on maternity or sick leave).[1]
- **Retrenchment:** An employer can lay off **multiple** employees without their consent on the grounds of a change in organisational structure, technology, or products; economic depression; or changes in government policies. Below are the significant procedures and requirements that must be satisfied to validate these redundancies. Employers must:
  - evidence the existence of the ground and its connection to the demand for lay-offs;
  - formulate a comprehensive labour-usage plan;
  - consult employee representatives through a workplace dialogue process;
  - offer new positions to the affected employees and, only after this has been rejected, can they be included in the to-be-laid-off list of the labour-usage plan;
  - give 30-days' advance notice to the provincial People's Committee and affected employees.
- **Termination with multiple employees due to a change of control:**
  - evidence the existence of the ground and its connection to the demand for layoffs;
  - formulate a comprehensive labour-usage plan;
  - consult employee representatives through a workplace dialogue process;
  - offer new positions to the affected employees and, only after this has been rejected, can they be included in the to-be-laid-off list of the labour-usage plan;
  - publicly inform employees of the labour-usage plan within 15 days of it being passed.

- **Disciplinary action of dismissal:**
    - Legal causes/grounds: Where **an** employee commits one of the following acts:
        - theft, embezzlement, gambling, deliberate violence causing injury, or using drugs at the workplace;
        - discloses business or technological secrets or infringes the intellectual property rights of the employer; an act which causes or threatens to cause serious loss and damage to the property or interests of the employer; or an act of sexual harassment at the workplace as defined in the employer's internal labour regulations;
        - a second violation while already subject to an unresolved disciplinary action during the period of wage decrease or demotion;
        - arbitrarily leaves work without a justifiable reason for an accumulated five days within a 30-day period or an accumulated 20 days within a 365-day period, calculated from the first day of absence.
    - Procedures:
        - The employer has to demonstrate the violating employee's fault;
        - There must be employee representatives participating in the disciplinary process;
        - The employee (or their authorised representative/counsel) must be present in the disciplinary process and has the right to defend their case;
        - The disciplinary process must be recorded in writing;
        - The disciplinary process must follow the statutory procedures in accordance with applicable laws.
    - Protected employees: An employer is not allowed to fire certain types of employees (e.g. those on maternity or sick leave, etc.).[2]

[1] Art. 37 of the 2019 Labour Code

[2] Art. 122.4 of the 2019 Labour Code

10. If the employer does not follow any prescribed procedure as described in response to question 8, what are the consequences for the employer?

If the employer does not meet the mandatory procedures for employment termination, this termination might be declared null and void by an adjudicating court. In this case, the employer must accept the affected employee back to work and pay him or her:[3]

- wages, benefits and compulsory contributions that he or she should have been paid if the labour contract had not been terminated illegally;
- compensation equal to at least two months' wages as prescribed in the labour contract;
- wages for the days for which advance notice (if any) was not provided;
- a severance allowance if the employee does not agree to go back to work;
- additional compensation equal to at least two months' wages as prescribed in the labour contract if the employer does not agree to accept the employee back to work.

[3] Art. 41 of the 2019 Labour Code

11. How, if at all, are collective agreements relevant to the termination of employment?

According to the Labour Code, collective agreements are not relevant to employment termination. A collective agreement under Vietnamese law is usually a document to record the rights and benefits that an employee can enjoy until a labour termination is effective.[4]

[4] Art. 48.2 of the 2019 Labour Code

12. Does the employer have to obtain the permission of or inform a third party (e.g local labour authorities or court) before being able to validly terminate the employment relationship? If yes, what are the sanctions for breach of this requirement?

As discussed in Question 9, in cases of termination due to retrenchment, it is mandatory to give 30-days' advance notice to the provincial People's Committee. Otherwise, the termination can be considered non-compliant and declared null and void by an adjudicating court. Furthermore, the employer can also be subject to an administrative fine of up to VND 20 million (around USD 880).[5]

[5] Art. 11.2(a) of 28/2020/ND-CP

13. What protection from discrimination or harassment are workers entitled to in respect of the termination of employment?

Discrimination and sexual harassment at the workplace, irrespective of faults on the part of employers or employees, are completely banned under the Labour Code. In particular, an employee is entitled to unilaterally terminate his or her labour contract without prior notice, but is still able to enjoy statutory benefits, if he or she:

- is abused, beaten, or subject to abusive/defamatory words or acts; or acts adversely affecting their health, dignity, and honour committed by the employer; or is subject to labour coercion; or
- is sexually harassed in the workplace.

In addition, an employee committing an act of physical or sexual harassment in the workplace can be dismissed.

14. What are the possible consequences for the employer if a worker has suffered discrimination or harassment in the context of termination of employment?

Please refer to Question 13. If a worker has suffered discrimination or harassment from their employer or other colleagues, he or she is able to unilaterally terminate their labour contract without prior notice. However, they are still entitled to statutory benefits such as severance allowance, unpaid wages, and unpaid leave. Meanwhile, the violator – regardless of what position he or she holds – can be dismissed. Furthermore, the violator can be subject to criminal charges if their acts are serious enough to constitute a crime.

It is also worth noting that employers committing acts of labour coercion or labour exploitation can be subject to a fine of up to VND 150 million (around USD 6,600).[6]

[6] Art. 10.3 of 28/2020/ND-CP

15. Are any categories of worker (for example, fixed-term workers or workers on family leave) entitled to specific protection, other than protection from discrimination or harassment, on the termination of employment?

As set out in Question 9, certain categories of employees are entitled to specific protection. These employees cannot be dismissed or have their labour contract terminated by the employer no matter the reason for the termination. In particular:

- employees on leave as agreed in advance with the employer; and
- employees on maternity and sick leave.

16. Are workers who have made disclosures in the public interest (whistleblowers) entitled to any special protection from termination of employment?

The Labour Code is silent on the issue of retaliation. However, as discussed in Question 9, any unilateral labour termination by the employer must be based on a specific cause laid down in the Labour Code and the list of these causes does not include retaliation.

17. What financial compensation is required under law or custom to terminate the employment relationship? How is such compensation calculated?

To lawfully terminate the employment relationship, the employer needs to settle all payables to the employee until the effective date of the termination, including:[7]

- wages, benefits and compulsory contributions (i.e. Social Insurance, Health Insurance, and Unemployment Insurance);
- job loss allowance or severance allowance (if

any). In which:

- job loss allowance (in case of termination due to retrenchment or change of control):[8]
  - is applicable to any employee who has regularly worked for the employer for a full 12 months or more;
  - is equal to **one month's wage** for each year of employment. **Minimum payable: 2 months' wages**.
  - The length of a working period used to calculate severance allowance is the total time the employee worked for the employer minus the period for which they participated in Unemployment Insurance and the working period for which the employee has already been paid a severance allowance or job loss allowance;
  - for the purposes of calculating severance allowance, wages means the average salary pursuant to the labour contract for the six consecutive months immediately preceding the termination of employment.
- severance allowance (in other cases excluding termination due to being expelled, fired, or an expired work permit):[9]
  - is applicable to any employee who has regularly worked for the employer for a full 12 months or more;
  - equals half of one month's wage for each year of employment;
  - The length of a working period to calculate severance allowance means the total working time the employee worked for the employer minus the period for which they have participated in Unemployment Insurance and the working period for which the employee has already been paid a severance allowance or job loss allowance;
  - for the purposes of calculating severance allowance, wages means the average salary pursuant to the labour contract for the six consecutive months immediately preceding the termination of employment.

[7] Art. 48.2 of the 2019 Labour Code

[8] Art. 47 of the 2019 Labour Code

[9] Art. 46 of the 2019 Labour Code

18. Can an employer reach agreement with a worker on the termination of employment in which the employee validly waives his rights in return for a payment? If yes, describe any limitations that apply, including in respect of non-disclosure or confidentiality clauses.

The Labour Code is silent on the issue of a mutual termination agreement or a labour dispute settlement agreement. As a matter of practice, these kinds of instruments have been commonly used by in-house counsels and HR executives.

In terms of enforcement, the courts of Vietnam have adopted different views on this issue. Concerning the waiver provision included in a mutual termination agreement or a labour dispute settlement agreement, in general, Vietnamese courts view that contractual rights (e.g. the right to receive a bonus) can be waived. However, with regard to constitutional and statutory rights (e.g. the right to work or the right to sue) courts are divided in their view. Some have ruled that these constitutional and statutory rights cannot be waived, even if the employee was to voluntarily sign a mutual termination agreement or a labour dispute settlement agreement. On the other hand, others have ruled that if

the employee made an informed decision when signing these agreements, they must be bound by their decision.

In respect of non-disclosure or confidentiality clauses, the prevailing view is that these clauses are related to the contractual rights of the employees and, therefore, should be enforceable.

19. Is it possible to restrict a worker from working for competitors after the termination of employment? If yes, describe any relevant requirements or limitations.

Please refer to Question 18. Most Vietnamese courts view that the right to work for a competitor after labour termination is linked to an employee's constitutional right to free choice of employment. Therefore, if this kind of non-compete provision is included in a labour contract, it is very likely to be unenforceable. Having said that, we are aware of some cases where this kind of provision has been considered enforceable by arbitral tribunals with the arbitration seat in Vietnam. In these cases, the tribunals ruled that if the employer did provide consideration in exchange for the employee's non-compete obligation, such non-compete provision is enforceable.

20. Can an employer require a worker to keep information relating to the employer confidential after the termination of employment?

Please refer to Questions 18 and 19 above. The answer is yes. However, to be prudent, the non-disclosure clause should be included in a written mutual termination agreement or a labour dispute settlement agreement. Furthermore, the dispute resolution provision should be designed as a multi-layer DR provision whereby arbitration will be prioritised and then, only when arbitration is not possible, can the parties resort to court litigation.

21. Are employers obliged to provide references to new employers if these are requested? If so, what information must the reference include?

The Labour Code is silent on this issue. As such, former employers have the right to refuse to disclose any information related to their ex-employees to their new employers.

22. What, in your opinion, are the most common difficulties faced by employers in your jurisdiction when terminating employment and how do you consider employers can mitigate these?

As mentioned in Question 1, the labour regulations of Vietnam tend to favour the rights of employees over employers. As such, termination of employment in Vietnam is not easy, even in cases of gross misconduct. Garden leave or pay in lieu of prior notice are not recognized under the Labour Code. Therefore, an employer can only apply these measures on the condition that the affected employee gives his or her consent. To mitigate the risk that a labour termination decision can be set aside by a Vietnamese court, employers are advised to strictly follow both substantive and procedural rules related to labour termination as set out in Vietnamese law.

23. Are any legal changes planned that are likely to impact on the way employers in your jurisdiction approach termination of employment? If so, please describe what impact you foresee from such changes and how employers can prepare for them?

The current Labour Code came into effect last year. Therefore, we do not foresee any changes in the next two to three years.

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