

Legal Update

December 2019



New Labour Code

A new Labour Code No. 45/2019/QH14 was recently passed by the National Assembly on 20 November 2019 and will come into effect on 1 January 2021 ("New Labour Code"). There are some fundamental changes with respect to overtime, retirement ages, workers' representative organisations, dialogue at the workplace, collective bargaining, labour contracting, labour discipline, and employment of foreigners. These changes will require employers to review and update their human resources policies and documents.

1. Overtime

Currently, overtime hours are capped at 30 hours per month and 200 hours per year, but can be extended to 300 hours per year for "special circumstances" upon provision of written notice to the relevant labour authority. The New Labour Code increases the monthly cap to 40 hours, but retains the annual cap. However, what comprises "special circumstances" under the New Labour Code has been expanded, and in addition to those circumstances provided under current legislation, the expanded circumstances also include production and processing in the electronics industry, and business requirement for highly qualified employees to work overtime. The New Labour Code also describes the circumstance of "urgent cases" in further detail, specifying that this means urgent cases due to seasonal tasks or raw material availability.

2. Retirement ages

The New Labour Code gradually increases the retirement ages from 60 to 62 years of age for men by 2028, and from 55 to 60 years of age for women by 2035. This change is to address anticipated insufficient funds in social insurance coupled with longer life expectancies, as well as the concern

raised by some international agencies such as the International Labour Organization ("ILO") and UN Women that the differential retirement ages for men and women have impeded women's ability to get promoted to top management positions.

3. Workers' representative organisations

The New Labour Code enshrines the freedom of employees in enterprises to exercise their right to form or join a representative organisation of their own choice, which does not have to be affiliated to the Vietnam General Confederation of Labour ("VGCL").

Currently, all trade unions are constituted under the framework of the VGCL. However, Vietnam has recently entered into the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP") and the EU-Vietnam Free Trade Agreement which require Vietnam's commitment to ratify all the core ILO conventions, including *ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise*. To implement this convention, Vietnam must allow trade unions independent from the VGCL to exist.

The New Labour Code implements this commitment by recognising independent trade unions for the first time, which are referred to as "workers' representative organisations" ("WROs"). WROs are permitted to be formed within one enterprise and are registered with relevant State agencies. They will draft their own constitutions, setting out their mandates and purposes. The requirements of a minimum number of participating workers at the registration time, registration procedures, state management of financial matters and property of the WROs will later be set out in guiding regulations to be issued by the Government.

Employers are responsible for respecting the legal rights of WROs and promoting the operation of these organisations by way of consultation. The New Labour Code includes numerous amendments to include WROs in the consultation procedures on major labour management steps which presently only require consultation with VGCL trade unions. Important matters requiring consultation include the formulation of internal labour regulations, the formulation of a labour usage plan in the case of redundancy, the formulation of a bonus policy, and disciplinary procedures.

4. Dialogue at the workplace

The New Labour Code reduces the frequency of periodic dialogue sessions to once a year and sets out the scope of such dialogues to include compulsory matters such as employer's unilateral termination of a labour contract in the case the employee repeatedly fails to fulfill his/her work as stated in the contract, termination of employees' labour contracts in cases of changes in the structure or technology or due to economic reasons, establishment of labour utilisation plans, development of wage scale, and prior to issuance or amendment, supplementation of internal labour regulations.

5. Collective bargaining

The New Labour Code introduces a new approach to collective bargaining which shifts the focus from one negotiation session to an ongoing process. It also links an unsuccessful attempt to collectively bargain to a dispute resolution mechanism. The parties must reach an agreement within 90 days of commencing the collective bargaining process, and if they fail to do so, either party may initiate dispute resolution procedures.

6. Labour contract

The New Labour Code introduces new forms of the labour contract so that a formal employment relationship is recognised in more situations. Instead of requiring a formal written signed agreement, the New Labour Code now recognises a contract to exist in the form of data messages which are shown in form of data interchange, electronic documents, e-mails, telegrams, telegraphs, faxes and other similar forms of communication in compliance with the Law on *E-transactions*. Verbal contracts are also more restricted and are now permitted where the term of work is under one month but are prohibited for employing minors under 15 years old and domestic servants.

The New Labour Code also reduces the number of categories of labour contracts from three to two. Under the current law, there are three types of labour contracts: (i) seasonal or project-based contracts for a term of less than 12 months; (ii) definite-term contracts for a term of 12 to 36 months; and (iii) indefinite-term contracts with no expiry date. The New Labour Code has eliminated the category of "seasonal or project-based contracts", and now there is no minimum period for a definite-term labour contract.

The current requirement for an employer to enter into an indefinite-term contract with an employee after having two definite-term contracts has led to some confusion in practical application, especially with respect to foreign workers since their work permits are limited to a two year period. The New Labour Code clarifies this situation and now permits multiple definite-term contracts for foreigners and the elderly.

7. Probation

The New Labour Code takes a more practical approach to probation periods. It permits employers and employees to either sign a separate probation agreement or to include a clause within the labour contract regarding probation. If the parties opt for the latter option, and the work during the probation period does not meet the parties' expectations, the labour contract will automatically terminate. The New Labour Code also sets out a much longer probation period of up to 180 days for executive positions, allowing an organisation to more accurately assess whether the individual is a good fit for a high level position. Probation is not applied to contracts under one month.



8. Termination of labour contracts

More flexibility in respect of contract termination has been set out in the New Labour Code. Two cases have been added in respect of the automatic termination of a labour contract: (i) the expiry of the work permit, and (ii) if the labour contract includes a probation clause, and the work during the probationary period does not meet the parties' expectations.

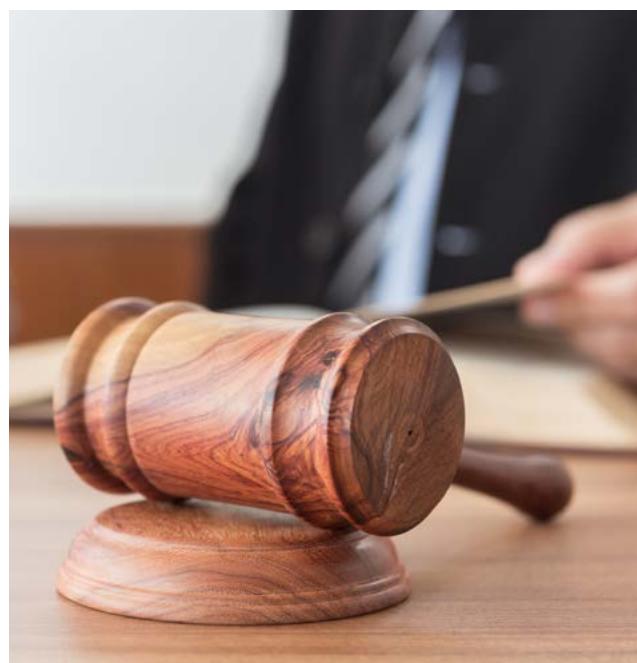
Employees may also resign more easily. Under the current law, an employee under a definite-term contract must provide not only a 30-day prior notice to resign but also a legal reason specifically set out in the law for his resignation. Now under the New Labour Code, employees with definite-term contracts must simply provide the notice.

Employers have also been given more circumstances to terminate employees' labour contracts. They may now unilaterally terminate an employee's labour contract for providing false information when applying for the job position. Under the current law, an employer would have difficulty dismissing an employee for this misconduct, and in most cases could only discipline them. The New Labour Code also allows employers to unilaterally terminate an employee's labour contract for an absence from the workplace of five consecutive days without proper reasons. Under the present law, this forms a basis for dismissal, but it is much more onerous for an employer to carry out a dismissal versus a unilateral termination. This is because the dismissal process requires the employer to convene a disciplinary hearing with the presence of the trade union as well as the employee. In contrast, there is no hearing process for a unilateral termination.

The New Labour Code also clarifies the circumstances under which written notice of termination of a labour contract must be provided. Currently, the law does not clearly stipulate that an employer must provide notice in the case of redundancy or cessation of business operations, however we are aware of several lawsuits where the court held that notice should be given in these circumstances. The New Labour Code clearly states that written notice must be provided in all cases of termination except the following: (i) the employee is sentenced to imprisonment, death and prohibited from performing the work stipulated in the employment contract according to an effective conviction; (ii) the employee being foreigner being expelled from Vietnam according to an effective

conviction or a decision of a competent authority; (iii) the employee is dead or is declared by the court to have lost the capacity of civil acts, or as missing or dead; or (iv) the employer being individual is dead or is declared by the court to have lost the capacity of civil acts, or as missing or dead or the employer being an organisation ceases its operation or is declared by the relevant business registry authority to have neither legal representative nor authorised representative to act on behalf of its legal representative; and (v) the employee is dismissed.

In the case where the employer being an organisation ceases its operation or is declared by the relevant business registry authority to have neither legal representative nor authorised representative to act on behalf of its legal representative, the labour contract is deemed terminated from the point of time having notification from the employer of the cessation of its business or from the relevant business registry authority in the latter case.



9. Foreign employees

The New Labour Code makes the work permit renewal process more inconvenient for foreign employees, stating that the term of the work permit is two years, and foreigners are only permitted to renew once for a further two-year term. After that, foreign employees must make a fresh work permit application. It is not clear whether the foreigner must leave the country before making a new work permit application.

The New Labour Code also updates work permit exemptions for foreigners. The Government will set a threshold of capital contributions by foreign owners or shareholding members of limited liability companies and shareholders being members of the board of directors of joint stock companies to be entitled to a work permit exemption. Foreign nationals married to Vietnamese citizens residing in Vietnam will also be entitled to a work permit exemption.

10. Labour discipline

Under the current law, an employer may only discipline an employee if the act of misconduct is specifically mentioned in the employer's registered internal labour regulations. If the employer lacks internal labour regulations, or if they are not properly registered, an employer is barred from taking any disciplinary action against an employee. Under the New Labour Code, however, an employer may take disciplinary action if an employee violates not only the internal labour regulations, but also if he/she breaches the labour contract or the law generally.

While removing the prohibition from applying labour discipline unless the conduct were recorded in internal labour regulations may discourage employers from putting these in place, the New Labour Code also now requires all employers to have internal labour regulations but only employers with 10 or more employees must register them with the relevant labour authority.

11. Sexual harassment

The current law has very little content addressing sexual harassment – it simply states that it is prohibited. The New Labour Code has expanded upon this issue, and includes a definition of sexual harassment, requires employers to put into place policies to prevent and address sexual harassment as well as addressing sexual harassment as part of the required contents of internal labour regulations. Sexual harassment has also now been added as a ground for dismissal.

12. Other amendments

The New Labour Code has abolished the requirement for employers to register their salary schemes with the relevant labour authority. It has also included a new definition for the minimum wage, and states that it is for the simplest work, but also to ensure minimum living standards in a way which is suitable for the development of the economy and social conditions. The New Labour Code also adds an additional public holiday, which is either preceding or following the National Day of Vietnam.

13. Further guiding regulations to come

In the next year, it is expected that the Government will issue guiding decrees for implementing the New Labour Code. As mentioned above, many details of the New Labour Code still need to be detailed in guiding regulations. The Trade Union Law will also likely be revised to address the introduction of independent trade unions and to implement ILO Convention No. 87.

Employers will need to make fundamental changes to their human resources policies, forms and contract templates based on the above changes.

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