



## **New Government Decrees providing guidance on the implementation of the labour code and the social insurance for foreign employees**

The Government has recently promulgated Decree No. 148/2018/ ND-CP dated 24 October 2018, effecting from 15 December 2018 (**Decree 148**) amending and supplementing a number of articles of Decree No. 05/2015/ND-CP defining and providing guidance on the implementation of a number of contents of the Labour Code (**Decree 05**); and Decree No.143/2018/ND-CP dated 15 October 2018, effected since 01 December 2018 (**Decree 143**) providing guidelines on the Law on Social Insurance and Law on Occupational Safety and Hygiene regarding compulsory social insurance for employees who are foreigners working in Vietnam.

These new Decrees have now changed a number of noteworthy employment regulations:

### **A. New regulations under Decree 148:**

#### ***1. Removing the mandatory form of authorization letter issued by the Ministry of Labour, Invalids and Social Affairs (MOLISA) in relation to the execution of labour contract on employer's side***

According to the Decree 05, the labour contract must be executed by the legal representative of the employer. In case the legal representative cannot or does not want to execute the labour contract, he/she must issue an authorization letter in writing authorize other person to execute the labour contracts on his/her behalf, and such authorization letter must be made under a mandatory form issued by the Ministry of Labour, War Invalids and Social Affairs. Such mandatory form shall no longer apply when the new Decree 148 takes effect (i.e. since 15 December 2018).

#### ***2. Notice to labour authorities in the case of changing the structure, technology and economic reasons***

According to the prevailing Labour Code, in case of changing the structure, technology or economic reasons, the redundancy of more than one employee may be implemented only after the employer has conducted the consultation with the trade union and made 30-day advance notice to the provincial labour authority. Decree 148 adds clearer guidance on the content of the advance notice. In particular,

the notice must include the following mandatory information: (a) the employer's name, address and legal representative; (b) total number of employees and number of laid-off employees; (c) reasons for layoff; (d) time of layoff; and (e) calculation of job-loss allowance (redundancy pay).

### ***3. Probation, internship and apprenticeship periods are no longer be included to determine the working period for severance allowance***

According to the new Decree 148, the working period serves as basis for calculation of mandatory severance pay or mandatory job-loss allowance (redundancy pay) does not include (i) probation, internship and apprenticeship period; and (ii) the time when employee is being detained or jailed away from work (and after which the employees are permitted to come back to work on account of the competent authority's reaching the conclusion that they are not guilty).

### ***4. Salary used as basis for compensation in case of illegal unilateral termination of the labour contract***

To avoid a common confusion and doubt that have raised in practice, Decree 148 now clearly stipulates that salary used as the basis for compensation in case of illegal unilateral termination of the labour contract (by either employer or employee) is the monthly salary specified in the labour contract applicable at the time of illegal unilateral termination of such contract.

### ***5. Substantial but tricky change in procedure for handling violations against the labour discipline***

According to the prevailing Labour Code, handling violations against the labour discipline must be conducted through a meeting with the participation of both the employer, the employee and the trade union. Decree 05 adds a guidance that if the employer has noticed and invited the employee and trade union in writing for **03 times**, but one of the participants is still absent, the employer can conduct the disciplinary meeting with the attendance of either the employee or trade union.

Decree 148 now has a new guidance which *prima facie*, seems to facilitate the disciplinary process by allowing employer to immediately conduct the disciplinary meeting without the need of sending the invitation for 03 times. In particular, in the cases where an employee's violation is detected after it has been committed (and before the expiration of time limit for dealing with breach of labour discipline) and there is ample evidence of such violation: the employers must make sure the meeting invitations are sent to all participants before the meeting schedules. Within 03 working days from the date of receipt of the meeting invitation, the participants must confirm their participation or refusal (and in case of refusal, must clearly explain refusal reason (Decree 148 is silent on whether the confirmation must be in writing or can be on verbal form). On the meeting date, if **one** of the participants (for example: the employee) does not confirm his/her participation or if his/her absence/refusal reason is not justified, or if the employee has confirmed to participate but does not show up on the meeting date, then the employer can immediately conduct the disciplinary meeting with the attendance of only the trade union without the need of re-sending other meeting invitation to the absent employee like the procedure under Decree 05.

However, from a strict legal point of view, Decree 148 does not add any clear guidance on the circumstance where the employee can give justifiable refusal reason to attend the meeting request – i.e. if the employees can repetitively give justifiable reason to refuse the participation to the disciplinary meeting, the employer may not be able to conduct the disciplinary meeting with only the participant of the trade union notwithstanding the number of reconvene meeting request. From a strict legal point of view, this could be a problem for employer when dealing with labour disciplinary case.

In addition, Decree 148 also have a separate guidance to deal with circumstance when an employee's violation is immediately detected/caught in the act – in this circumstance, the Decree now allows the employer to immediately draw up a minutes of the violation, then send notice to both the employee and trade union to conduct the disciplinary meeting. Decree 148 however is silent on detailed procedure re how to conduct such meeting – i.e. there is no clear confirmation that employer can conduct the meeting with the attendance of only either the trade union or the employee. As such, strictly speaking, in this case, the employer can only conduct the meeting *if* all mandatory participants (i.e. both the trade union and employee) show up. This unclear guidance thus would rather limit the employer in conducting disciplinary meeting when the employee's violation is caught in the act. As such, to be on safe side, in case where the non-cooperation of the employee is foreseeable the employer should apply general disciplinary procedure as if the employee's violation is detected after it has been committed.

### **B. New regulation under Decree 143:**

Decree 143 comes into force from 01 December 2018, in addition, the Social Security of Hanoi has recently issued Official Letter No.5251/BHXH-QLT providing temporary guidelines on compulsory social insurances in accordance with Decree 143 (**Official Letter 5251**). Decree 143 and Official Letter 5251 have introduced the following remarkable points:

#### ***6. From 01 December 2018, the employer must contribute into the sickness and maternity fund and the occupational accident and disease fund for foreign employees***

From 01 December 2018, the employer has mandatory obligation to pay 3% of the monthly payroll to the sickness and maternity fund and 0.5% of the monthly payroll to the occupational accident and disease fund for its foreign employees.

**The subject of the application:** This provision shall be applied to all foreign employees who obtain valid work permit and has a labour contract of at least 01 year. This regulation shall not apply to foreign employee who are assigned to work in Vietnam under the form of internal transfer (among an international cooperation or organization) or are over 60 year-old for man and 55 year-old for woman.

Accordingly, the foreign employee shall be entitled sickness and maternity benefit regime and occupational accident and disease benefit regime in accordance with the Law on Social Insurance and Law on Occupational Safety and Hygiene of Vietnam.

#### ***7. From 01 January 2020, the employer and foreign employee must pay into the retirement and death fund***

From 01 January 2020, the employer has obligation to pay 14% of the monthly payroll to the retirement and death fund and the employee has obligation to pay 8% of the monthly salary to the retirement and death fund.

**The subject of the application:** same as section 6 above.

Accordingly, the foreign employee shall be entitled retirement benefit regime and death benefit regime in accordance with the Law on Social Insurance of Vietnam.

**Key contacts**

If you have any questions, or would like to know how this might affect your business, please contact these key contacts.



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