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Legal Update

January 2021

The Government of Vietnam issued Decree No. 145/2020/ND-CP detailing and guiding the implementation of the Labor Code on working conditions and labor relationship

Following the effectiveness of the new Labor Code No. 45/2019/QH14 (**Labor Code 2019**), the Government has introduced a master guiding document, which will take effect on 01 February 2021, called Decree No. 145/2020/ND-CP detailing and guiding the implementation of the Labor Code on working conditions and labor relationship (**Decree 145**).

The effectiveness of Decree 145 puts an end to 13 previous Decrees[1] that provides guidance for the implementation of the old Labor Code – i.e., the Labor Code 2012. While Decree 145 still adopt/inherit many important legal provisions from its preceding Decrees, it further stipulates a number of important changes or amendments and novelties to govern the following matters related to employment relationship:

(1) Employers' responsibilities in labor-management;

[1] 1. Decree No. 41/2013/ND-CP guiding Article 220 of the Labor Code on the list of employers that are not allowed to conduct strike and resolution of employees' request to conduct strike.
2. Decree 44/2013/ND-CP guiding the Labor Code on labor contracts.
3. Decree No. 45/2013/ND-CP guiding the Labor Code on working hours and rest time and labor safety and hygiene.
4. Decree No. 46/2013/ND-CP guiding the Labor Code on labor dispute.
5. Decree No. 49/2013/ND-CP guiding the Labor Code on salaries.
6. Decree No. 03/2014/ND-CP guiding the Labor Code on occupation.
7. Decree No. 27/2014/ND-CP guiding the Labor Code on housekeeper employees.
8. Decree No. 05/2015/ND-CP guiding the Labor Code.
9. Decree No. 85/2015/ND-CP guiding the Labor Code on policies for female employees.
10. Decree No. 121/2018/ND-CP amending Decree No. 49/2013ND-CP guiding the Labor Code on salaries.
11. Decree No. 148/2018/ND-CP amending Decree No. 05/2015/ND-CP guiding the Labor Code.
12. Decree No. 149/2018/ND-CP guiding Article 63.3 of the Labor Code on democracy policy at workplace.
13. Decree No. 29/2019/ND-CP guiding Article 54.3 of the Labor Code on the labor outsourcing license, escrow and list of outsourcing jobs.

(2) Contents, termination, and invalidity of labor contracts;

(3) Labor outsourcing;

(4) Dialogue and democracy policy at workplace;

(5) Salary payment and calculation;

(6) Working hours and rest time;

(7) Labor discipline and material responsibilities;

(8) Female employees and gender equality assurance; and

(9) Settlement of labor disputes.

In this legal update, we briefly summary notable issues under Decree 145 that, from our point of view, corporate employers should stay alert.

1. 120-day prior termination notice for company managers

As per Article 35 and Article 36 of the Labor Code 2019, if either the employer or the employee wishes to exercise its unilateral right to terminate the labor contract, the employer/the employee must send an advance notice to the counterparty. This notice usually must be sent of about 03 working days to 45 calendar days (depending on the labor contract of such employee). However, the Labor Code 2019 requires some exceptional cases where the terminating party must serve the advance notice of a longer period. Following this new provision of the Labor Code 2019, Article 7 of Decree 145 has provided a list of specific jobs that require such longer advance notice.

Among others, company managers (in Vietnamese: *người quản lý doanh nghiệp*) fall under these exceptional cases. The company managers under the context of the Labor Code 2019 comprise of the following persons:

(1) For a private enterprise (in Vietnamese: *doanh nghiệp tư nhân*) or a partnership (*công ty hợp danh*)[2]: its owners;

(2) For a limited liability company: the chairman (or president) and members of Board of Members;

(3) For a joint-stock (shareholding) company: the chairman and members of Board of Directors;

(4) For all forms of enterprise: the (General) Director(s) and any other persons/positions which are stipulated in such company's charter as a manager.

In the cases mentioned above, the terminating party has to serve a prior notice to another party of at least (i) 120 calendar days, if the labor contract of the concerned employee has an indefinite term or a definite term of at least 12 months, or (ii) one-fourth of the labor contract's term if the labor contract of concerned employee is on definite term of less than 12 months.

[2] Unlike limited liability company and joint stock company, private enterprise and partnership are companies that do not have independent assets with its owner(s).

According to new regulation above (especially point #4 above), in case the employer wishes to adopt a longer notice period for key personnel positions, it is advisable to take a closer look at the company's charter and revise (where necessary) to clearly clarify those key personnel as the company's managers – to create a solid ground to determine the termination notice period for those key personnel.

2. No severance allowance for employees who arbitrarily has been absent from works for at least 5 consecutive days without good reason(s)

Being absent from works for at least 5 consecutive days without good reasons triggers the unilateral termination right of the employer, which is a new right conferred upon the employer under the Labor Code 2019 (click here for more information). Accordingly, Article 8.1 of Decree 145 now sets a clearer regulation on severance payment if the employer exercises its termination right: in particular, the employees shall not be entitled to severance allowance in case they are terminated under this cause.

On a separate note, "good reason" is the vital element to determine and justify the unilateral terminations as well as no payment of severance allowance. "Good reason" is not subject to discretionary interpretation of the employers – rather, Decree 145 now sets out the clarification of "good reason" to be at least one of the following: (i) natural disaster, (ii) fire, (iii) certified sickness on self or relatives, and (iv) **other cases provided by the internal labor rules**. Once again, it would be a prudent step for the employers to take a look at the internal labor rules and updated (where necessary) to build a strong and solid ground for the employers to eliminate the obligations to pay severance allowance to terminated employees under this cause.

3. Mandatory substances in the internal labor rules

Regarding the internal labor rules, Article 69 of Decree 145 requires an employer having at least 10 employees to issue and register the internal labor rules (this is the same rule under the previous labor laws). Decree 145 also clearly confirms that for the employers having less than 10 employees, the internal labor rule is not mandatory – instead, however, the labor contract with each employee has to contain substances on discipline and material responsibilities.

Compared to Decree 05/2015/ND-CP, Decree 145 provides more detailed information required in the internal labor rules, mainly including:

(1) Sexual harassment prevention and procedure to handle sexual harassment at workplace, which must include the following information:

a. Sexual harassment is prohibited at workplace;

b. Activities considered sexual harassment at workplace;

c. Responsibilities, timeline, procedures to handle the sexual harassment at workplace and complaints;

d. Labor discipline applicable to (i) person conducting sexual harassment and (ii) person denouncing incorrectly; and

e. Compensation for person being sexually harassed and remedies.

We further note the workplace under Decree 145 is not only the employer's office, but also covers any actual working location of the employees as agreed or assigned by the employer. Such actual working location includes (without limitation to) work-related places or virtual platform, such as (i) social activities, (ii) seminars, (iii) training, (iv) official business trips, (v) meals, (vi) phone conversations, (vii) electronic communication activities, (viii) vehicles arranged by the employers from home to working location and vice versa, (ix) accommodation provided by the employers and (x) any other location specified by the employers. Therefore, the employers, please, carefully take into account to draft this part of the internal labor rules.

(2) Circumstances that the employers may temporarily transfer the employees to another job, especially those arising out of the business demand as required by Article 29 of Labor Code 2019.

This is a new required substance under the Labor Code 2019. We had to expect that Decree 145 could provide some further guidance for the employer to track and determine which cases should trigger such temporary transfer. This would also help the employers working with the labor authority in registration of the internal labor rules (or explanation in case of employees' claims). However, Decree 145 remains silent on this issue. Therefore, it is important for the employers to clearly clarify and create a solid ground for the temporary transfer of employees in the internal labor rule to minimize the risk of claim from the concerned employees. Having said that however, due to the silence of Decree 145, the employers should expect difficulties in dealing with the labor authority when registering the internal labor rules on this particular issue.

(3) Material responsibilities, which must comprise of (i) cases that the employees have to compensate because they have broken equipment or conducted activities causing loss and damages in the employer's assets, or lose equipment, assets, or exceedingly consumed materials; (ii) compensation level in corresponding with damages; and (iii) person having authority to handle the compensation.

(4) Person having authority to handle labor discipline: Decree 145 clearly confirms that the employers can authorize, in the internal labor rule, other person with authority to handle discipline violation within its business. This means that employers can (and should) clearly designate the authorization to handle labor disciplinary within its business in the internal labor rule (NB: if the internal labor rules are silent on the authorization, person having the right to handle labor disciplinary is only the legal representative or those having written authorization from the legal representative).

Given that many parts of the internal labor rules need to be reviewed in accordance with Labor Code 2019 and Decree 145, it would be necessary to update the internal labor rules to lay a solid foundation in handling the labor relationship.

4. Internal procedures

There are two important changes re mandatory internal procedures for an employer, including (i) procedure on handling labor discipline and (ii) procedure on handling compensation from the employees to employers. Under Labor Code 2012 and its guiding documents, these procedures are the same; however, the Labor Code 2019 has differentiated these procedures under 02 different provisions. We expect the new regulations will be helpful to mitigate obstacles that may arise during the handling of labor disciplinary and compensation in practice.

Regarding the procedure on handling labor discipline, it mainly remains unchanged but has some amendments being more favorable to the employer (compared to its precedence regulations). Among others, there are the following interesting points that the employers may take into consideration:

(1) Lowering the age of employees whose parents or legal guardian must participate in the disciplinary meeting: this applies for employees under 15 (instead of 18 as pursuant to Decree 148/2018/ND-CP);

(2) Extending the employers' right to conduct the disciplinary meeting if some participant is absent: According to Article 70 of Decree 145, if either the representative of labor representative organization, violated employee, his/her legal counsel, or his/her parents/legal guardian[3] is absent (without any reason), it does not affect the meeting process.

We note that the previous regulation (Decree 148/2018/ND-CP) does not allow the employer to conduct the meeting if at least one of the above-mentioned persons confirmed not to join the meeting for a ***good*** reason. Practice has shown that some violated employees took advantage of this provision to defer his/her discipline procedure as long as possible. It has caused many difficulties for the employers to close a disciplinary case. With the new guidance under Decree 145, it is expected that the employers will have more ground to facilitate and close labor disciplinary cases to avoid any unnecessary interruption to the business.

Regarding procedure to handling the compensation, Article 71 of Decree 145 has provided a detailed procedure to handle the material compensation by the employees to the employers. Basically, it adopts principles of the disciplinary procedures and provides some tailor-made amendments for compensation handling meetings.

5. Clearer regulations on health care for female workers

Decree 145 mostly inherits regulations on health care for female employees provided by Decree 85/2015/ND-CP. Having said that however, it also provides clearer regulations for implementation in practice. The below are some noteworthy points for employers to make sure their business fully comply with the new regulation:

(1) The female employees are entitled to a 30-minutes break per day during their menstrual cycle in accordance with Article 80.3 of Decree 145. Furthermore, the employers need to reach

[3] Only applicable to employee under the age of 15.

agreements with the concerned employees on the number of working days that the females enjoy such break, but in no event can be lesser than 3 working days.

(2) Similarly, female employees having (an) under-12-month child(ren) have the right to take a 60-minute break per day as per Article 80.4 of Decree 145. This entitlement will last until the child turns full 12-month old.

(3) Please note that the employees still enjoy full payment of salary even if they take the above-mentioned breaks. If they do not want to take a break and do reach the employers' approval on same, the employees will be entitled to an additional salary corresponding to the job that they work during the break, in addition to full payment of daily salary. Besides, this working time is not counted as overtime (meaning it does not affect the total overtime arrangement of the employers).

(4) Lactation room becomes mandatory for the employers having at least 1,000 female employees at a time (regardless of whether the employees having children or not), and the lactation room must be a private place, not being a (part of) bathroom or a toilet. In addition, lactation room must have certain facilities including power source, water source, table, chairs and hygiene refrigerators, fans or air-conditioners. Decree 145 also requires that lactation room be arranged at a convenient location, being protected from intrusion and visibility by colleagues and the public.

Key contact

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

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