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LEGAL UPDATE

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Legal Update

Highlights on new regulations of the new Labor Code 2019

The National Assembly of Vietnam has enacted the new Labor Code on 20 November 2019 (the **Labor Code 2019**) that will supersede the prevailing Law No. 10/2012/QH13 dated 18 June 2012 (the **Labor Code 2012**) from the 1st of January 2021. The transition period is rather long and the Labor Code 2012 still takes effective during the whole year of 2020, it is thus still at the very preliminary stage to prepare any change for the business to accommodate new regulations outlined in the Labor Code 2019 to the business in this year of 2020. Nevertheless, it is still a prudent step for the business to well prepare in this transition period and plan for the year 2021.

In this legal update, we will discuss about some noteworthy changes under the Labor Code 2019 that, from our point of view, business employers should stay alerted on for the changes which will take effect since 2021:

1. Execution of labor contracts

There are a number of changes in relation to the execution of labor contract. In particular, with regards to the oral contract, the Labor Code 2019 offers a stricter regulation that only allows the employer and employee to enter into oral employment agreement for temporary job of less than 01 month (compared with the current regulation that allows employer to enter into oral contract for temporary job of less than 03 months).

In addition, the Labor Code 2019 has removed the type of “seasonal/work-specific contract” from the classification of labor contracts. This would mean that from 2021 onward, employers

must treat all seasonal employees as employees undergoing definite-term contracts of less than 12 months – i.e. while employers are still allowed to sign contracts of less than 12-month term with the employees to accommodate the seasonal demand from the business, those contracts shall be regarded as definite-term contracts (not as "seasonal contracts" under the prevailing Labor Code 2012), and should employers wish to terminate those contracts, the same procedure applicable to termination of definite-term contracts shall apply.

The Labor Code 2019 also stipulates the same limitation on number of definite-term contracts that employers may sign with the employees – i.e. "if the employees keep working upon expiration of the 2nd definite-term contract, the 3rd contract shall be of indefinite-term" (Art. 20.2.c of the Labor Code 2019). Pending further clarification and guidance from the Government on this regulation, this leaves a question mark for employers who wish to intermittently sign different short definite-term contracts with the same employees for seasonal works.

The new law now also adds a clarification to justify *de facto* labor contracts: any contract that has arrangement re paid job, remuneration or the management and supervision of a party over other party would be considered as *de facto* labor contract, regardless of the form or name of such contract.

2. Termination of labor contracts

The Labor Code 2019 expands the scope of circumstances where employers or employees may exercise their right to unilaterally terminate the labor contracts:

2.1 For employers

According to Article 36 of the Labor Code 2019, the employers will enjoy new rights to unilaterally terminate the labor contract under the following circumstances:

(a) <u>If the employees reach the retirement age in accordance with Article 169 of the Labor Code 2019</u>.

The prevailing Labor Code 2012 is not crystal clear on whether employers can unilaterally terminate the labor contracts if/when the employees reach retirement age but still wish to stay at work. The guiding Decree No. 148/2018/ND-CP says that if employers do not wish to keep the employees at works (or if the employees do not wish to stay at work), the parties shall "negotiate to terminate the contract" (Article 6.2 of Decree 05/2015/ND-CP, as amended by Decree 148/2018).

The new regulation under the Labor Code 2019 is a positive confirmation that clear up the above confusion currently exists under the Labor Code 2012 – to confirm that employers will have right to unilaterally terminate the labor contracts when the employees reach retirement age notwithstanding the employees' wishes to stay at work.

(b) The employee arbitrarily quits his/her job without any good reason for 05 consecutive working days or more

This is the same circumstance where, under the prevailing Labor Code 2012, the employers only have right to impose dismissal sanction upon the employees.

Since 2021, under the Labor Code 2019, employers will be allowed to, without prior notice, unilaterally terminate the employees rather than undergo the lengthy disciplinary procedure. This would save much time and cost for employers to terminate and depart the employee who shows no discipline and quits his/her job without any approved reason.

However, it is important to note that in order to exercise such rights, employers must prove that the employees have arbitrarily been absent from job without any good/approved reasons pass the legitimate threshold. Pending a clear guidance on this regulation, the burden of proof still vests onto the employer to identify and demonstrate the non-existence of any good reason from the employees for the absent from work. Should the termination be issued on undue ground, it would give rise to potential risk of claims from the employees when they seek to challenge the employer's ground of termination.

(c) Also, the new Labor Code includes an updated regulation that, according to Article 36.1(d), if the employee does not show up for 15 days from the date of suspending his/her employment contract, the employer can unilaterally terminate the contract **without prior notice**. This is a positive change under the new Labor Code that allows the employer to control the situation when their employers are arbitrarily off without informing and being permitted by the employer after approved suspending period. Under the current Labor Code 2012, if the employees do not return to work, employers have to send them notice in advance regarding termination of work as if they are disciplined for absent from works without legit reasons.

(d) The employee provides dishonest information when concluding employment contracts that affects the recruitment of employers.

This is a new termination ground under the Labor Code 2019. In particular, the employers will have right to unilaterally terminate the contract if it is confirmed that the employees have provided untruthful information including full name, date of birth, gender, place of residence, education, vocational skills, health status verification and other issues directly related to the conclusion of employment that the employer requires.

Again, it is too early to discuss further about the implication of this new termination ground, as to exercise such right to unilaterally terminate the labor contract based on this ground, the employers still bear the burden of proof. We expect the Government to issue clear guidance for the implementation of this new regulation.

2.2 For employees

Compared with those new termination grounds for the employers as discussed above, the Labor Code 2019 offers a far more generous regulation of unilateral termination for the employees. In particular, the employees will be able to:

(a) Unilaterally terminate any type of labor contracts without any reason, just by sending advance notices to the employer.

Under the prevailing Labor Code 2012, the employees can only terminate a contract without any legitimate reason if they are undergoing indefinite-term labor contracts. From 2021 onward, the employees will be able to unilaterally terminate both indefinite-term and definite-term contracts without any reason, just by serving advance notices to the employees.

(b) Unilaterally terminate the labor contracts without sending any advance notice: the employees also enjoy a greater right to unilaterally terminate their contracts without sending prior notices to the employers, should the employees determine that:

(i) they have been mistreated or beaten by the employers, or if the employers have insulted them by words or acts that humiliate or affect the employees' health, dignity, honor.

(ii) they are not assigned to appropriate jobs, workplaces or working conditions in accordance with the labor contract.

(iii) they are not paid in full or on time (except exceptional case as stipulated in Article 97.4 of the Labor Code 2019).

(iv) they are being sexual harassed at workplace.

(v) [only for female employees who are pregnant:] they have confirmation from a competent health facility which states that her pregnancy may be adversely affected if they continue working.

(vi) they have reached retirement age (this right is corresponding to the right of employers to unilaterally terminate the contract).

(vii) the employers have provided untruth information during the recruitment.

The circumstances from point (i) to (v) above are similar to current circumstances where, under the prevailing Labor Code 2012, the employees can unilaterally terminate the contract with advance notices. Under the Labor Code 2019, the employees can unilaterally terminate the contracts without any advance notice based on above grounds.

While the burden of proof to exercise such right still vest on the employees, we note that the above generous new regulation may potentially give rise to unnecessary claims or disputes between employers vs. employees (especially when the new Labor Code 2019 now also equips the employers the right to terminate the contract upon the employees' "no-show" as discussed above).

2.3 Cancellation of termination notice

The Labor Code 2019 now adopts a new stipulation that allows the employer or the employee to revoke such unilateral termination notice should the advance notice period has not lapsed, provided that such cancellation/revocation is accepted by the non-terminating party. This revocation provision shall not apply should the unilateral termination is exercised without any advance notice.

3. Labor discipline

The new Labor Code 2019 now introduces more detailed requirements with regards the preparation and issuance of the internal labor rule (**ILR**). In particular: the new law now clearly clarifies that every employer must prepare and issue an ILR for its business (Art. 118.1 of the Labor Code 2019) regardless of number of employees they may employ. This means that for employers employing less than 10 employees, they still have to prepare and consult with the trade union for issuance of the ILR, even though they may opt to issue such ILR **not** in written form (i.e. in oral or visual form), and while such ILR is not required to be made in written form and registered with labor authorities, the laws still require the ILR be well noticed to all employees, and the main contents of such ILR to be published within the workplace (Art. 118.4 of the Labor Code 2019). This is a new (stricter) requirement compared to the current requirements under the Labor Code 2012, where the laws only generally require employers employing more than 10 employees to prepare and issue an ILR.

The Labor Code 2019 also widens the scope of prohibited acts in relation to labor discipline: it is now prohibited to "*impose labor discipline measure against an employee for a violation which is not stipulated in the internal labor regulations **nor** labor contracts **nor** labor laws*". This new language of the laws would give the employers more room in determining labor disciplinary ground for its business – i.e. to put those disciplinary regulations in either or both the ILR or/and

individual labor contract of the employees. However, pending a further and clear implementation guidance on the new Labor Code, the above wordings also appear to be debatable as whether the employers can impose disciplinary measure against a violation which is *not stipulated in the then-current labor laws* (including both the Labor Code 2019 and its future guiding regulations). It is expected that the Government will promulgate a new Decree guiding the implementation of the Labor Code 2019. At this stage, it is still too early to jump to any conclusion re the interpretation of this specific regulation, and the business should keep a close eye onto this specific issue for planning any change in the labor disciplinary arrangement for 2021 onward.

The new law also imposes more mandatory contents to be included in the ILR: in addition to those contents currently required under the Labor Code 2012, the new law further requires the ILR to clearly address regulations to prevent sexual harassment within the business, cases in which employers may temporary assign the employees to different positions, cases in which material responsibility may be imposed upon employees, and also clearly address the competent personnel in charge of labor discipline measure. This means that when the new Labor Code 2019 takes effective in 2021, the businesses must make sure that their ILRs clearly cover all those additional mandatory contents, and if not yet, a revision and re-registration of the ILRs shall be required.

4. Normal working hours and overtime

The new Labor Code 2019 does not introduce any new or different limitation regarding working hours and overtime – i.e. the normal working hours remain the same as under current Labor Code 2012: to be not exceed 08 hours per day and not more than 48 hours per week; and maximum number of overtime working hours remain the same at 300 hours per year (with an adjustment re maximum number of overtime hour per week be increased from 30 to 40 hours). Nevertheless, the Labor Code 2019 now introduces a clearer guidance as which/when the employers are allowed to adopt overtime working hours of up to 300 hours per year: in addition to situations current allowed under the guiding Decree of the Labor Code 2012, the Labor Code 2019 now introduces a new circumstance where the work requires highly skilled workers that are not available on the labor market at the time (when overtime demand arises). This new regulation seems to offer a more flexible and generous ground for employers to seek to apply overtime of more than 200 hours per year for its business in Vietnam. However, again, it is still too early to jump into any conclusion at this stage, as the businesses must wait for further guidance from the Government with regards to the implementation of this new regulation.

Summary of remarkable changes in Labor Law 2019 are in Annex 1 attached to this note. If you have any questions or would like to know how this might affect your business, please contact these key contacts.

Nguyen Hong Hai

Partner and Head of Employment Practice

Hanoi, Vietnam

+84 24 3971 0888

hai.nguyen@lexcommvn.com

Le Lien Huong

Senior Associate

+84 24 3971 0888

huong.le@lexcommvn.com

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Annex 1 – Major changes of the new Labor Code 2019

1. For employees

1.1. Wider scope of application and governing objects

This is the first time the scope of application and governing objects of the Labor Code has covered workers without written labor contracts (Art. 1 of the Labor Code 2019).

1.2. Regulations on sexual harassment at workplace

(a) The new Labor Code has added definition and terms on sexual harassment at workplace, which is "*sexual behaviors of any person towards others at workplace that is not desirable or acceptable to that person. Workplace is any place where the employees actually work as agreed upon or assigned by the employers*" (Art. 3.9 of the Labor Code 2019). Also, this is a matter for employment contractors to note that must be included in the ILR.

(b) Notably, sexual harassment is not only considered a basis for employers to dismiss employees but also regarded a ground for employees to unilaterally terminate the labor contract without notice to employers in advanced according to Article 35.2(d) of the new Labor Code.

1.3. Minimum wages

To solve actual problems of employees making life ends, the National Assembly Standing Committee, with comments from Vietnam General Confederation of Labor, has amended and add criteria to decide the minimum wage of employees. Accordingly, the minimum wages are adjusted on the basis of the minimum living standards of employees and their families; correlation between the minimum wages and the common salary of employees on the market; consumer price index, economic growth rate; labor supply and demand relations; employment and unemployment; labor productivity; affordability of the business (Art.91 of the Labor Code 2019).

1.4. Holiday Leaves

According to Article 112.1 of the new law, employees are entitled to have holiday leave of 02 days of National Day (September 2nd and 01 day before/after) with full payment rather than only 01 days compared to the prevailing Labor Code 2012.

1.5. Retirement Age:

(a) Under Article 169 of the Labor Code 2019, the retirement age for employees in normal working conditions is adjusted following the route until they reach 62 years of age for men in 2028 and 60 years for female workers in 2035.

(b) From 2021, the retirement age for ordinary employees is 60 years and 03 months for men; 55 years and 4 months for women. Then, the retirement age in each year increases by 3 months for male employees; 04 months for female employees.

(c) Employees with high professional and technical qualifications and in some special cases may retire at a higher age but not older than 5 years from the time of retirement, unless otherwise provided for by law.

(d) Employees with high professional and technical qualifications and in some special cases may retire at a higher age but not older than 5 years from the time of retirement, unless otherwise provided for by law.

1.6. Collective Bargaining

Collective Bargaining applies to a wider range of scope (i.e. collective bargaining of several businesses) and is regulated more specifically. In particular, the new law has provided regulations on negotiating, signing and sending the Collective Bargaining to the competent authorities, implementing Collective Bargaining in cases of companies merging and acquisition, ownership and/or assets transfer of the company, and regarding relationship between types of Collective Bargaining (corporate level, sector level and of several businesses).

1.7. Probation

(a) The probation provision under the Labor Code 2012 is not applied to seasonal employment contracts which have the term under 12 months. However, in the new Labor Code, the exception of application of the probation period is only for under-01-month-term labor contracts (Art.24 of the Labor Code 2019).

(b) In addition, Article 25 of the new Labor Code also supplements regulations on probation period which shall not exceed 180 days for managers in accordance with the Law on Enterprises, the Law on Management and Use of State Capital Invested in Business and Production at Enterprises.

1.8. Juvenile labor

Chapter XI of the new Labor Code states more detailed mechanism to protect juvenile labor by specifically classifying of juvenile labor under 13 years old, from 13 years old to under 15 years old, from 15 years old to under 18 years old; working hours (no overtime on weekends or at night), forbidden types of work, etc. and provides clearer provisions for hiring underage employees of all ages.

1.9. Right to choose dispute settlement mechanism

(a) The new Labor Code is more flexible in regulating the right to choose labor dispute settlement mechanism after conducting conciliation procedures, not stipulating government intervention and administrative settlement of labor dispute settlement.

(b) The new Labor Code also adds cases where due to force majeure events or objective obstacles which cannot be requested in time, the time of such force majeure events or objective obstacles shall not be counted in the terms for requesting labor dispute settlement.

(c) It is notable that the provisions of responsibilities of the labor, war invalids and social authorities under the People's Committee is supplemented as the receiving point of labor dispute settlement requests and be responsible for classifying and assisting parties in the process of labor dispute resolution.

2. For employers

2.1. Periodic dialogue at the workplace

Instead of the current 3-month periodic arrangement, Article 63.1 of the new Labor Code has increased the period of periodical dialogues at the workplace to 1 year/time; at the same time, added a number of cases where employers must organize dialogues such as due to economic reasons that many employees are at risk of losing their jobs or have to quit their jobs; when building the wage scale, payroll, labor norms, etc.

2.2. Salary scale

Article 93 of the new Labor Code stipulates that employers are allowed to take the initiative in setting wage scales, payrolls and labor norms on the basis of negotiation and agreement with employees. Accordingly, the salary paid to employees is the amount of money to perform the job, including the salary by job or title, salary allowance and other additional payments. The salary according to the job or title is not lower than the regional minimum wage set by the Government. In addition, the new Labor Code stipulates that employers must consult with the employee organizations at the establishment when building the pay scale, payroll, labor norms and publicizing them at the workplace.

2.3. Termination of the employment contracts

(a) The amended code expands the right to unilaterally terminate the labor contract of the employers by adding cases as follows:

(i) The employee reaches retirement age;

(ii) The employee quits his/her job without plausible reasons for 5 consecutive working days or more (NB: under the current Labor Code,

this is subject to dismissal disciplinary sanction, not unilateral termination); or

(iii) Providing untruthful information to employees under the provisions of Clause 2, Article 16 of this Code when entering into labor contracts, thus affecting the recruitment of laborers.

(b) The new law states situations of terminations as follow:

(i) Abort the probationary agreement, unsuccessful probationary work if there is a probation clause in the contract;

(ii) Foreigners working in Vietnam are deported;

(iii) The foreigner's work permit expires;

(iv) Employees who voluntarily quit their jobs without plausible reasons from 05 consecutive working days or more are put on the unilateral termination section of the employer, no longer requiring taking disciplinary action;

(v) Employees reaching retirement age (not required to complete the full year of paying insurance premiums) is also the basis for unilaterally terminating the employment contracts;

(vi) Employers/employees provide dishonest information affecting the performance of employment contracts;

(vii) The employer must notify the employee in writing of the termination of the labor contract, except in some specific cases; and

(viii) Adding regulations of the time of termination due to the liquidation/insolvency of employers (corporate employer in general): is the time of termination of operation notice.

2.4. Labor disputes

(a) The Labor Code 2019 has provided more flexible provisions on labor dispute resolution on the right to choose the labor dispute settlement mechanism after conducting conciliation procedures, not stipulating the intervention and administrative settlement from state in labor dispute resolution.

(b) Also, cases due to force majeure events or objective obstacles which cannot be requested on time have been supplemented. Accordingly, the time of such force majeure events or objective obstacles shall not be counted in the term for requesting individual labor dispute settlement.

(c) The Ministry of Labor, Invalids and Social Agencies under the People's Committee are appointed to be the focal point to receive labor dispute settlement

requests and is responsible to classify, guide and assist the parties in the process of labor dispute resolution.

2.5. New definition of non-complete working

(d) A part-time employee is an employee whose working time is shorter than the normal working hours by day or by week or by month prescribed in the labor law, labor agreement, collective bargaining or internal labor rules.

(e) The employee agrees with the employer to work on a part-time basis when entering into a labor contract.

(f) Employees who work part-time are not entitled to wages; equality in exercising rights and obligations with full-time workers; equality of opportunities, non-discrimination, assurance of occupational safety and sanitation.