Rödl & Partner

CLIENT ALERT VIETNAM

MANAGING CHANGE

Issue:
January 2020

Legal update on the Labor Code 2019

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→ Legal update on the Labor Code 2019

On 20 November 2019, the National Assembly of the Socialist Republic of Vietnam enacted the new Labor Code (the "**Labor Code**" or the "**Code**") which shall enter into full force and effect as of 1 January 2021, replacing the Labor Code 2012 (the "**current Code**"). We would like to emphasize that from the effective date of the new Labor Code, the labor contracts, collective labor agreements and lawful agreements which are valid under the current Code and are not contrary to the new Code or do provide rights and conditions which are more in favor of the employees than stipulated by the provisions under the current Code, shall continue to be valid unless the parties agree to amend them in order to fully comply with the provisions under the new Code.

Below please find a survey of the most significant changes to the rights and obligations of both, the employee and the employer, prescribed by the new Code:

AMENDMENT TO LABOR CONTRACT REGULATIONS

1. DEFINITION OF LABOR CONTRACT:

In addition to the definition of a clear-cut labor contract, the new Code does also provide regulations for the recognition of further employment agreements regardless of their individual nature and designation (such as service contract, freelancer contract etc.). Consequently, any agreement concluded between the parties containing paid work, salary and management, administration, supervision of one party shall be deemed a labor contract, regardless of the name given to the agreement.

2. FORM OF LABOR CONTRACT AND MAIN CONTENTS OF A LABOR CONTRACT:

While the current Code provides for a labor contract to be concluded in writing, except for contracts covering a term of less than three months which may be concluded either in writing or in oral form; the new Code stipulates that a labor contract has to be concluded in writing unless it covers a contract term of less than one month, in which case it may be concluded either in writing or in oral form (except for some special cases). The new Code does additionally provide that a labor contract concluded by electronic means conformable with the prevailing electronic transaction laws shall have the same value as a physical contract.

A labor contract must contain the main contents as prescribed under Article 21 of the new Code.

3. TYPE OF LABOR CONTRACT, ANNEX TO LABOR CONTRACT AND PROBATION TIME:

While the current Code does provide three types of labor contracts of (i) indefinite-term; (ii) definite-term from 12 – 36 months; and (iii) seasonal labor contracts with terms of less than 12 months with the latter not being permitted for regular jobs, the new Code only provides two contract types: (i) indefinite-term labor contracts and (ii) definite-term contracts with a term of up to 36 months. The parties may only conclude a definite-term contract twice during a consecutive employment relationship and are obliged to enter into an indefinite-term contract upon the 3rd contract of consecutive employment relation, except for the following specific cases: (i) elderly employees; (ii) foreign employees; and (iii) contract with members of the trade union executive board. Attention should be paid to the fact that the new Code clearly stipulates that the term of the labor contract with a foreign employee may not exceed the duration of the granted work permit. In fact this used to cause quite some controversy confusion under the yet unclear regulation of the current Code.

The parties may add one or more annexes to the labor contract in order to provide details, amendments or supplements to the content of the signed contract, while they may not amend the agreed contract term, though.

The parties may agree for the probation period to be either included in the labor contract or to be subject to a separate probation contract. As a significant change, the new Code provides that in addition to the probation time frames of 60 days, 30 days and 6 days, respectively, the probation period for management positions shall not exceed 180 days.

4. TERMINATION OF LABOR CONTRACT

In addition to the cases provided under the current Code, the new Code also allows for the labor contract to be terminated in case: (i) a foreign employee working in Vietnam is expelled pursuant to an effective verdict or judgment of the court or a decision of a competent authority; (ii) the employer terminates the labor contract in accordance with Article 42 and Article 43 of the Code; (iii) the work permit of a foreign employee expires according to Article 156 of the Code; (iv) the employee fails to perform his/her tasks during the probationary period under the employment contract or gives up the probation.

Just as provided by the current Code, the parties may still unilaterally terminate the labor contract in certain cases. Furthermore, the new Code enlarges the rights of both, the employees and the employers, for a unilateral contract termination, providing the following:

a. Unilateral termination of a labor contract by the employee

Except for certain specific jobs as regulated by the Government of Vietnam, the employee only needs to provide an advance notice in due time in order to exercise the termination right for all three types of labor contracts: (i) at least forty-five days' advance notice if working pursuant to an indefinite term labor contract; (ii) at least thirty days' advance notice if working pursuant to a definite term labor contract with a duration of 12 months to 36 months; (iii) at least three days' advance notice if working pursuant to a definite term labor contract with a duration below 12 months.

To protect the employee from a violation on the part of the employer (except for point (v) and (vi) below), the Labor Code also stipulates specific cases in which the employee has the right to immediately terminate the labor contract unilaterally without giving a prior notice: (i) the employee is not assigned to the correct job or workplace or the working conditions agreed in the labor contract are not ensured; (ii) the employee is not paid the wages due in full or on time; (iii) being mistreated, beaten or being insulted by acts or verbalism or being challenged by the employer to execute activities which affect the health, dignity or honor or is subject to labor coercion; (iv) being sexually harassed in the workplace; (v) a female employee is pregnant and needs to rest upon instructions from a competent medical diagnostic or assessment establishment; (vi) the employee has reached the retirement age; (vii) the employee provided incorrect information as regulated by the Labor Code which affect the performance of the labor contract. The new regulations fixed the inadequacy of the current Code, under which the employee still had to work for the employer until the end of the advance notice period, although being sexually harassed. Furthermore, for the first time, the definition of “sexual harassment” has been clearly recorded in a law “Sexual harassment in the workplace means conduct of a sexual nature by any person to another person in the workplace without the latter's wish or consent. Workplace means any place where an employee actually works pursuant to the agreement with or assignment by the employer.”

b. Unilateral termination of labor contract by employer

The Labor Code extends the range of circumstances under which the employer may unilaterally terminate the labor contract from four to seven cases; these are the three additional circumstances: (i) the employee has reached the retirement age; (ii) the employee arbitrarily leaves the job without a satisfactory explanation for a period of at least five consecutive working days; (iii); the employee provided false information when entering into the labor contract and this fact adversely affected the recruitment of employees.

In case the employees do not return to work after the expiry of a suspension of performance of the labor contract or when they leave the job without a satisfactory explanation as mentioned above, the employer has the right to terminate the contract without prior notice.

MORE FLEXIBILITY UPON SETTLING A LABOR DISPUTE

The new Code provides enhanced flexibility with regard to the choice of a labor dispute settlement mechanism. Particularly, in addition to inheriting the provisions under the current Code on the statute of limitations for request, respectively the labor mediator and the Court to settle individual labor disputes, the new Code has added provisions on the statute of limitations for requesting a labor dispute settlement by the Labor Arbitration Council, which is nine months as of the date on which a party identifies the infringement of their lawful rights and interests.

Further to that, the new Code also takes provisions for those cases in which the claimant may prove that he/she is unable to submit the request within the stipulated time limit due to a force majeure event, an objective obstacle or other reasons defined by law. The time consumed by force majeure events, objective obstacles or reasons defined by law shall not be

included in the statute of limitations for requesting personal labor disputes.

This is a remarkable addition, because the current Code only stipulates the statute of limitations for requesting a labor dispute resolution, without giving room for exceptions.

NEW REGULATIONS ON ORGANIZATION OF EMPLOYEES AT ENTERPRISES

The Labor Code sets forth new regulations on the Organization of Employees at Enterprises ("**Organization of Employees**") which is an independent organization with the Vietnam General Confederation of Labor. The Organization of Employees may be lawfully established and start operating after the competent State agency has issued its registration. Together with the Trade Union, these are the two types of organization representing the employees at the grassroots level. Nonetheless, the Organization of Employees does not have as many levels as the Trade Union but is limited to the company itself.

The Organization of Employees has its own Charter and board of management, members must be employees of the company. The Organization of Employees and the Trade Union at grassroots level are equal regarding the rights and obligations to represent the lawful rights and interests of employees in the labor relationship.

Currently, the Labor Code does not provide too many detailed information for the Organization of Employees, thus, the employees will have to wait for further guiding from a Decree of the Government, Circular or other types of documents from the relevant authorities to know the application dossier, procedures and steps to establish the Organization of Employees.

FURTHER CHANGES TO PUBLIC HOLIDAYS, RETIREMENT AGE, OVERTIME WORKING HOURS

The Labor Code supplements an additional day off for National Day (2 September plus one preceding or following day). This would result in a total of eleven public holidays. The Labor Code also states that the Prime Minister will have the competence to decide the specific day off for Tet and National Day of each year.As from 1 January 2021, the retirement age of an employee in normal labor conditions shall be 60 years, three months for a male, and 55 years, four months for a female. Thereafter, the retirement age shall be increased on a yearly base by three months for men and by four months for women until 2028, when the retirement age will have reached the age of 62 for men, and until 2035 respectively, when the retirement age will have reached the age of 60 for woman. The current retirement ages are 60 years for men and 55 years for women.

The overtime working hours have been increased from 30 to 40 hours/month. The total overtime hours in one year remain unchanged.

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