

Liability of legal representative and managers in the company

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Legal representative and managers are key figures when it comes to successfully and smoothly running a business. They have the power to take vital decisions having a major impact on the development of a company. Therefore, many foreign investors are concerned about the responsibility, the liability assigned to these top positions - ahead of the owners and the shareholders of the company -, fearing they might commit any breach of obligation.

In this newsletter, we will present the main liability of the legal representative as well as of the management positions in limited liability companies and joint stock companies in accordance with the Law on Enterprises No. 68/2014/QH13 dated 26 November 2014 ("**Law on Enterprises**"), and the draft Law on Enterprises 2020, dated 10 March 2020, expected to be passed by the National Assembly of Vietnam in May ("**Draft Law on Enterprises**"), the Civil Code No. 91/2015/QH13 dated 24 November 2015 ("**Civil Code**") and the Criminal Code No. 100/2015/QH13 dated 27 November 2015 ("**Criminal Code**").

LIABILITY OF LEGAL REPRESENTATIVE

1. DEFINITION OF LEGAL REPRESENTATIVE:

Currently, the Law on Enterprises defines that legal representative of an enterprise means an individual representing the enterprise in exercising the rights and performing the obligations arising from transactions of the enterprise, and representing the enterprise upon acting as plaintiff, defendant or person with related interests and obligations in arbitration or court proceedings, as well as exercising further rights and performing further obligations in accordance with the law. This definition remains unchanged under the Draft Law on Enterprises.

In practice, the legal representative usually holds a vital position such as Director or General Director, Chairman of Members' Council or President, etc.

2. LIABILITY OF LEGAL REPRESENTATIVE IN THE COMPANY

Generally, the legal representative of an enterprise has the following responsibilities:

(a) To exercise the delegated rights and perform the delegated obligations honestly and prudently, and to his or her best ability in order to assure the lawful interests of the enterprise;

(b) To be loyal to the interests of the enterprise; not to use information, know-how or business opportunities of the enterprise; not to abuse his or her position and power, and not to use assets of the enterprise for his or her personal benefit or that of other organizations or individuals;

(c) To notify the enterprise in a timely, complete and accurate manner that he or she and a person related to him or her is the owner or holds controlling shares or shares of capital contribution in other enterprises.

The legal representative must be personally liable for any loss and damage to the enterprise due to a breach of the obligations mentioned above.

We understand that in case the company has many legal representatives, only the person who commits the breach of obligation will be held liable for that breach. Nonetheless, according to the Draft Law on Enterprises, if the company has more than one legal representative and the company's charter does not specify the division of rights and obligations of the legal representatives, all legal representatives are to be held jointly liable for damages to the company due to a violation of their rights, obligations and responsibilities.

This is a remarkable new addition, because it rises the responsibility of all legal representatives, and it also urges the company's owner to divide the competence between the legal representatives.

LIABILITY OF MANAGERS

1. DEFINITION OF MANAGERS

In limited liability companies and joint stock company, the Law on Enterprises provides regulations for those in charge of the management of an enterprise, comprising the Chairman of a Members' Council, member of a Members' Council, the President of a company, the Chairman of a Board of Management, a member of a Board of Management, a director or general director, and an

individual holding another managerial position, who is authorized to enter into transactions in the name of the company as stipulated in the charter of the company. This definition remains unchanged under the Draft Law on Enterprises.

The Law on Enterprises also stated that a member of the Inspection Committee or inspector is considered a management position in the company while the Draft Law on Enterprises does not state this point anymore.

In general, the managers shall act within their scope of responsibility regulated in many documents such as laws, Charter, labor contract, internal policies of company and they will have to bear liability upon acting beyond their granted competence.

1. LIABILITY OF MANAGERS IN ONE MEMBER LIMITED LIABILITY COMPANY

The general liability of the Members' Council, the President of the company, the inspector are to take responsibility before the law and the company owner for the implementation of delegated rights and obligations in accordance with the Law on Enterprises and other provisions of relevant laws.

Nevertheless, the Draft Law on Enterprises does not require the one member limited liability company to have an inspector in the management structure anymore (except for a subsidiary of a state-owned enterprise). Therefore, the regulation on the liability of an inspector has been removed. The company, however, may decide to appoint or hire an inspector at their discretion.

The director or general director is responsible before the law and the Members' Council or the President of the company for the implementation of his or her rights and obligations.

In the event of a transaction that does not obtain the required approval as set forth by law (i.e. the transaction between the company and the director or related person of director), thereby causing loss and damage to the company, the signatories to the contract and related persons being the parties to the contract are to be held jointly responsible for any loss arising and for the forwarding to the company of any benefit gained from the performance of such contract or transaction.

We note that these top positions shall be liable for any breach of obligations, including omission, imprudence, negligence.

2. LIABILITY OF MANAGERS IN TWO OR MORE MEMBERS LIMITED LIABILITY COMPANY

The members of Members' Council shall bear personal liability when performing the following acts in the name of the company:

(a) Breach of the law;

(b) Conduct of business or other transactions not in the interests of the company and thereby causing loss to other persons;

(c) Premature payment of debts in cases where the company is likely to be in financial danger.

They must also take personal responsibility for (i) failing to contribute or failing to contribute in full the due amount of capital contribution; or (ii) distributing the profits or reduction of charter capital not in accordance with the laws; or (iii) not convening the meeting of Members' Council as stipulated by law (only applies to the Chairman of Members' Council).

The director or general director is responsible to the Members' Council for the exercise of his or her rights and the performance of his or her obligations.

In the event of a transaction that does not obtain the required approval as set forth by law (i.e. the transaction between the company and the director or related person of director), thereby causing loss and damage to the company, the signatories to the contract or transaction, the interested member and the related persons of such member must compensate any loss arising and return to the company any benefits gained from the performance of the contract or transaction.

In addition to the above, while the Law on Enterprises provides for the liability of the Inspection Committee to be governed by the Charter of the company, the Draft Law on Enterprises clearly stipulates that the inspectors shall have to bear personal liability or be held jointly liable for damages caused to the company in case of a breach of obligations.

We note that these top positions shall be liable for any breach of obligations, including omission, imprudence, negligence and any member of a company may, in their own name or in the name of the company, initiate a legal action regarding civil liability against them upon failing to comply with their responsibility.

3. LIABILITY OF MANAGERS IN JOINT STOCK COMPANY

Each member of the Board of Management, the director or general director and other managers have the following responsibilities:

(a) To exercise his or her delegated powers and to perform his or her delegated obligations strictly in accordance with the Law on Enterprises, other relevant laws, the Charter of the company, and the resolutions of the General Meeting of Shareholders;

(b) To exercise his or her delegated powers and perform his or her delegated obligations honestly and prudently, to their best ability in order to assure the maximum legitimate interests of the company;

(c) To be loyal to the interests of the company and shareholders; not to use information, knowhow, business opportunities of the company, not to abuse his or her position and powers and not to use assets of the company for his or her own personal benefit or for the benefit of other organizations or individuals;

(d) To notify the company in a timely manner, and fully and accurately of enterprises in which he or she or his or her related persons own or have contributed capital or controlling shares.

The managers, depending on their specific positions, shall bear personal responsibility upon failing to comply with the obligations on (i) supervising and monitoring the payment of subscribed shares; or (ii) registration for change of charter capital based on the payment of subscribed shares and registration for any change to founding shareholders; (iii) ensuring the contents and form of a share certificate issued by the company; (iv) promptly and accurately providing information to the register of shareholders as requested by shareholders; (v) destroying share certificates as required by laws; (vi) the payment for redeemed shares or dividends; (vii) convening a meeting of the General Meeting of Shareholders, Meeting of Board of Management; (viii) passing resolution of Board of Management in compliance with the laws; (ix) performing the transaction with required approval.

As a result of committing a breach, a shareholder or a group of shareholders owning at least one per cent of the number of ordinary shares for six consecutive months has the right, on their own behalf or on behalf of the company, to initiate a legal action regarding civil liability against a member of the Board of Management or the director or general director who committed a breach of obligation as required by laws. We also note that the Draft Law on Enterprises now does not require the share holding period to start the legal process anymore.

The Draft Law on Enterprises also additionally stipulates that the managers in the company must bear personal liability or joint liability to compensate for lost benefits and return the received benefits and compensate for all loss to the company and third party resulting from a breach of obligations.

CRIMINAL LIABILITY OF LEGAL REPRESENTATIVE AND MANAGERS

Depending on the seriousness and type of the committed breach, the legal representative, the managers could be subject to criminal liability in accordance with the Criminal Code of Vietnam. For instance, they may face up to 3 years' imprisonment for illegally dismissing the employees or a penalty of up to 7 years' imprisonment for evading payment of social insurance, health insurance, unemployment insurance for employees, etc. In addition, the person who commits the breach may also be prohibited from holding certain positions or doing certain works for 01 - 05 years.

We note that the criminal liability does not exclude the legal representative and managers from other liabilities vis-a-vis the company owners and shareholders.

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