

LABOR RELATIONS DURING COVID 19

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31 March 2020

On 01 February 2020, the Prime Minister of the Socialist Republic of Vietnam issued Decision No. 173/QĐ-TTg declaring coronavirus (“**Covid 19**”) as an epidemic. The outbreak of Covid 19 is severely impacting business operations in Vietnam across a broad array of industries. It is causing supply shortages, the reduction of demand in products and services, and supply chain and logistics disruptions. Consequently, as in many other parts of the world, many businesses in Vietnam are being forced to downsize or restructure its labor force.

In this legal alert, we discuss the legal options available to employers in the face of Covid 19. Our assessment is based on Law No. 10/2012/QH11 (“**Labor Code**”), its related legislation, and the specific guidance regarding Covid 19 provided by the Ministry of Labor, Invalids, and Social Affairs under the Official Letter No. 1064/LĐTBXH-QHLĐTL on 25 March 2020 (“**Letter 1064**”).

Work Suspension

If employees are unable to work because of a “dangerous epidemic,” their salary may be reduced per Article 98.3 of the Labor Code.

Examples of such instances provided in Letter 1064 include:

- a foreign employee who is unable to return to work because of a government order;
- an employee who has stopped working because the government placed the employee on quarantine; and,
- an employee who must suspend his/her work because the enterprise or a division [of the enterprise] cannot operate without the employer or other employees who cannot return to work due to quarantine or [for other reasons] has not returned to the enterprise.

Employees must consent to the amount of salary reduction, and the reduced salary cannot be lower than the regional minimum wage stipulated by the Government.¹ Currently, the regional minimum wage is between VND3.07 million (USD135) and VND4.42 million (USD190) per month, depending on the region (“**Minimum Wage**”).² During work suspension, the labor contract remains valid. Thus, employees are not qualified to claim unemployment insurance.

New Job Assignment

Per Article 31.1 of the Labor Code, employers may temporarily assign their employees to perform tasks other than that specified in their labor contracts when an epidemic causes unforeseen business difficulty. Reassignments under this provision must not exceed 60 accumulated workdays within one year unless otherwise agreed to by the employees.³

¹ Article 98.3 of Labor Code 2012.

² Decree 90/2019/ND-CP.

³ Article 31.1 of Labor Code 2012.

Thus, if a specific sector or department of the employer is affected by Covid 19, the employer might consider transferring the affected employees to another department. Salary during the first 30 working days of the reassignment must not be less than the wages of the previous job.⁴ After that, the pay might be reduced to a maximum of 85% of the last position but not lower than the Minimum Wage.⁵

Labor Contract Suspension

Article 32.5 of the Labor Code allows employers and employees to agree to a suspension of labor contracts. In other words, an employer can negotiate with its employees to suspend the performance of their executed labor contracts. Parties will determine the suspension period and salary during the suspension.⁶

Since the labor contract remains valid during the suspension, suspended employees would not be qualified to claim unemployment insurance. If employees on suspended contracts are not paid for more than 14 working days in a particular month, then the social insurance contributions are not required for that month.⁷

Termination Based on Force Majeure

Per Article 38.1(c) of the Labor Code, employers may unilaterally terminate labor contracts based on “force majeure” events. “An epidemic” qualifies as a force majeure event under Article 38.1(c).⁸ However, to end contracts on Article 38.1(c) grounds, employers should be prepared to prove that they looked into all alternatives before deciding to terminate labor contracts.⁹ If an employer chooses to proceed on Article 38.1(c) grounds, it would need to provide 45 days prior notice for its employees on indefinite term contracts and 30 days on specific term contracts.¹⁰

If contracts are terminated on this ground, a statutory severance allowance of a half month’s salary for each working year must be paid to employees who have worked regularly for 12 months or more.¹¹ An employer is not required to pay severance allowance for the duration of time that the employees benefit from the unemployment insurance fund per the Law of Social Insurance.¹² The wage used for the calculation of the statutory severance allowance is the employee’s average wage for the period six months before the termination.¹³

Also, Employees are entitled to unemployment insurance payments from the State if unemployment insurance premiums have been paid for at least a full 12 months within the 24 months before the labor contract termination.¹⁴

Termination Based on Restructuring

As an alternative to termination based on Article 38.1(c) of the Labor Code, an employer can conduct mass redundancy via Article 44 of the Labor Code. This article allows redundancy based on corporate “restructuring,” which includes “labor restructuring,” or for “economic reasons,” which includes

⁴ Article 31.3 of Labor Code.

⁵ Article 31.3 of Labor Code.

⁶ Article 32.5 of Labor Code.

⁷ Article 42.4 of Decision No. 595/QĐ-BHXH.

⁸ Article 12.2(a) of Decree No. 05/2015/ND-CP (“Decree 05”).

⁹ Article 38.1(c) of the Labor Code.

¹⁰ Article 38.2 of the Labor Code.

¹¹ Article 48.1 of the Labor Code.

¹² From January of 2009, most employers with more than ten employees were legally required to pay into the unemployment insurance fund for their employees. One major exception to this rule was no fund payments were required for foreign employees.

¹³ Article 48 of Labor Code.

¹⁴ Article 49 of Law on Employment.

“economic crisis or economic recession.”¹⁵ An employer can argue that Covid 19 has caused its business to conduct labor restructuring or that it has created an economic crisis, leading to a need for mass redundancy.

However, employers suffering from the impact of Covid 19 are unlikely to choose Article 44 over Article 38.1(c) as grounds to conduct mass redundancy because the procedures for Article 44 terminations are much more complex, lengthy, and expensive.

To terminate the labor contracts under Article 44, employers must:

- (a) Draft a Labor Usage Plan (“LUP”);
- (b) Consult with the Executive Board of the Grassroot Trade Union on its LUP;
- (c) Notify the local Department of Labor, Invalids, and Social Affairs of its LUP and successfully register its LUP at least 30 days before the date of termination of the affected labor contracts; and,
- (d) Consult with the Executive Board of the Grassroot Trade Union before terminating the labor contracts with the affected employees.¹⁶

As a matter of practice, completing the procedure above will usually take three to six months.

Furthermore, employees who have worked regularly for at least 12 months and are made redundant per Article 44 are entitled to a statutory job-loss allowance, which is equal to an employee’s one month’s wage for each working year, but at minimum two month’s salary.¹⁷ The rules for the calculation wages and the relevant work period applicable to statutory job-loss allowance are the same as those for statutory severance allowance, as outlined in the section above.

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¹⁵ Articles 44.1 and 44.2 of the Labor Code, and Article 13.1(a) and 13.2(a) of Decree 05.

¹⁶ Articles 44 and 46 of Labor Code; Articles 14 of Decree 05; and, Article 7 of Circular 47.

¹⁷ Article 49 of Labor Code.