DILINH LEGAL

Key Developments Under Vietnam's New Labor Code

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The new Labor Code No. 45/2019/QH14, which became law on in November of 2019 ("**New Code**"), will become effective on January 1, 2021, superseding the existing Labor Code No. 10/2012/QH13 ("**Old Code**"). In this legal alert, we examine key developments under the New Code that are of particular relevance to foreign-invested entities operating in Vietnam. These include the abolition of indefinite term contracts for foreign employees, 180-day probation periods for corporate executives, the recognition of employee organizations as an alternative to labor unions, and new grounds for termination of employees.

Foreign Employees

Under the Old Code, employers could only sign two "definite-term" labor contracts (defined as labor contracts for a term of one to three years) with employees, and the third contract became an "indefinite-term" contract by the operation of law.[1] The New Code creates exceptions to this rule for certain types of employees, including foreign employees.[2] Furthermore, the duration of a foreign employee's labor contract cannot exceed the term of the employee's work permit.[3] Since the maximum term of a work permit is two years[4], this will limit the duration of a foreign employee's labor contract accordingly. If an employer wants to continue to employ the foreign employee after his/her initial term, the employer may enter into another definite-term contract.[5] There is no limitation on the number of definite-term contracts foreign employees can sign.

The abolition of indefinite term contracts for foreign employees can be seen as a positive development for employers. Vietnam does not have at-will employment. Termination of a labor contract before the end of its term can only occur on legally recognized grounds. Due to a variety of factors, it is often difficult to terminate a labor contract before the end of its term, even with proper legal grounds. With definite-term contracts, employers will have the option of not renewing labor contracts at the end of contract terms, and it will lessen the damages foreign employees could claim against their employers in wrongful termination cases. Foreign

[1] Article 22.2 of the Old Code.
[2] Article 20.2(c) and Article 151.2 of the New Code.
[3] Article 151.2 of the New Code.
[4] Article 155 of the New Code.
[5] Article 151.2 of the New Code.

employees who have entered into indefinite-term contracts before January 1, 2021, would be able to maintain the indefinite-term nature of their contracts unless they agree otherwise.[6]

On a related note, under the Old Code, foreign employees are allowed two-year work permits, which are extendable for an additional term of up to two years without limit to the number of extensions. Under the New Code, only one work permit extension of up to two years is allowed.[7] Thereafter, the foreign employee would need to apply for a new work permit.

Probation

Under the Old Code, the parties entered into a separate probation contract before a labor contract.[8] The New Code provides the parties with a clear option of having either a separate agreement or combining the two contracts into one.[9]

Moreover, the Old Code limits the probation period to:

- 60 days for positions requiring college level or higher specialized expertise or technical expertise;
- 30 days for positions requiring vocational or professional intermediate level specialized or technical expertise or for technical workers and professional staff; and,
- 06 working days for other positions.[10]

The New Code limits the probationary periods to:

- 180 days for executive positions in enterprises as prescribed by the Law on Enterprises;
- 60 days for positions that require a junior college degree or above;
- 30 days for positions that require a secondary vocational certificate, professional secondary school; positions of or for technicians, and skilled employees; and,
- 06 working days for other positions.[11]

Under the Law on Enterprises, the following are executive positions:

1. For limited liability companies:
    a. Chairman of the Members' Council;
    b. A Member of the Members' Council;
    c. Chairman of the Company;
    d. The Director/General Director; and,
    e. Other persons holding a managerial position who is authorized to enter into contracts or transactions on behalf of the company under the company's charter.
2. For joint-stock companies (otherwise knowns as shareholding companies):
    a. The Chairperson of the Board of Management;
    b. A member of the Board of Management;
    c. The Director/General Director; and,

[6] Article 220.2 of the New Code.
[7] Article 155 of the New Code.
[8] Article 26.1 of the Old Code.
[9] Article 24.1 of the New Code.
[10] Article 27 of the Old Code.
[11] Article 24. Of the New Code.

d. Other persons holding a managerial position who is authorized to enter into contracts or transactions on behalf of the company under the company's charter.[12]

Internal Employee Organizations

The New Code provides legal recognition to employee organizations other than labor unions to represent the employees. It refers to "employee representative organizations" ("**EROs**"), which is defined as "an internal organization voluntarily established by employees of an employer which protects the employees' legitimate rights and interests in labor relations through collective bargaining or other methods prescribed by labor laws. Employee representative organizations include internal labor unions and internal employee organizations."[13]

Under the Old Code, company executives are required by law to consult with or require the participation of the internal labor unions ("**ILU**") on matters relating to internal labor rules[14], collective labor bargaining agreements[15], salary schemes[16], and labor discipline hearings[17], among others.[18] If an ILU does not exist within a company, "immediate upper-level labor unions" must perform the duties of the ILU.[19] The participation of these upper-level labor unions in the labor affairs of a company can be problematic because they are quasi-governmental organizations with a robust pro-labor bias. Furthermore, as external organizations, they have little knowledge of the relevant company's business/industry nor its human resource needs, rules, and structure. Under the New Code, if an ERO does not exist within a company, its management is no longer required to seek consultation from an upper-level labor union or any other external body. It may proceed without consultation.

Per the New Code, it is possible for a company to have both an ILU and internal employee organizations ("**IEO**"). In such instances, ILU and IEO shall respectively conduct their obligations and rights as an ERO separately.[20] In other words, for matters where consultations or participation from EROs are legally required[21] and both an ILU and IEO exists within a company, both must be consulted or allowed to participate. The New Code requires IEOs to register with the relevant authority.[22] As of the date of this legal alert, the registration requirements and procedures have not been released.

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[12] Article 4.18 of the Law on Enterprises.
[13] Article 3.3 of the New Code.
[14] Article 119.3 requiring ILU consultation and Article 121.3 requiring minutes of opinion of ILU on the internal labor rules as part of the application dossier.
[15] An ILU is required to participate in negotiations for collective labor bargaining agreements if requested by any of the parties per Article 72.2 of the Old Code.
[16] Article 93.2 of the Old Code.
[17] Article 123.1(b) stating that ILU must participate in disciplinary actions.
[18] See Article 188.1 of the Old Code for a general statement on the role of an ILU.
[19] Article 188.3 of the Old Code.
[20] Article 170.1 of the New Code.
[21] Under the New Code, instances where consultation with EROs are required include when issuing or revising internal labor regulations per Article 118.3 and the establishment of the pay scale, payroll and labor productivity norms per Article 93.3. Participation of EROs in disciplinary actions is required per Article 122.1(b). If no EROs exists within the company, the upper-level labor unions shall participate in the disciplinary actions if requested by the affected employee(s) per Article 17 of Law No. 12/2012/QH13 dated 20 June 2012 on Trade Union.
[22] Article 172.1 of the New Code.

New Grounds for Termination/Dismissal

The New Code adds the commission of "sexual harassment in the workplace against the internal labor regulations" as a new statutory grounds for dismissal of an employee.[23] Also, it recognizes the violation of the "employment contract" and "labor laws" as grounds for taking lawful disciplinary action against employees.[24] Under the Old Code, only violations of a company's internal labor rules were grounds for disciplinary action.[25]

An employee's failure to provide truthful information during the employment process is grounds for termination by the employer.[26]

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[23] Article 125.2 of the New Code.
[24] Article 127.3 of the New Code.
[25] Article 128.3 of the Old Code.
[26] Article 36(g) of the New Code.