

Comprehensive Legal Guide on Cross-Border Employment in Vietnam

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In recent years, Vietnam has witnessed a growing trend in cross-border employment, with Vietnamese workers gaining attention from foreign companies across various sectors, especially IT and quality control. This is due to the country's relatively younger and more affordable workforce compared to other developing nations.

Vietnamese laws allow foreign companies to hire Vietnamese through their registered local offices/entities and regulate cases where Vietnamese employees work overseas. However, there is no legal framework for foreign companies without a presence in Vietnam to hire Vietnamese workers under labor contracts. As a result, this creates compliance gaps with Vietnamese labor laws, including personal income tax withholding, insurance contributions, and reporting requirements. Additionally, managing employment relationships could lead to administrative burdens, especially when handling labor disputes, as Vietnamese laws and jurisdiction will apply, regardless of the terms stated in the contracts.

To avoid potential legal issues with signing labor contracts with Vietnamese employees, foreign companies often turn to alternative solutions, such as service contracts with individuals or maintaining a dedicated team at the service providers or Employer of Record (EOR). This article explores key considerations for foreign companies hiring in Vietnam using these alternative employment models.

1. Service contract with individuals

a. Overview

Under the Civil Code 2015, a service contract is an agreement where a service provider performs services for a client in exchange for a fee. Governed by the Civil Code and Law on Commerce 2005, service contracts are not subject to the Labor Code. Foreign companies can engage Vietnamese independent contractors through service contracts, provided the services are legal and ethical. Service contracts are commonly used for freelancers, consultants, and specialized professionals.

Compared to the labor contracts model, this model is easier to execute with fewer regulatory requirements, particularly regarding labor laws. However, to mitigate the risk of a service contract being reclassified as a labor contract, a thorough review of service contracts is crucial when adopting this model.

b. Risk concerning this model

In the service contract model, foreign companies are not liable for personal income tax (PIT) declaration and finalization, as the independent contractor is solely responsible for these obligations. Social insurance contributions do not apply, and foreign companies are not accountable for work-related injuries. Independent contractors are generally responsible for their own safety. In contrast, under the labor contracts mode, foreign companies shall be responsible for PIT declaration and finalization, social insurance contribution, work-related injuries, and other labor issues.

The Labor Code 2019 provides that *“if the parties have an agreement with a different name but such an agreement still indicates the agreement on a paid job, on the management, instruction and supervision by one party, then such an agreement is deemed to be an employment contract”*. Given that the obligations under labor contracts are more stringent, it is crucial to distinguish between service and labor contracts to avoid the risk of reclassification.

Vietnamese law does not provide explicit criteria to differentiate between labor and service contracts, but the 2019 Labor Code outlines key provisions governing labor agreements. The primary distinction between a service and a labor contract lies in the obligations between parties. In a labor contract, the employee is subject to the employer's supervision, whereas in a service contract, the provider operates independently and is accountable only for results. Contract execution also plays a role. Labor contracts typically require continuous work over a set period, while service contracts offer flexibility.

As such, if the service contracts contain terms that are deemed to exhibit employment characteristics (e.g., fixed working hours, salary-based payments, employer control), authorities may reclassify a service contract as a labor contract upon inspection.

c. Key consideration to implement this model

To mitigate the risk of misclassification or recharacterize between a service and a labor contract, it is essential that foreign companies strictly structure the service contract to clearly emphasize the independence of the contractor and the commercial nature of the agreement. This independent nature should be explicitly stated in the contract through clear terms affirming that Vietnamese contractor maintains full control over their work, assume responsibility for associated risks, and are not subject to the company's supervision or management. Additionally, an explicit statement confirming that the individual is an independent contractor and is not an employee of the company should be considered by the parties. On the other hand, any terms that imply an employment relationship, such as salary-like payments, regular working hours, or employment-related benefits like social insurance and paid leave, should be avoided.

As a further safeguard, foreign companies should encourage contractors to obtain a business registration certificate and operate as a household business, as required under the Commercial Law 2005 and Enterprise Law 2020. While many contractors in Vietnam may be reluctant to register due to administrative burdens, doing so strengthens the classification of the relationship as a commercial arrangement rather than employment. Additionally, foreign companies should obtain proof of the contractor's compliance with the local tax law regulations to ensure a smoother operation in Vietnam and the risk of double taxation.

Another critical consideration is the payment structure. Payment structures should reinforce the business-to-business nature of the engagement, with project-based or milestone payments preferred over hourly or daily rates, which should be used cautiously. Regular salary-like payments and unnecessary expense reimbursements should be avoided, as they may indicate an employment relationship. Structuring payments around project completion or milestones further reduces the reclassification risk for long-term engagements.

2. Maintaining a dedicated team at the service providers

a. Overview

Another option for foreign companies is to maintain a dedicated team at the service providers in Vietnam. This arrangement allows foreign companies to receive tailored services from a dedicated team or individual without assuming direct employer responsibilities. It provides access to specialized expertise while mitigating acquisition and training costs.

b. Risks concerning this model

This model imposes fewer employment risks. However, it is only suitable for certain specific occupations, such as software developers at software developer or dedicated sales force at a distributor.

c. Key consideration to implement this model

To successfully implement this model, it is vital for foreign companies to identify an appropriate service provider with the requisite business lines to legally perform the required services.

The service contract should clearly specify the scope of services provided by the service providers, emphasizing project-based collaboration or specific deliverables rather than direct management or control of the dedicated team by foreign companies. This distinction is paramount in avoiding the implications of a de facto employment relationship between foreign companies and their employees.

In addition, as the service providers could provide the same personnel for other companies in the same field, data security should be taken into consideration to protect sensitive company and employee information by verifying that the service provider has robust data protection measures in place.

3. Maintaining a dedicated team at the Employer of Record (EOR)

a. Overview

The concept of Employer of Record (EOR) has not yet been recognized in Vietnamese law. However, there are HR service companies that effectively offer EOR services similar to labor outsourcing. These companies handle onboarding new employees, payroll, local tax withholdings, salary payments, and employee benefits such as health insurance and retirement plans.

b. Risks concerning this model

Labor outsourcing risks

Vietnam's Labor Code regulates labor outsourcing, which shares some similarities with Employer of Record (EOR) arrangements. In this model, an employee signs a labor contract with an outsourcing company, which then assigns the employee to work for another employer. However, the employee's labor relationship remains with the outsourcing company.



Labor outsourcing in Vietnam requires a Labor Outsourcing License and is subject to several conditions, including: Outsourced assignments can last a maximum of 12 months; outsourcing is restricted to specific professions, such as interpreters, bodyguards, and sales assistants; and outsourcing must be based on legitimate reasons, such as addressing temporary labor surges (e.g., hiring tour guides during peak season), replacing employees on maternity leave or dealing with occupational injuries, diseases, or civic duties, or filling specialized roles (e.g., pilots, flight attendants, ship maintenance personnel).

Given the nature of labor outsourcing, it is not suitable for cross-border employment. If authorities classify maintaining a dedicated team under EOR as labor outsourcing, foreign companies and the EOR could incur administrative penalties for not meeting the necessary conditions.

Costs for termination of a dedicated team

Given that the EOR assumes the obligations of an employer, it means that they are also responsible for the administration of employee matters. This responsibility extends to the termination of employees, a process that necessitates strict adherence to the complexities of Vietnamese labor law. A key concept within is redundancy, often defined as a reduction in the workforce due to technological or organizational changes, alterations in organizational structure, or personnel rearrangements. However, a critical challenge arises in the context of foreign companies that do not establish a direct employment relationship with the employee. Such changes within the foreign companies' organization cannot serve as a basis for terminating of these employees under Vietnamese law. However, because foreign companies do not establish a direct employment relationship with the employees, such changes cannot serve as a legitimate basis for employee termination. While foreign companies may initially secure high-quality, long-term employees through the EOR, they also risk being burdened with underperforming staff. The process of dismissal and replacement can be protracted, potentially undermining the efficiency and expediency sought in cross-border employment arrangements.

c. Key consideration to implement this model

It is crucial for foreign companies to partner with an EOR that has expertise in HR services and a strong track record of compliance with Vietnam's labor laws. The EOR should ensure that labor contracts with employees uphold the rights and benefits mandated by Vietnamese law, including working hours, wages, and social insurance.

A potential strategy for foreign companies is to collaborate with the EOR to create a dedicated team supported by the EOR and integrated into their payroll system rather than relying entirely on the EOR for the recruitment process. This approach allows for greater control and oversight.

When drafting the service agreement with the EOR, it is important not to label the arrangement as a labor outsourcing agreement. The contract should clearly define the staff's work location as the EOR's premises and specify the scope of services provided, focusing on project-based collaboration or specific deliverables rather than direct management or control by the foreign company. This distinction is crucial to avoid creating a de facto employment relationship between the foreign company and the employees.

Foreign companies should also establish clear grounds for terminating the service agreement at will and removing a team member for non-performance. In addition, the assignment of intellectual property (IP) and inventions created by employees to foreign companies also need to be clearly set out in the service agreement.

Finally, with the rise of remote work, there are increased risks related to cybersecurity and data privacy. The EOR must have the necessary infrastructure to safeguard data and protect any intellectual property produced by remote employees for foreign companies.



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