Client Alert

January 2013

Vietnam - Employment Law

New Labour Code

On 18 June 2012, Law No. 10/2012/QH13 instituting a new Labour Code ("**New Labour Code**") was passed by the National Assembly of Vietnam.

The New Labour Code will come into force on 1 May 2013, replacing the current Labour Code adopted in 1994 and amended three times (in 2002, 2006 and 2007), bringing in numerous new provisions as well as consolidating others from currently effective implementing regulations.

This alert summarizes some of the key changes resulting from this New Labour Code[1] that affect all employees, as well as particular changes affecting foreign employees.

ENHANCED EMPLOYEE RIGHTS AND BENEFITS

The reform focuses on enhancing the guaranteed rights and benefits of the Vietnamese labour force. The following matters are of particular note:

- **Increase in minimum salary during probation periods**

  The salary paid during an employee's probation period must not be less than 85% of his or her contractual salary, against 70% in the current Labour Code.

- **Increase in overtime rates (during paid-leave and night work)**

  Overtime rates remain unchanged, i.e. 150% of the official salary if overtime is worked during standard days, 200% during week-ends and 300% during holiday or paid-leave. However the New Labour Code clarifies that during holidays or paid-leave, salary paid at a rate of 300% of the official salary rate is in addition to the official salary paid during such paid-leave or holidays. The overtime rate applying to "*night work*" has also been increased to 150% of the official salary (against 130% currently).

[1] Implementing regulations (decrees and circulars) are expected in the course of 2013. Initial drafts (subject to revisions) of several implementing decrees have just been released and additional Client Alerts will be provided once the final versions of these implementing regulations are adopted.

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- **"Night work" definition**

  The definition of "*night work*" has been harmonized across the whole country, and will be only between the hours of 22:00pm and 6:00am.

- **Maximum daily working hours**

  Total daily and weekly working hours remain capped at 8 hours per day or 48 hours per week, with the employer retaining the right to determine working hours on a daily or weekly basis. However, if determined on a weekly basis, the New Labour Code now provides that normal daily working hours must not exceed 10 hours, against 12 currently, meaning that any hour worked in excess of 10 hours on a given day will have to be paid as overtime.

- **Public holidays**

  The New Labour Code extends the annual Têt (Lunar New Year) holiday to 5 consecutive days (against 4 days currently).

- **Increase in minimum salary during temporary re-assignment**

  Employers remain entitled, in cases of natural disaster or depending on business production demand, to temporarily re-assign their employees to different positions within the enterprise for a maximum accumulated period of 60 days within a year. Employees are still guaranteed to receive their previous salary rate for at least 30 days, but after this initial 30 day period, the new salary may be decreased to an amount at least the higher of (i) 85% of the original rate (against 70% currently) and (ii) the minimum salary from time to time (currently from VND 1,650,000 to VND 2,350,000 depending on the region).

- **Maternity leave**

  The New Labour Code provides for only 1 standard maternity leave period of 6 months (with a maximum prenatal leave of 2 months), whereas the current law allows variations from 4 to 6 months depending on the nature and conditions of the job. The New Labour Code also stresses the obligation for the employer to maintain the employees' job and salary rate after the employee's maternity leave.

- **Enhancing the employee's right to information**

  The New Labour Code has introduced an express obligation for employers to disclose certain information before hiring an employee. In particular, (in addition to a description of the work to be undertaken and work conditions) information regarding the regulations on business confidentiality (if any) and "*other issues directly related to labour contract's conclusion that the employee may want to know*" must be provided.

  At this stage, it is unclear to what extent an employer will have to anticipate issues "*that an employee may want to know*", and what consequences any disclosure failures may have on the employment relationship.

FOREIGN EMPLOYEES

- **Work permits**

  The New Labour Code incorporates the provisions of *Decree 46/2011/ND-CP* adopted last year (which amended the previous *Decree 34/2008/ND-CP* on the employment and administration of foreigners working in Vietnam), in particular:

  (i) New exemptions to the requirement for a work permit (namely, internal transferees within an enterprise operating in Vietnam in one of the services sectors covered by the Vietnam WTO Commitments; NGO representatives; experts of a program or project using Official Development Assistance (ODA); and journalists);

  (ii) New conditions for renewing an existing work permit; and

  (iii) Conditions for recruiting foreign employees.

  For more information, please see our previous Employment Law Client Alert dated November 2011.

- **Terms of work permits reduced**

  The New Labour Code substantially reduces the maximum term of work permits from 36 months currently to 24 months.

- **Stays of less than 3 months**

  In addition, the New Labour Code seems to limit the exemption of work permits for stays below 3 months only to cases where a foreigner enters Vietnam to (i) offer services; or (ii) "*resolve an incident or technically or technologically complex situation arising and affecting production or business with which Vietnamese experts or foreign experts currently in Vietnam are unable to deal*".

  From the current wording, it would appear that foreigners working in Vietnam for less than 3 months but not in either of these 2 cases will be required to obtain work permits. This is a departure from the current position which could pose serious inconvenience to foreigners and their employers. Practical implementation however remains to be seen.

LABOUR RELATIONS

- **Confidentiality**

  Currently, the validity and enforceability of employee confidentiality agreements, in particular after the termination of a labour contract, is uncertain as a legal matter, although such agreements are commonly signed.

  The New Labour Code makes a first step towards acknowledging the validity of such contractual undertakings, providing that, for "*jobs directly related to technology and business secrets*", the employer will have the right to enter into a written confidentiality agreement with the employee. This limited provision will require further guidance as it remains unclear whether confidentiality agreements may validly be signed with employees working in positions that are not "*directly related to technology and business secrets*". The New Labour Code also states that such confidentiality agreements must provide the content and duration of secret protection, as well as the "*benefit*", and the "*compensation obligation*" in case of violation by the employee, terms which will no doubt also require further guidance as to interpretation.

- **Dialogue in the workplace**

  Employers and employees (or employees' representatives) will be required to hold quarterly meetings, with a view to promote the sharing of information and transparency in the enterprise, and improve "*mutual understanding*". The suggested agenda for such meetings includes: the implementation of current labour contracts, collective agreements and internal regulations, respective queries, the status of production and the business of the employer.

- **Collective labour agreements**

  The New Labour Code introduces the concept of industry-level collective agreements, in addition to the enterprise-level ones, the former superseding the latter if its provisions are more favourable. There is, however, no obligation for enterprises within an industry to actually negotiate and sign an industry-level collective agreement. Nonetheless, once adopted, an industry-level collective agreement will constitute the minimum standard for all enterprises operating in the concerned industry, including those who have not signed, or participated in the negotiation of, the relevant industry-level collective agreement.

- **Collective bargaining**

  The New Labour Code provides that enterprise-level collective bargaining (i.e. bargaining with a view to putting in place an enterprise-level collective agreement), is compulsory if requested by either the representative of the employees or the employer. It also sets out a new detailed step-by-step procedure, during which the employer must provide information on the operations and business situation of the enterprise (upon request), except in cases of "*business secrets or technology secrets*".

TERMINATION OF LABOUR CONTRACTS

- **Grounds for dismissal extended**

  The New Labour Code has slightly widened the circumstances in which dismissals are authorized. In addition to cases of:

  (i) Poor performance;

  (ii) Long term incapacity of the employee;

  (iii) Force majeure;

(iv) Acts of theft, bribery, disclosure of business or technology secrets, or other conduct "*detrimental to the assets or well-being of the enterprise*";

(v) Certain repeat offences; or

(vi) Unjustified absences (5 days within one month or 20 within a year);

from May 2013, employers will also be authorized to terminate a labour contract:

(vii) If an employee does not attend the workplace after the expiry of a temporary suspension; or

(viii) In cases of gambling, use of drugs in the workplace, "*deliberate violence causing injury*" and infringement to the intellectual property rights of the employer.

- **Extended statute of limitations**

The statute of limitations for applying disciplinary measures to a breach of the labour rules has been extended to 6 months (from the date of the breach, compared to 3 months currently) and to 12 months for breaches directly related to the finance or assets of an employer or to the disclosure of technological or business secrets.

- **Trade union consultations no longer required in cases of authorized dismissal**

In cases of (i) poor performance, (ii) long term incapacity of the employee, (iii) force majeure and (iv) non attendance at the workplace after the expiry of a temporary suspension, the employer is no longer required to consult the grassroots trade union or report to local authorities before dismissing the employee. Trade unions consultations remain required before disciplinary dismissals.

- **Withdrawal of a decision to terminate**

According to the New Labour Code, a unilateral decision to terminate a labour contract, either by the employer or the employee, may only be withdrawn with the consent of the other party. Currently such decision can be withdrawn unilaterally by either party at any time during the notice period.

- **Re-employment after illegal dismissal**

The New Labour Code confirms that, in case of illegal termination of a labour contract by the employer, the employer must reemploy the employee. However, the New Labour Code now provides that if the job or position stipulated in the labour contract is no longer available, in addition to monetary compensation, the parties must negotiate to amend and supplement the labour contract. It fails however to address cases where no agreement can be reached.

- **Redundancy for "economic reasons"**

In addition to the cases currently authorizing redundancy, namely (i) internal restructuring and technological changes, (ii) corporate restructuring such as mergers or divisions, or (iii) asset transfers resulting in a reduction of the number of jobs attached the transferred assets, the New Labour Code introduces the concept of redundancy for "*economic reasons*", which is a welcome innovation although its meaning and perimeter remain to be clarified.

LABOUR LEASING

- **Labour leasing activity**

The New labour Code introduces for the first time in Vietnam the long awaited concept of "*labour leasing activities*". These are defined as the business activity for a company (the leasing company) to lease its own employees to another entity that will direct the leased employees. The primary labour relationship between the leased employees and the leasing company is maintained. Labour leasing will however only be permitted for certain types of work (the list of which remains to be adopted), and is a "conditional" activity, meaning it will be subject to heavier licensing requirements and specific conditions, such as the payment of an escrow deposit by the leasing company (presumably to secure the payment of the salaries of the leased employees).

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