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The Global Employer: Vietnam 2021

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Vietnam Guide 2021

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**Trench Rossi Watanabe and Baker McKenzie have executed a strategic cooperation agreement for consulting on foreign law*

About the guide

This guide is intended to provide employers and human resources professionals with a comprehensive overview of the key aspects of Vietnamese labor law. It covers the entire life cycle of the employment relationship from hiring through to termination, with information on working terms and conditions, family rights, personnel policies, workplace safety and discrimination. The guide links to our global handbooks, which include information for Vietnam on immigration and data privacy. The guide also contains information on the employment implications of share and asset sales.

Save where otherwise indicated, law and practice are stated in this guide as at September 2021.

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1 Overview

1.1 General overview

Generally, Vietnam's labor laws are employee-friendly, especially on issues related to the termination of employment contracts. On 20 November 2019, the National Assembly of Vietnam adopted the Labor Code No. 45/2019/QH14 ("**Labor Code**") after an amendment process lasting nearly four years. The Labor Code superseded the 2012 Labor Code and took effect from 1 January 2021. The Labor Code revises and supplements several provisions across all chapters of the 2012 Labor Code. The changes introduced by the Labor Code are expected to have a significant impact on enterprises and organizations recruiting employees in Vietnam. The amendment of the current Labor Code was to realize Vietnam's commitments regarding labor under international trade agreements and to address shortcomings in the current system.

1.2 General legal framework

1.2.1 Sources of law

The Labor Code, which was passed by the National Assembly on 20 November 2019, and took effect from 1 January 2021, is the main source for labor and employment law in Vietnam. All Vietnamese citizens and foreign nationals working in Vietnam are subject to the regulations of the Labor Code.

The Labor Code is very general and provides only a basic framework on the rights and obligations of affected parties. Therefore, lower-level authorities must issue additional regulations to clarify and implement the law. Accordingly, the government has issued a number of decrees clarifying and providing further detail on various aspects of the Labor Code. The Ministry of Labor, War Invalids and Social Affairs (MOLISA) issues the circulars implementing these decrees.

Other legislation relevant to labor relations includes the Civil Code and Civil Procedure Code, the Law on Occupational Hygiene and Safety, the Law on Trade Unions, the Law on Social Insurance, the Law on Health Insurance and the Law on Employment.

1.2.2 Collective agreements

Collective agreements are entered into between the employer and the employee representatives. The employee representatives are the enterprise's corporate trade union (under the system of the Vietnam General Confederation of Labor) and the employees' organization. The collective agreement addresses working conditions and the rights and obligations of both parties. It is negotiated and is entered into on the principles of voluntariness, equality and openness.

The collective agreement is established if over 50% of employees agree with its contents. Within 10 days from the signing of a collective agreement, a copy of it must be sent to the local labor authority.

1.2.3 Court framework

The People's Courts at the local levels and the Supreme Court at the highest level have jurisdiction over most legal matters. The People's Courts consist of: (i) the Supreme Court; (ii) the superior-level court; (iii) the provincial-level court; and (iv) the district-level court. The Supreme Court has the highest level of authority and the district-level court has the lowest level of authority.

Generally, the Vietnamese court system maintains a two-tier adjudication regime. First, a dispute will be heard at the first instance court, which could be either the provincial-level court or the district-level court, depending on the specific circumstance. More often than not, the district court will be the first instance court, except where the provincial court wishes to hear the case if deemed necessary or upon the request of the district-level court.

First instance judgments or decisions not appealed within 15 days from the date of the judgment shall become legally binding. When a party appeals the first instance judgment or decision, the case will undergo an appellate trial and the appellate judgments or decisions shall be binding and final. Appellate courts must be from the provincial level and above.

1.2.4 Litigation considerations

In Vietnam, for individual labor disputes, before both parties resort to litigation or arbitration, they must first consult a labor reconciler who is appointed by the provincial/city-level labor body. Labor reconcilers have initial jurisdiction in all labor disputes, except those that are specifically exempt from this requirement and can be resolved directly by the labor court. Labor reconcilers must reach a resolution within five working days of receiving a request for dispute resolution. If the parties are not satisfied with the result, or a resolution is not reached within five working days, they can appeal to the labor court or the labor arbitration council. Parties can also directly request the labor court or the labor arbitration council to settle certain labor disputes — including unilateral termination and dismissal, compensation or allowance when terminating the employment contract, disputes between a housemaid and an employer, disputes related to social insurance, health insurance, unemployment insurance and insurance for labor accidents and occupational diseases, compensation disputes between an employee and an enterprise that sent an employee to work overseas pursuant to a contract, and disputes between outsourced employees and the employer that hires outsourced employees from a labor outsourcing provider — thereby bypassing the reconciliation process.

The limitation period for an individual to request a labor reconciler to resolve a labor dispute is six months from the date the individual discovered the breach of their lawful rights or interests. The limitation period for an individual to request the labor arbitration council to resolve a labor dispute is nine months from the date the individual discovered the breach of their lawful rights or interests. For labor disputes that may be heard directly by the labor court, a one-year limitation period applies.

While Vietnam is a civil law jurisdiction and traditionally had not operated based on court precedents, since October 2015, the Supreme People's Court has begun to recognize few, select rulings as precedents in an effort to modernize the rule of law in Vietnam. Up until now, only 43 cases have been recognized as precedents. As precedents, these 43 court rulings have the same binding effect as any laws, decrees or circulars passed by the legislative bodies.

On 17 October 2018, the Council of Justices for the Supreme People's Court of Vietnam issued a court precedent on labor and employment, which is the first of its kind in Vietnam. The precedent discusses whether an employment relationship exists where an employee continues to work for the employer past the probation period and the employer does not notify the employee if they have passed probation.

1.3 Types of working relationship

Individuals who provide their service broadly fall into the following main groups: (i) employees; (ii) service providers; (iii) outsourced workers; and (iv) independent contractors. The status of an individual is important because it determines whether they can enjoy the full protection of Vietnam's employment laws, such as narrow termination grounds and entitlement to a severance payment, or mandatory social insurance contributions. The table below provides more information on these groups.

Types of working relationship	
Employees	Employees include full-time employees, part-time employees and project-based employees. The company employs them directly. Under the Labor Code, part-time employees are equal with full-time employees regarding the

Types of working relationship	
	implementation rights and responsibilities, opportunities and the provision of labor hygiene and safety.
Outsourced workers	Outsourced workers are generally employed by a staffing agency and are seconded to work for the host company under a labor outsourcing agreement. The host company manages them, but their official employer is the staffing agency. A labor outsourcing arrangement involves two contracts. First, the employee and the staffing agency sign an employment contract. Second, the staffing agency and the host company sign a labor outsourcing agreement, under which the employee is seconded to the host company. Labor outsourcing arrangements face a number of restrictions. For example, labor outsourcing may only be used for a temporary purpose, or for highly skilled or technical workers. Furthermore, the maximum term of a labor outsourcing for an employee is 12 months, and renewal is not possible. Labor outsourcing is also permitted for only 20 job categories, which include drivers, project assistants, among others, and many of these job categories do not accurately reflect most employers' needs. Using outsourced workers to replace laid-off employees, or those on strike or engaged in a labor dispute, is also prohibited.
Service providers	Due to the strict regulations surrounding labor outsourcing, many companies attempt to circumvent these regulations by characterizing their relationship with workers as a "service agreement" rather than an outsourcing agreement. In this type of arrangement, a company offers to provide a specific service, such as "IT services," to the host company. The company providing the service is the official employer of the service providers, and manages them. The parties attempt to distinguish the arrangement so that the company only provides "services" and not "people." The company providing the service will enter into a contract with the host company; this only describes the scope of the services being provided but does not refer to specific workers. It is very important that the host company checks the service providing company's business license to ensure that the particular service offered is listed in that company's permissible lines of business. Under a genuine service arrangement, the staff of the service provider works under the direct management of and follows the instruction of the service provider. The service provider will be fully responsible for the services it provides. One risk with this arrangement is that the authorities may find that the labor outsourcing is actually in breach of the regulations and may subject the parties to administrative fines. Another risk is that the authorities may find a de facto employment relationship between the host company and service providers.

Types of working relationship	
Independent contractors	Independent contractors are generally individuals who work for a company by directly signing a service contract. They do not have the same level of rights and protection as employees and outsourced workers, and the contract would be treated as a normal civil contract. In an independent contractor arrangement, the parties' intention is to avoid establishing an employment relationship by signing a civil contract (instead of an employment contract) and by naming the individual as an independent contractor of the intended services. There is a risk that the individual could later claim a de facto employment relationship with the host company.

1.4 On the horizon

International commitments

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), a multilateral free trade agreement (FTA) formerly known as the Trans-Pacific Partnership (TPP), was officially signed by 11 countries, including Vietnam, on 8 March 2018 in Santiago, Chile. The CPTPP was ratified by the National Assembly of Vietnam on 12 November 2018 and came into effect on 14 January 2019. The CPTPP is labelled as the new generation of FTAs that do not impose new labor standards, but greatly emphasize labor rights to allow employees and businesses to enjoy their fair share of economic gains.

Vietnam and the European Union officially concluded negotiations of the European Union-Vietnam Free Trade Agreement (EVFTA) on 1 December 2015. The text of the agreement was announced on 1 February 2016. The EVFTA was officially signed in Hanoi, Vietnam on 30 June 2019.

Following the European Parliament's ratification of the EVFTA on 12 February 2020, Vietnam's National Assembly ratified the same on 8 June 2020. The EVFTA came into force at the beginning of August 2020.

Beyond its economic benefits, the EVFTA also aims to promote the sustainability of working environments, ensuring inclusive and sustainable economic growth, employment and decent work for all. With respect to labor and employment issues, the specific objective of the EVFTA is to promote the ratification and application of the International Labor Organization's (ILO) fundamental conventions and to collaborate in trade-related aspects of the ILO Decent Work Agenda.

Generally, under the EVFTA's Chapter 13 on Trade and Sustainable Development, the parties' commitments on the ILO's labor standards specifically focus on the following principles concerning the fundamental rights at work:

- the freedom of association and the effective recognition of the right to collective bargaining
- the elimination of discrimination in respect of employment and occupation
- the elimination of all forms of forced or compulsory labor
- the effective abolition of child labor

In compliance with these core principles, Vietnam ratified the ILO Convention on the Right to Organize and Collective Bargaining and Convention on Abolition of Forced Labor in June 2019 and June 2020, respectively.

In addition, under the EVFTA, an additional category of foreign employees coming to work in Vietnam would be introduced — the so-called "trainee intracorporate transferees." Presently, in order for a foreign national to come to work in Vietnam as an intracorporate transferee, they must qualify as an expert, manager, executive or technician, and have worked for the parent company of the Vietnamese entity for at least two years. To qualify as an expert, which is the most commonly relied on category, an individual is required to have worked for at least three years in their field, and possess at least a university degree. Under the new possible category of trainee intracorporate transferee, the individual would only need to be employed by the parent company for one year and be in possession of a university degree.

Certain commitments under these agreements are expected to affect the labor and immigration laws of Vietnam, particularly regarding labor standards, the resolution of labor disputes, collective bargaining and the establishment of employee representative bodies.

Compulsory social insurance for foreign employees

From 1 December 2018, employers are required to contribute to compulsory social insurance for foreign employees. As a result, foreign employees will be covered for all five compulsory social insurance regimes, which were previously only applicable to Vietnamese employees, at the same contribution rate. However, the application of the five regimes to foreign employees will be phased as follows:

- The short-term benefit regimes for illness, maternity, and labor accidents and occupational diseases commenced on 1 December 2018.
- The long-term benefit regimes for retirement and survivorship will apply from 1 January 2022.

This development is expected to have an adverse financial impact on employers in terms of labor costs. See further at **6.12.**

2 Hiring employees

2.1 Key hiring considerations

The concept of "at will" employment is not recognized in Vietnam, so employees should be carefully chosen and employers should first enter into definite-term contracts with employees, rather than indefinite ones.

2.2 Avoiding the pitfalls

For new employees, it is important that the employee is required to serve probation. The parties can agree on probation under a separate probation agreement or include a probation clause in the employment contract. Under Vietnamese law, either party may terminate the probation without any notice or compensation during the probation period. At the end of the probation, the employer is required to officially recruit the employee if the work during the probationary period satisfies the requirements as agreed by the parties. It is important, therefore, for the employer to carefully assess the employee's performance over the probationary period.

Employers should also be careful not to allow employees to continue working after their probation, or after the definite-term contracts have expired, if the employer does not want to retain such employees. If an employee continues to work for 30 days after the expiration of their definite-term contract, they will be deemed to be employed on an indefinite-term contract.

2.3 Procedural steps and key documents in recruitment

2.3.1 Identifying the vacancy

When there is a vacancy, the employer should consider whether the position should be performed by a full-time or part-time employee or, alternatively, by an outsourced worker. In addition, the employer should consider the appropriate term for the employment.

2.3.2 Recruitment

In most cases, employers may directly recruit prospective employees by entering into an employment contract with the employee or, in the case of intra-corporate foreign employee transfers, through a "letter of appointment/assignment."

2.3.3 Special considerations for representative offices of foreign enterprises

Representative offices of foreign enterprises (ROs) operating under the Law on Commerce can directly recruit their local employees or ask a labor outsourcing company, a job service company/organization or a Labor Supply Organization (LSO) to find a suitable candidate. An LSO is an organization established or authorized by the Provincial Departments of Labor, War Invalids and Social Affairs (DOLISA).

If a foreign RO requests a LSO to find a suitable candidate, the RO must file their requests with the LSO, which, within 15 working days from the receipt of the request, must select and introduce Vietnamese employees to the RO. If the RO accepts the candidate chosen by the LSO, the RO and the LSO must enter into a labor supply contract (LSC). After 15 working days, if the LSO fails to provide any Vietnamese candidates, the LSO must explain the reason in writing.

If the RO directly recruits local employees, within seven working days from the date of contract signing, the RO needs to notify the relevant LSO of such recruitment.

2.3.4 Making an offer of employment, subject to conditions where appropriate

Many employers initially offer employment through an "offer letter," which is distinct from a formal employment contract. It is acceptable for an employee to work under an offer letter throughout the probationary period, but they must enter into a formal employment contract once the employment is confirmed. In such case, the offer letter should contain required contents of a probation agreement as required by the law.

Employment contracts have many prescribed terms and follow a common template, although under the Labor Code there is no prescribed form for an employment contract.

3 Carrying out pre-hire checks

3.1 Background checks

Background checks are permitted under Vietnamese law, but the potential employee's explicit written consent is required for these to be carried out. Vietnam has strict privacy laws requiring that any collection, use, processing or disclosure of an individual's personal information be subject to that individual's consent. Moreover, most types of background checks, such as criminal record checks and verifying the individual's educational credentials, require the individual to apply for such records in person.

Reference checks

The employee's explicit written consent is required to contact previous employers or referees, as they will disclose the individual's personal information. Other than this requirement, there are no regulations on this.

3.2 Medical checks

Prior to employment, an employee is required to disclose their health status to the employer under the Labor Code. Though the language of the law is ambiguous as to whether the employer is required to arrange a health check for the employee prior to commencement of work, it is common for employers to arrange a medical check for employees before entering into an employment contract. Nevertheless, it is essential that this process be completed prior to signing the employment contract, as the authorities would probably not recognize an employment contract that is subject to a condition precedent.

4 Immigration

Please refer to our Handbook — The Global Employer: Focus on Global Immigration and Mobility, which is accessible HERE, for information about the immigration system applying in Vietnam.

5 The employment contract

5.1 Form of the employment contract

Generally, an employer must conclude a written employment contract with each employee. However, an employer may enter into an oral contract for temporary work of less than one month.

The Labor Code recognizes the validity of electronic employment contracts but it is not a common practice in Vietnam to sign electronic contracts, as the courts' acceptance is uncertain.

5.2 Types of employment contract

There are two main types of employment contract in Vietnam: (i) an indefinite-term employment contract; and (ii) a fixed-term employment contract. The table below provides further information on these types of employment contracts.

Types of employment contract	
Indefinite-term contracts	An employment contract with an indefinite term is entered into for jobs with an undefined completion time of the work.
Fixed-term contracts	A fixed-term contract may be for a term up to 36 months. The parties are only permitted to enter into two fixed-term contracts; after that, the parties are required to enter into an indefinite-term contract, except for elderly employees, foreign employees and part-time officers of employees' representative organizations. If a fixed-term contract expires, but the employee continues to work for more 30 days without signing a new contract, the employee is deemed to be employed on an indefinite-term contract.

5.3 Language requirements

There is no specific requirement regarding the language of the employment contract. An employment contract, therefore, may be in a foreign language. However, authorities or courts only work on the Vietnamese language version. As a matter of practice, employment contracts are prepared in bilingual language form.

Employment contracts between Vietnamese employees and ROs of foreign enterprises can be signed in a foreign language but a Vietnamese translation must be submitted to the LSO.

6 Working terms and conditions

6.1 Probationary periods

The employer and employee may agree on a probationary period.

Except for the probation of managerial positions in enterprises as defined in the Law on Enterprises, which can be up to 180 days, a probationary period may not exceed 60 days for jobs requiring university-level education and above; 30 days for jobs requiring a secondary education, technician or trained staff; and six days for any other types of employees. Salary for the probationary period can be equivalent to at least 85% of the official salary of the position.

At any time during the probationary period, the employer and the employee may both terminate the probation agreement without notice and without compensation.

6.2 Working time

An employer has the right to determine the working hours on a daily or a weekly basis, provided the employees are notified in advance.

If working hours are determined on a daily basis, the normal working hours may not exceed eight hours in a day and 48 hours in a week in normal working conditions. For junior employees from 15 to under 18 years old, normal working hours may not exceed eight hours in a day and 40 hours in a week.

If working hours are determined on a weekly basis, the normal working hours may not exceed 10 hours a day and 48 hours in a week.

An employee working six hours or more a day is entitled to a break of at least 30 consecutive minutes, or at least 45 consecutive minutes if working at night.

If an employee works in consecutive shifts of six hours or more, the break is included in the number of hours worked.

In addition to the above-mentioned rest breaks, the employer can determine other short breaks and record them in the internal work rules.

An employee who works in shifts is entitled to a break of at least 12 hours between each shift.

6.3 Wage and salary

There are two types of minimum wage in Vietnam:

- the general minimum wage or GMW, which is used to calculate contributions and benefits for statutory social and health insurance

- the regional minimum wage or RMW, which is applicable to both Vietnamese and foreign-invested companies located in different regions

GMW

The current GMW, as of 1 July 2019, is VND 1.49 million per month (approximately USD 64 per month).

The GMW is used to calculate social insurance and health insurance benefits and contributions.

RMW

The applicable RMW depends on where the enterprise is located. The government divides the country into four regions based on the cost of living and applies different minimum wages to each region.

Effective 1 January 2020, the RMW for employees in the four regions is:

- Region 1: VND 4.42 million (approximately USD 192)
- Region 2: VND 3.92 million (approximately USD 170)
- Region 3: VND 3.43 million (approximately USD 149)
- Region 4: VND 3.07 million (approximately USD 133)

The salary for trained employees must be at least 7% higher than the RMW.

6.4 Making deductions

Generally, employers may only make deductions from employees' salaries for contributions to state health, social and unemployment insurance and to make withholdings for the employee's personal income tax liability.

However, if certain conditions are met, employers may also make deductions as compensation for material damage to the employer's assets caused by the employee. In this case, employees must be informed of the reason for the deduction and no more than 30% of the employee's monthly salary may be deducted after the employer has already deducted amounts owing for compulsory state insurance and personal income tax.

6.5 Overtime

Overtime hours shall not exceed 50% of normal work hours per normal working day. The total normal working hours and working overtime hours in a day shall not exceed 12 hours if work hours are determined on a weekly basis. On a public holiday or weekly days off, the total overtime hours cannot exceed 12 hours. Overtime shall also not exceed 40 hours per month and 200 hours per year. In special cases, this limit may be increased to 300 hours of overtime per year.

Working overtime is subject to the employees' consent. Only in the following exceptional circumstances is an employee's consent not required:

(i) where the employee's duties are pursuant to a mobilization order related to national defense and security in a state of emergency

(ii) where the employee is performing work to protect human life and property relating to natural disasters, fire, dangerous epidemics and disasters, except for circumstances where the employee's life and health are potentially threatened according to laws on labor safety and hygiene

Overtime pay on normal working days will be compensated at the rate of at least 150% of the employee's actual paid wage for the current work on a normal working day; at least 200% on weekly days off; and at least 300% on holidays or fully paid leave days. If an employee, who receives a salary on a daily basis, works overtime on paid leave days or on holidays, the employer must pay them at least 300% of the normal wage and the normal salary for such holidays/paid leave, excluding the wage paid for the paid leave in accordance with the Labor Code.

6.6 Bonus and commission

It is common practice that an employer pays several other types of remuneration, in addition to base salary. Such remuneration may include cash benefits such as bonuses, allowances or commissions.

There are two types of bonus: the nondiscretionary annual bonus ("13th month salary") that is often paid before the Lunar New Year holiday, and discretionary bonuses that are paid based on job performance or meeting a specific company goal.

The "13th month salary" bonus is not required under Vietnamese law unless the parties to the employment contract have agreed upon it. A discretionary bonus may also be provided for by the contract, but would be payable at the employer's discretion in accordance with the specific terms of the relevant contract. We suggest using the wording "annual bonus" instead of "13th month salary" as the nature of the payment is a bonus rather than a salary.

Employers are required to pay statutory allowances to employees in some cases. For example, employees working in hazardous, toxic or dangerous forms of work are entitled to an allowance in addition to their salary.

6.7 Benefits in kind

Some employees, particularly senior employees, may receive benefits other than their base salary, such as company cars, medical and disability insurance, and life insurance, but such benefits are not mandatory. The benefits may also be subject to personal income tax.

6.8 Equity incentive plans

The Vietnamese government has issued Decree No. 135/2015/ND-CP on offshore indirect investment, effective 15 February 2016 ("**Decree No. 135**"), which provides that individual investors who are Vietnamese citizens can partake in offshore indirect investment by participating in a plan of awarded foreign shares.

Thereafter, the State Bank of Vietnam (SBV) issued Circular No. 10/2016/TT-NHNN, effective 13 August 2016, giving guidance on the implementation of Decree No. 135 regarding offshore indirect investment by individual investors ("**Circular No. 10**").

Circular No. 10 provides that:

- The implementation of share plans must be registered with the SBV and the SBV will issue confirmation on the plan registration.
- Vietnamese employees can receive, own and sell foreign shares abroad; receive, exercise and sell the right to purchase foreign shares; and receive dividends and other lawful income from the share plans.
- There are no restrictions on Vietnamese employees owning or holding foreign shares.
- Vietnamese employees can remit money out of Vietnam for the implementation of share plans (specifically stock options). However, we note that recently the SBV will only allow stock option plans with a cashless exercise i.e., under which no money will be transferred abroad.

- All implementation of share plans must be done through the local employing entities, which are responsible for filing the plan with the SBV for registration.
- Upon issuance of the SBV's confirmation on the plan registration, the local employing entities are required to open a foreign currency transactional bank account to implement the share plan, and all incoming and outgoing transactions under the share plans must go through such bank account (dedicated bank account).
- Employees' income in foreign currency has to be remitted to the employees via the dedicated bank account.

6.9 Pensions

The pension fund is included in the Social Insurance Fund, to which the employee and their successive employers jointly contribute. Generally, when the employee reaches retirement age, and the employee has accumulatively contributed to the Social Insurance Fund for 20 years or more, the employee will be entitled to a pension allowance. As of 1 January 2018, the pension allowance is equivalent to 45% of the average salary used as a basis to determine the amount of contributions to the Social Insurance Fund for the first 15 years of contribution for female employees, and for the first 16 years of contribution for male employees. The number of years of contribution for male employees equivalent to the amount mentioned above will be increased by one year for every calendar year until it has reached 20 years of contributions in 2022. Afterward, for every additional year of contribution, the pension allowance is increased by 2% for men and 3% for women, but it is capped at 75%.

6.10 Annual leave and public holidays

An employee is entitled to at least 12 days of annual leave if the employee works under normal working conditions, and 14 to 16 days if the employee is a minor, disabled, works with heavy loads, or under hazardous or dangerous conditions.

Employees are also entitled to an additional annual leave day for every five years of service.

In addition, employees are entitled to 11 public holidays per annum.

6.11 Sick leave and pay

An employee who is contributing to the Social Insurance Fund will be entitled to the following number of sick leave days per year, depending on the duration of the contribution to the fund:

- less than 15 years of contributions to the Social Insurance Fund: 30 working days per year
- from 15 to less than 30 years of contributions to the Social Insurance Fund: 40 working days per year
- 30 years or more of contributions to the Social Insurance Fund: 60 working days per year

The state Social Insurance Fund pays the employee's compensation during sick leave, based on the formula set out below:

$$\frac{\text{The employee's salary for the month preceding the sick leave}}{\text{24 days}} \times 75\% \times \text{Number of days of sick leave}$$

However, the employee's monthly salary is capped at 20 times the GMW, which is VND 29.8 million (approximately USD 1,284).

6.12 Taxes and social security

State insurance

Employers must contribute to state social insurance (17.5%), health insurance (3%) and unemployment insurance (1%). Employees must contribute 8% to state social insurance, 1.5% for health insurance and 1% for unemployment insurance.

Contributions are calculated based on the employee's monthly salary, which is capped at 20 times the GMW (VND 29.8 million — approximately USD 1,284) for the calculation of social and health insurance, and capped at 20 times the RMW (VND 61.4 million to 88.4 million — approximately USD 2,669 to 3,843) for the calculation of unemployment insurance. From 1 January 2018, in addition to base salary and salary allowances, the salary used for calculating the social insurance contribution will include supplemental payments.

On 15 October 2018, the government issued Decree No. 143/2018/ND-CP providing guidance on compulsory social insurance for foreign employees. According to this decree, foreign employees who satisfy the following conditions are subject to compulsory social insurance:

- individuals working in Vietnam under an indefinite-term employment contract, or a definite-term employment contract, with a term of one year or more
- individuals granted a work permit, practicing certificate or practicing license

The exceptional cases are:

- individuals who have reached retirement age
- intracorporate transferees as defined under the regulation on foreign labor management

The contribution rate of foreign employees is as follows:

Period	Party	Contribution rate
From 1 December 2018 to 31 December 2021	Employer	3.5%
	Foreign employee	N/A
From 1 January 2022 onward	Employer	17.5%
	Foreign employee	8%

Taxes

Taxpayers are classified as either "residents" or "nonresidents" and are subject to different rates on this basis. Residents must meet one of the following conditions:

- being present in Vietnam for 183 days or more in a calendar year or in 12 consecutive months from their first day of presence in Vietnam
- having a registered regular residence (e.g., foreign nationals having a Permanent Residence Card or Temporary Residence Card)
- having a lease contract in Vietnam (including hotel stays) with a term of 183 days or more in a tax year

Tax rates for residents depend on the source of income. Progressive tax rates apply to a resident's income from business, salaries and wages, and range from 5% to 35% depending on an individual's income level. Nonresidents are subject to tax on income derived from Vietnam. A flat rate of 20% applies to income derived from salaries and wages.

7 Family rights

7.1 Time off for antenatal care

Expectant mothers are entitled to paid leave for the purpose of up to five prenatal checkups. One working day is provided for each visit, or two working days for each visit if the mother has medical problems. Employees are entitled to receive 100% of the average wage for the six months preceding the leave, capped at 20 times the current GMW (VND 29.8 million per month as of 1 July 2019, approximately USD 1,284).

7.2 Maternity leave and pay

Mothers are entitled to six months' maternity leave. Employees receive payments from the state Social Insurance Fund, based on 100% of their average wage for the six months preceding the leave, capped at 20 times the current GMW (VND 29.8 million per month as of 1 July 2019, approximately USD 1,284).

Mothers also receive a lump-sum allowance upon the birth of their children equal to two months' GMW.

7.3 Paternity leave and pay

New fathers are entitled to 5-14 days' paid leave depending upon the circumstances of the birth. Employees receive payments from the state Social Insurance Fund, based on 100% of their average wage for the six months preceding the leave, capped at 20 times the current GMW (VND 29.8 million per month as of 1 July 2019, approximately USD 1,284).

7.4 Parental leave and pay

Parental leave is not available in Vietnam.

7.5 Adoption leave and pay

An employee adopting a child of under six months old is entitled to take leave until the child is six months old and, in this case, either the father or the mother may take leave. Employees receive payments from the state Social Insurance Fund, based on 100% of their average wage for the six months preceding the leave, capped at 20 times the current GMW (VND 29.8 million per month as of 1 July 2019, approximately USD 1,284). In this case, the employee would also receive the lump-sum allowance of two months' GMW, which is granted to employees upon the natural birth of a child.

7.6 Other family rights

Female employees are entitled to a one-hour break per day during the nursing period (the one-year period after the birth of the child). Employees are entitled to full pay during this break and such breaks are considered working hours (i.e., the employee will be treated as if she had worked during that break). In addition, for up to 12 months after the birth of the child, the mother has protected status from disciplinary action and unilateral termination by the employer.

8 Other types of leave

8.1 Contraception leave

Employees are entitled to paid leave for undertaking contraceptive procedures in the following amounts:

- seven days when the employee has an IUD inserted
- 15 days when the employee undergoes sterilization

The leave period includes holidays and weekends. Leave is paid out at 100% of the employee's average wage for the six months preceding the leave, capped at 20 times the current GMW (VND 29.8 million per month as of 1 July 2019, approximately USD 1,284).

8.2 Leave for miscarriage, abortion or stillbirth

For a miscarriage, abortion or stillbirth, the employee is entitled to paid leave in the following amounts:

- 10 days for pregnancy that lasted under five weeks
- 20 days for pregnancy of between five and 13 weeks
- 40 days for pregnancy of between 13 and 25 weeks
- 50 days for pregnancy of over 25 weeks to full term

The leave period includes holidays and weekends. Leave is paid out at 100% of the employee's average wage for the six months preceding the leave, capped at 20 times the current GMW (VND 29.8 million as of 1 July 2019, approximately USD 1,284).

8.3 Convalescence leave

If after taking maternity leave, the death of a child after childbirth or miscarriage, stillbirth, or abortion, the employee's health has not yet recovered within the first 30 working days after such leave, the employee may take from five to 10 days off for convalescence and health recuperation. The leave is inclusive of holidays and weekends. During this leave, employees are entitled to 30% of the GMW (VND 1.49 million, or approximately USD 64) per day.

8.4 Leave for a child's illness

Employees are permitted to take leave paid by the Social Insurance Fund to care for their sick children. The leave period shall be calculated based on the number of days of care for the sick child and includes working days only. For children under three years old, employees may take up to 20 working days off per year. For children between the ages of three to seven years, employees may take up to 15 days off per year. During this leave, employees are entitled to a monthly allowance equal to 75% of the salary they received in the month immediately preceding the leave, capped at 20 times the current GMW (VND 29.8 million per month as of 1 July 2019, approximately USD 1,284).

8.5 Personal leave

An employee is entitled to a fully paid leave of absence in the following circumstances:

- the employee's marriage: three days
- the marriage of the employee's natural or adoptive child: one day

- death of a natural parent, adoptive parent, natural or adoptive parent-in-law, spouse or natural or adoptive child: three days

In addition to the above, employees are also entitled to one day of leave without pay for the death of a grandparent or sibling, or the marriage of a parent or sibling. Apart from these circumstances, the employee may negotiate with the employer for other unpaid leave days.

9 Termination provisions and restrictions

9.1 Notice periods

Please refer to **15.2**.

9.2 Payment in lieu of notice

The Labor Code does not specify that an employer may make a payment in lieu of notice, but in practice, it can be done with the employee's consent.

9.3 Garden leave

The concept of garden leave is not recognized under Vietnamese law. However, it is often used in practice. Placing an employee on garden leave would technically be breaching the employment contract, as it would be changing the employee's job duties to stay at home. Nonetheless, if employees receive their full salaries and benefits during the garden leave period, it would be difficult for them to prove damages arising from this breach.

9.4 Intellectual property

If there is no agreement to the contrary between the employer and the employee, copyright and the rights to inventions, and industrial and layout designs created by an employee during their course of employment, shall belong to the employer.

If an independent contractor or service provider produces the work, the law states that the party contracting for the service will hold copyright to any work created as part of those services. For inventions and industrial and layout designs, the party contracting for the service may have copyright only if this party supplied the funds, materials or facilities used to create the work.

9.5 Confidential information

While Vietnam does have regulations recognizing intellectual property rights with respect to trade secrets and generally accepts certain commercial practices and principles, such as confidentiality undertakings (all of which, in principle, lend weight to enforceability), it does not have sophisticated and clear laws or regulations that specifically or comprehensively govern confidentiality or non-disclosure agreements. The Labor Code requires the employer to provide the employee with regulations on protection of trade secrets and technology secrets prior to signing employment contracts. The code also allows the parties to sign agreements on confidentiality.

On 12 November 2020, the MOLISA issued Circular No. 10/2020/TT-BLDTBXH with one article specifically addressing confidentiality or non-disclosure agreements. Accordingly, the employer and the employee can either add confidentiality clauses to the employment contract or enter into a separate agreement on confidentiality. Circular No. 10/2020/TT-BLDTBXH also recommends main terms and conditions of a confidentiality agreement and regulates the employee's compensation for violations of the agreement.

Nevertheless, the intellectual property law and the Civil Code provide for the protection of trade secrets. A trade secret is defined as "information obtained from activities of financial or intellectual

investment, which has not yet been disclosed and which is used in business." A trade secret must meet the following requirements, in order to be protected legally:

- not be common knowledge or easily obtainable
- create business advantages for those who hold it
- have its secrecy maintained by its owner so that it will not be disclosed or easily accessible by others

Therefore, it is not sufficient for a trade secret to be used by the owner, but instead the owner must take measures to maintain the secrecy of this trade secret. If these requirements are fulfilled, the owner may exploit the trade secret and may also prohibit another person from using, accessing or disclosing the trade secret (or permit them to do so).

A company's internal labor regulations (ILRs), i.e., the working rules of the company, should address the steps taken to maintain the secrecy of trade secrets. Moreover, the Labor Code requires that ILRs include policies on the protection of technology and trade secrets.

Vietnamese courts will also enforce an employer's rights to preserve the confidentiality of their information pursuant to provisions within the employment contract, and the Labor Code lists confidential information as one of the matters that can be addressed in the contract. Many employers also have their employees enter into separate confidentiality agreements; this is recommended if the employee may have access to sensitive information.

Vietnamese law recognizes an employer's legitimate interest in protecting its confidential information, and the disclosure of trade secrets and technology secrets is grounds for an employee's dismissal. Competition law also prohibits employees from disclosing to another person the company's trade secrets or attempting to breach a trade secret's confidentiality measures.

9.6 Post-termination restrictions

Vietnamese law is very underdeveloped with respect to post-termination restrictions, and the enforceability of such covenants is questionable, especially regarding non-compete obligations. While the Labor Code does not address restrictive covenants at all, it does explicitly allow employees to hold multiple job positions at one time, suggesting difficulties in enforcing a post-employment non-compete agreement. Nevertheless, we are aware of cases where the court has enforced non-compete agreements. It appears that the court is more willing to enforce a non-compete agreement where it applies only to employees with access to confidential information and where it is limited to a maximum term of one year and to the territory of Vietnam.

Non-solicit obligations, particularly those prohibiting employees from soliciting the employment of other employees, are more enforceable as these provisions would not impede the former employee's ability to work as in the case of a non-compete agreement.

9.7 Retirement

In 2021, female employees who are 55 years and 4 months of age and male employees who are 60 years and 3 months of age are entitled to monthly pensions from the Social Insurance Fund if they have contributed to the social insurance for 20 years or more. The retirement age will annually increase by 4 months for female employees and by 3 months for male employees until it reaches 60 years of age for female employees and 62 years of age for male employees in 2035.

10 Managing employees

10.1 The role of personnel policies

Businesses employing 10 or more employees must have written ILRs that primarily provide rules and order at the workplace and disciplinary measures for dealing with labor discipline breaches.

ILRs must be written in Vietnamese and be consistent with the provisions of the Labor Code. Before promulgating the ILRs, the employer must consult with the employees' representative organization/group through the workplace dialogue process.

Employers that have 10 or more employees must register them with the local labor authority. ILRs shall take effect from the date on which the local labor authority approves the same in writing or after 15 days from the date on which the ILRs are submitted if the labor authority has not replied. Once the labor authority approves them, ILRs must be communicated to each individual worker and their main points must be listed at public places in the business.

The Labor Code lists out specific violations of the employees that are directly subject to dismissal (e.g., workplace sexual harassment). If employees commit any of these violations, employers can dismiss them even if there are no ILRs. Nevertheless, the ILRs are still essential as a basis to discipline an employee.

10.2 The essentials of ILRs

The table below shows the policies and procedures that are required, in general, by law. It is not recommended to include content that is not required by law in ILRs, such as the company's benefits policies. This is because ILRs are legally binding upon the employer and cannot be amended unless the employer consults with the union again and re-registers them with the labor authority. Therefore, to afford the employer with greater flexibility to change its policies, it is best to include only the contents required by law.

Policies required by law
Working hours and rest breaks
Order in the workplace (i.e., general workplace rules such as the use of the employer's technology and assets; entry and exit from the workplace; etc.)
Occupational safety and hygiene in the workplace
Prevention of sexual harassment at the workplace; procedures to take actions against sexual harassment at the workplace
Protection of assets, business secrets and confidentiality of technology and of intellectual property of the employer
Circumstances where temporary transfer of an employee to another job is allowed
Conduct by employees constituting a breach of labor discipline and penalties imposed for those breaches
Compensation for damage
Persons authorized to take disciplinary actions.

10.3 Codes of business conduct and ethics

Companies in Vietnam often have such policies in place, and these are useful for communicating the company's core values and for providing guidance on compliance issues. However, to be legally binding on employees, content from the codes of business conduct and ethics should be incorporated into the ILRs.

10.4 Performance assessment policy

The Labor Code allows employers to terminate employees due to frequent performance failure. In order to do so, employers are required to set up a performance assessment policy that clearly sets out (i) the applicable performance assessment criteria and details of what performance level is considered by the employer to be a failure and (ii) what amounts to frequent performance failure.

11 Data privacy and employee monitoring

Please refer to our Global Privacy Handbook, which is accessible HERE, for information on data privacy and monitoring requirements in Vietnam.

12 Workplace safety

12.1 Overview

The Labor Code stipulates that the employer must provide adequate means of ensuring occupational safety and hygiene. Those who work in dangerous and toxic working conditions are entitled to allowances and preferential treatment in respect of working hours and resting time.

Where a position presents an obvious and serious danger to the employee's health, the employee may refuse to work, but they must also report the situation immediately to a manager.

The employer bears responsibility for work accidents or occupational diseases. Work accidents mean accidents causing death or injury to any part of the employee's body and occurring during the process of working and in connection with the execution of the work or task assigned. Occupational diseases are diseases caused by the effect of harmful working conditions.

12.2 Main obligations

During the hiring process, employers must truthfully inform employees regarding the workplace safety and hygiene policies of the company, and any other information relevant to the employment contract, which would also include whether the work is of a hazardous nature.

Every year, or as frequently as necessary, employers have the responsibility to inspect and assess dangerous factors and hazardous factors at the workplace in order to implement technical and technological measures to eliminate and minimize these factors, improve working conditions and take care of employees' health.

All employers must — based on occupational safety and health law, national standards and technical regulations, and local technical regulations, as well as their production, business and working conditions — formulate, issue, and organize the implementation of, regulations and procedures for ensuring occupational safety and health. Employers have to consult the corporate trade union, or, in general, the employees' representative organization/ group, when formulating these regulations and procedures.

Employers are also required to consistently perform inspections, maintenance and repairs on machinery and provide notice of workplace hazards. Employers must organize periodical employee health checkups and provide first aid and emergency services when necessary.

12.3 Claims, compensation and remedies

If an employee is injured or if they become ill due to a work accident or occupational disease, they must undergo a medical assessment to determine the degree of disability and subsequent degree of reduction in their working ability. This assessment determines the treatment and vocational rehabilitation that the employee will receive. The employer is responsible for all medical expenses incurred from emergency first aid through to the completion of medical treatment for victims of work accidents and occupational diseases. The employee is entitled to social insurance benefits and if they are not yet covered by compulsory state social insurance, the employer will pay the employee an amount equivalent to what they would have received under social insurance.

Depending on the percentage by which the employee's ability has been reduced, the employer pays compensation equivalent to at least 1.5 to 30 months' salary and allowances, if any, to an employee injured in a work accident or suffering from an occupational disease that is not entirely due to an employee's fault. If the accident or disease is entirely due to the employee's fault, the employer pays compensation of at least 40% of the above-mentioned premium.

13 Employee representation, trade unions and works council

Information about working with trade unions and works councils can be found throughout this guide. For more information about this subject in Vietnam, please contact us. See Key Contacts for contact details.

14 Discrimination

14.1 Who is protected?

Vietnam has not yet developed a sophisticated set of laws and regulations to deal with employment discrimination issues. However, the main policy seeks to prevent any kind of discrimination based on gender, national or social origin, race, ethnic, age, pregnancy, marital status, beliefs, religion, opinion, family responsibility, HIV infection, disability or establishment, participation and activities in the enterprise's trade union or employees' organization. Vietnamese laws strictly prohibit gender-based discrimination in employment. Women are not to be discriminated against in recruitment, employment, compensation, working conditions and promotion in the workplace. The labor law also prohibits the employer from dismissing or unilaterally terminating the employment contract of a female employee due to her getting married, being pregnant, taking maternity leave or nursing a child under 12 months. The female employee is also entitled to various types of preferential treatment during pregnancy, maternity leave and while her child is under 12 months.

14.2 Types of discrimination

Discrimination: please refer to **14.1** and **14.4**

Sexual harassment: The Labor Code generally prohibits sexual harassment. Sexual harassment is a new legal ground for dismissal of an employee. Accordingly, procedures and policies on the prevention of sexual harassment at workplaces must be included in the ILRs with the following aspects:

- prohibition of sexual harassment in the workplace
- list of behaviors that constitute sexual harassment in the workplace
- responsibilities, limitations of time, procedures for internally handling sexual harassment, including responsibilities, limitations of time, steps and procedures for complaints and settlement of complaints and other relevant regulations

- disciplinary actions for harassers or false accusers, correspondingly following the nature and level of violation
- compensation for the victim's damage and relevant remedial measures

The Labor Code defines "sexual harassment" as actions of a sexual nature of a person towards another person that are unwelcome or unwanted. "Workplace" is defined as any place where the employee actually works as agreed or assigned by the employer. The employer is responsible for formulating and implementing solutions to prevent and combat sexual harassment at the workplace.

14.2.1 Disability discrimination

The law on disabled persons provides that an employer may not refuse to recruit individuals with disabilities who fully satisfy the recruitment conditions or set recruitment criteria in violation of law in order to restrict working opportunities of persons with disabilities. Violation of this provision may subject an employer to a fine of VND 10 million (approximately USD 431) to VND 20 million (approximately USD 862). Moreover, employers are required to attempt to accommodate jobs and working conditions so they are suitable for disabled persons, and must comply with the labor law in employing them. Violation of this provision may subject an employer to a fine ranging from VND 2 million (approximately USD 86) to VND 30 million (approximately USD 1293), depending on the number of disabled employees whose rights have been violated.

14.2.2 Equal pay

The gender equality law provides that male and female employees must be treated equally in the workplace regarding work, wages, pay and bonus, social insurance, labor conditions and other working conditions. Violations of this law are subject to an administrative fine ranging from VND 6 million (approximately USD 258) to VND 20 million (approximately USD 858).

14.3 Exclusions

14.3.1 Occupational requirements

Vietnam's laws regarding discrimination are very underdeveloped. The Labor Code generally states that different treatment or exclusion arising from unique job requirements or protection of employment for vulnerable employees are not considered discrimination, without any clear definition of unique job requirements. However, there are exceptions relating to age.

Discrimination based on age is prohibited, but, at the same time, the law requires an employee to disclose their age to the employer prior to the signing of the employment contract.

The Labor Code prohibits senior employees (who reach retirement age) from working heavy, toxic or dangerous jobs, unless safe working conditions are ensured. The Labor Code also excludes junior workers (under 18 years of age) from performing certain types of work. Moreover, junior workers may only work up to 40 hours a week (for those aged 15 to 18 years old), or up to 20 hours a week (for those under 15 years old), rather than the 48 hours a week that is generally applicable.

If an employer can demonstrate that these prohibitions prevent the individual from performing the job, the employer may be able to exclude the individual based on age.

14.4 Employee claims, compensation and remedies

Regulations on non-discrimination are a relatively new aspect of Vietnamese law. Although prohibitions against discrimination based on gender, disability, HIV status and religion are clearly enunciated in many pieces of legislation, these prohibitions were only drafted with very general wording, which makes it difficult to identify in practice whether an act is considered discriminatory or is permitted by law. Moreover, there is no enforcement mechanism for non-discrimination regulations

provided under Vietnamese law. In general, violations of these regulations are only subject to administrative sanctions ranging from VND 10 million (approximately USD 431) to VND 20 million (approximately USD 862).

Currently, many employers take advantage of the lack of enforcement. In practice, many employers straightforwardly address their discriminatory preferences/requirements, mostly based on gender and social background, in their public recruitment announcement. However, individuals who are disadvantaged by such recruitment preferences are often not aware of the law and, therefore, take no actions against these employers.

In summary, due to the underdeveloped nature of Vietnam's anti-discrimination law and lack of an effective enforcement mechanism, employee claims are rare.

14.5 Potential employer liability for employment discrimination

Please refer to **14.4** above.

14.6 Avoiding discrimination and harassment claims

As mentioned above, Vietnam has not yet developed a sophisticated set of laws and regulations to deal with workplace discrimination and harassment issues. However, the laws generally prohibit sexual harassment, maltreatment of workers in the workplace and the use of forced labor in whatever form.

Please refer to the information above and in particular to **14.1** and **14.4**.

15 Termination of employment

15.1 General overview

By law, except where employment contracts are mutually terminated or automatically terminated, there are three legal ways to terminate employment contracts. They are:

- unilateral termination
- dismissal
- redundancy

Employees cannot contract out of their statutory rights, so imposing a notice period longer than the statutory notice period is not enforceable.

The dismissal for cause of an employee requires a disciplinary hearing with the involvement of the trade union.

Redundancies require the employer to consult with the employees' representative organization/group through a workplace dialogue process and to notify the local authority and the affected employees of the lay-off 30 days prior to the termination date.

We note that even if no advance notice is required, the employer still has an obligation to notify the employee of their termination.

15.2 By the employer

Employers need a recognized legal basis to terminate employees, in addition to providing notice.

Unilateral termination

The employer has the right to terminate an employment contract unilaterally, provided prior notice is given based on the following legitimate reasons:

- The employee regularly fails to fulfill their task as assigned in the employment contract.
- The employee is ill and labor capacity has not recovered after having received treatment for a specific period (half of the term for an employment contract with a definite term of less than 12 months; six consecutive months for an employment contract with a definite term of 12 to 36 months; and 12 consecutive months for an employment contract with an indefinite term).
- Force majeure events force the employer to reduce production and workforce.
- The employee fails to attend the workplace after 15 days from the expiration of the period of employment contract postponement as required by law.
- The employee is intentionally absent from work without permission and legitimate reasons for at least five consecutive working days.
- The employee provides dishonest information when signing the employment contract, which impacts the recruitment of the employee.

Procedures and formalities

To terminate an employment contract unilaterally, the employer must give the employee a prior notice. Depending on the type of employment contract and the reason for termination, prior notice may be served at least 45 days, 30 days or three working days in advance. For some special jobs, the advance notice must be at least 120 days if the employee is working under an indefinite term labor contract or a definite term of 12 months or more. The employer may pay the employee the salary equivalent in lieu of the notice period as long as the employee agrees. In certain cases such as the employee's absence for five consecutive days, no advance notice is required.

Terminations on the grounds listed in the first item above (poor performance) entail additional considerations. To lawfully terminate an employee on these grounds, the employer must have a performance management policy (PMP) in place setting out the criteria by which the employee's performance will be judged, and such PMP must have been formulated in consultation with the employees' representative organization/group through a workplace dialogue process.

Dismissal

Dismissal may be applied as a disciplinary measure only in the following circumstances:

- the employee steals, embezzles, gambles, deliberately causes injury, uses drugs at the workplace, discloses trade or technological secrets, infringes the employer's intellectual property rights, commits sexual harassment at the workplace, or commits other breaches causing serious damage or threatening to cause particularly serious damage to the employer's interests or assets
- the employee, who has previously been disciplined by having their salary review delayed, recommits the same offense during the trial period; or recommits the offense after being demoted

- the employee has been absent for a total of five days per month, or 20 days per year, without any approval by the employer and legitimate reason

Procedures and formalities

To dismiss an employee and address breaches of labor discipline, an employer must have duly issued and registered ILRs (see **10** above) in Vietnamese consistent with the provisions of the Labor Code. This is especially the case where the dismissal is based on "other breaches causing serious damage or threatening to cause particularly serious damage to employer interests or assets" as provided in the first point above. The Labor Code prohibits an employer from taking action against an employee for conduct in breach of labor discipline when the act is not stipulated in the ILRs or the law. The Labor Code lists out specific violations of the employees that are directly subject to dismissal (e.g., workplace sexual harassment). If employees commit any of these violations, employers can dismiss them even if there are no ILRs. Nevertheless, the ILRs are still essential as a basis to discipline an employee. To dismiss an employee, an employer must follow complicated procedures mandated by law and bear the burden of proof. Specifically, the employer must collect all the evidence of the misconduct, and conduct a disciplinary hearing with the presence of the concerned employee and the employee's representative organization. The disciplinary hearing must be recorded in written minutes with the signatures of the attendees. After the disciplinary hearing, the employer may issue the dismissal decision.

A dismissal will be declared illegal if the employer does not strictly follow the procedures as required by law. At least five working days before the disciplinary hearing, the employer must first send a request for attendance at the disciplinary hearing to the employee and the employee's representative organization. Upon receipt, the invitees must confirm their attendance. If any of the invitees confirm their unavailability to attend the hearing, the employer and the employee must negotiate to change the time and location of the hearing. If the employer and the employee cannot reach any agreement, the employer will decide the time and location of the hearing.

The employer conducts the disciplinary hearing. The disciplinary hearing should be conducted with the attendance of the representative of the employer, the employee's representative organization (if any), the employee, witnesses (if any), the defender/lawyer of the employee (if any), and any others assigned by the employer (if any). The disciplinary hearing must be documented (recorded in minutes).

The employee is not entitled to severance allowance if they are dismissed.

15.3 By the employee

An employee can unilaterally terminate the employment contract without any reason, provided they serve a prior notice within the statutory notice period. Employees on an indefinite-term contract must give at least 45 days' notice.

An employee on a fixed-term contract may only unilaterally terminate their employment contract by providing at least three working days' notice (if the contract term is under 12 months) or 30 days' notice (if the contract term is from 12 months to 36 months).

Some special occupations specified by the government require a longer notice period. For example, a managerial position in an enterprise as defined by the Law on Enterprises is subject to a 120-day prior notice if the contract is of indefinite term or a definite term of 12 months or more.

In some cases listed in the table below, the employee does not have to serve any prior notice.

Employee is not assigned to the correct job or workplace or the working conditions are not as agreed in the employment contract.

Employee is not fully paid or paid on time the salary due as agreed in the employment contract.
Employee is maltreated; physically or verbally abused in a manner that impacts the employee's health, dignity and honor; sexually harassed at the workplace; or is subject to forced labor.
Employee reaches the statutory retirement age, unless the parties agree otherwise.
A pregnant employee may resign and give advance notice as determined by the doctor if by continuing to work, the fetus could be adversely affected.
The employer provides dishonest information that impacts implementation of the employment contract.

The employee must pay the employer earnings equivalent to the wages for the number of days not notified, if they fail to give proper notice. Violation of advance notice requirement will make the termination illegal. In such case, the employee will not be entitled to severance allowance and must pay compensation to the employer of half of one month's salary, as specified in the employment contract.

15.4 Employee entitlements on termination

All employees are entitled to the following upon the termination of their employment contracts:

- accrued salary or wages until the termination date
- accrued but unused annual leave until the termination date
- reimbursement of employee's outstanding expenses
- pro rata amount of any earned and unpaid bonus and/or commission/incentive payment(s), except provided otherwise
- any other individual contractual obligations (as set out in the employee's employment agreement, equity plans, employee handbooks, or any other terms or conditions of employment)

A termination may also trigger severance, unless:

- the employment was terminated pursuant to dismissal for cause
- the employee is terminated by the employer due to absence from work for five consecutive days without permission or legitimate reasons
- the employee resigns or is terminated when reaching the retirement age and being entitled to pension
- the foreign employee is deported or their labor contract expired
- the labor contract is terminated during the probation, or due unsatisfactory probationary work
- the employee is retrenched due to redundancy (where the employee will be entitled to job loss allowance)

Employees may be entitled to either severance or job-loss allowance, depending on the reason for the termination. Severance allowance applies to all types of termination except the above-mentioned

exceptional cases. Job-loss allowance applies to redundancy terminations. Employees are only entitled to severance or job-loss allowance if they have worked for at least 12 months.

Unemployment insurance was introduced on 1 January 2009 to replace severance and job-loss allowance. Employees are not entitled to severance/job-loss allowance for periods during which the parties have contributed to unemployment insurance.

Severance allowance is equal to half a month's salary for each year of service; while job-loss allowance is equal to one month's salary per year of service, with a minimum of two months' salary — see further at **15.9**.

15.5 Notice periods

Employer notice

Employers need a recognized legal basis to terminate employees, in addition to providing advance notice (if applicable) — see further at **15.1** and **15.2**. Again, we note that even when advance notice is not required (including the case where the labor contract automatically terminates), the employer is still required to notify the employee of the termination.

Employee notice

Employees can terminate the employment contracts without any reason. In most of the cases, for fixed-term employment contracts, the notice period is either three working days or 30 days and for indefinite-term employment contracts the notice period is 45 days — see further at **15.3**.

15.6 Terminations without advance notice

Advance notice is not required for termination pursuant to dismissal for cause. However, before dismissing an employee, an employer must hold a disciplinary hearing and undertake other statutory procedures, and the employer is required to serve the employee a decision on imposing dismissal. This means that the employee will effectively notify the termination to the employee.

Terminations under mutual termination agreements also do not require any advance notice.

15.7 Form and content of notice of termination

The law does not prescribe a specific form for notice of termination. However, we recommend that it be in writing and specify critical information such as the date notice is given and the termination date. Notice of termination from an employer should also specify the employee's entitlements upon termination.

15.8 Protected employees

The following employees have protected status under the Labor Code:

- employees who are sick or suffering from an injury caused by a work-related accident or occupational disease and are receiving medical care as instructed by a competent medical establishment (except long term sickness as provided by the law)
- employees who are on annual leave, personal leave and other leave as agreed by the employer
- female employees who are pregnant; male or female employees on maternity leave, or raising a child under 12 months
- part-time officers of the employees' representative organization

Please note that the above-listed employees are not specifically protected from redundancy under the Labor Code. Instead, the Labor Code states that these employees are protected from unilateral termination.

With regard to part-time officers of the employees' representative organization, the protection is extended to temporary transfers to another job. To unilaterally terminate, dismiss or temporarily transfer a part-time trade union officer, the employer must, in addition to complying with all the required procedures and requirements under the law applicable to a normal case, obtain the consent of the employees' representative organization. Otherwise, the employer must comply with additional formalities as required by law.

We recommend that an employer proceed with great caution when making employees with a protected status redundant as the authorities or the court could interpret the wording of the Labor Code broadly, and thus challenge the redundancy.

15.9 Mandatory severance

As noted above at **15.4**, severance or job-loss allowance is owed only in certain circumstances. Severance allowance is equal to half a month's salary for each year of service, while job-loss allowance is equal to one month's salary per year of service, with a minimum of two months' salary.

Entitlement

In all cases of termination except for the above-mentioned exceptional cases, when an employee has been employed for at least 12 months, the employer must pay such employee a statutory severance allowance equivalent to half a month's salary for each year of service. In the case of termination due to redundancy, job-loss allowance would apply instead, which is equal to one month's salary per year of service, with a minimum of two months' salary.

Severance/job-loss allowance calculation

The statutory severance payment is calculated as follows:

Severance allowance = total working time (years) x salary used as basis for computing severance x 0.5

Job-loss allowance = total working time (years) x salary used as basis for computing severance x 1 (but a minimum of two months' salary will apply)

In which:

- The total working time used as the basis for severance or job-loss allowance is the total period the employee works for the employer excluding periods during which the parties participated in unemployment insurance. Please note that on 1 January 2009, the unemployment insurance (UI) scheme was introduced. Specifically, employees will be entitled to severance or job-loss allowance for periods during which the parties did not participate in the UI scheme, such as working periods prior to 1 January 2009, or periods during which their UI contributions were suspended (e.g., during maternity leave and long-term sickness).
- If the total working time calculated as above includes any odd months, then the odd months shall be rounded up as follows:
    - for a period of up to six months, rounded up to half a year
    - for a period from over six months, rounded up to one year

Salary used as basis to calculate severance or job-loss allowance

The salary used as the basis to calculate severance or job-loss allowance will be the average salary of the last six months of service as stated in the employment contract. It includes base salary, salary allowance and supplemental benefits.

The severance or job-loss allowance and any outstanding amounts must be settled within 14 working days from the termination date. In exceptional circumstances, this period may be extended but must not exceed 30 days. These exceptional circumstances include the following:

- the employer's cessation of operation
- the employer or the employee encounters natural disasters, fire, enemy-inflicted destruction or dangerous epidemics
- the employer's organizational restructuring or technological changes; sale, lease, conversion of the enterprise form; economic reasons; acquisition, consolidation, total division, or partial division of an enterprise or a cooperative; or a transfer of property use rights or company ownership

15.10 Collective redundancy situations

Redundancy is only recognized in particular circumstances and the employer must comply with the Labor Code provisions on the grounds for termination, procedures and formalities, and compensation.

A redundancy is only recognized for the following reasons:

- organizational restructuring or technological changes
- an economic reason
- enterprise acquisition, consolidation, division or separation
- sale, lease, conversion of the enterprise form
- an enterprise's property use right transfer or ownership transfer

"Organizational restructuring or technological changes" under the Labor Code can include any of the following:

- a change to the employer's technological process, machinery, equipment associated with production or the business activities of the employer
- a change of product or product structure
- a change in organizational structure or the reorganization of employment

"Economic reason" is new grounds under the current Labor Code, which is defined as: (i) an economic recession or crisis; or (ii) the implementation of state policies for restructuring the economy or Vietnam's international commitments.

Procedure and formalities

For a redundancy, the employer must prepare a labor use plan. The plan must set out the number of employees to be retained, retrained, retired and terminated, and financial sources for the plan. In formulating the plan, the employer must consult with the employees' representative organization/group through a workplace dialogue process. The labor use plan must be notified to

the employees within 15 days from the date of approval. Once the labor use plan has been prepared, if the employer still wishes to terminate employees it must follow the following procedures:

- For redundancies involving multiple employees, the employer only has the right to terminate employment contracts after 30 days from the date of notifying the labor authority and the affected employees of the terminations.
- For a redundancy due to an enterprise acquisition, consolidation, division, or separation, sale, lease, conversion of the enterprise form, or a transfer of property use rights or the company ownership, the current employer and the next employer must implement the labor usage plan.

15.11 Claims, compensation and remedies

If the labor court declares a unilateral termination of an employment contract by the employer illegal, it would order the following remedies:

- reinstatement
- back pay of all salaries and allowances for the period the employee cannot work
- contribute to the statutory insurances for the period the employee cannot work
- at least two months' salary as compensation, but possibly a greater amount
- if the employee agrees not to be reinstated and to terminate the employment contract, the employee would be entitled to severance and an additional compensation package of at least two months' salary

With regard to the last point, in practice, most employees negotiate very high amounts to secure their agreement to terminate their employment contracts, considering the fact the employer may be ordered by court judgment to reinstate them.

15.12 Waiving claims

Mutual termination contracts can include a waiver and release clause whereby the employee waives all present or future claims against the employer, which are generally deemed enforceable as long as no statutory rights are being waived.

16 Employment implications of share sales

16.1 Acquisition of shares

Where an investor sells its equity in an enterprise, there should be no change in the identity of the employer and no legal transfer takes place merely by virtue of a change in the ownership of the employer.

16.2 Information and consultation requirements

A share sale per se does not trigger consultation or notification requirements with the employees' representative organization/labor authority or employees. However, if a share sale will result in any change to employment benefits or terms and conditions, or termination and redundancy, various consultation and notification requirements may apply, including the requirement to set up a labor use plan.

17 Employment implications of asset sales

17.1 Acquisition of assets

Frequently, a company will not wish to take over an entire target enterprise, but rather only a specific business division within it. Generally, not only will the company want to purchase physical assets or inherit contractual rights related to the division, but it will also want to retain the employees who are currently supporting it. This makes sense because the employees already involved in the business division will be familiar with the business operations. Furthermore, hiring all new employees would involve a great amount of time and cost.

17.2 Automatic transfer of employees

The acquisition of assets does not automatically transfer the employees from the vendor enterprise to the acquirer. The method for employee transfer in Vietnam is “termination and rehire,” meaning the employees will terminate their employment with the vendor enterprise and sign new employment contracts with the acquirer.

17.3 Changes to terms and conditions of employment

In Vietnam, when an employee signs a new employment contract with the purchaser, a completely new employment relationship is created. The purchaser is under no obligation to take on the terms and conditions that were offered by the seller entity to its employees, unless the purchaser agrees to do so by contract. There is no legal requirement that a purchaser offer employees the same or, taken together, similar compensation and benefits as were previously provided by the seller.

Because employees cannot be forced to sign an employment contract with any entity, however, employee consent is essential in order to complete any employee transfer. In addition, there is no collective transfer of employees in Vietnam. Instead, each individual employee must agree to be employed by the purchaser. This puts an employee in a position of power if the purchaser truly wants or needs their services.

In light of this, a purchaser may, in practice, need to offer employees terms and conditions that are substantially the same as or better than those provided by the seller. In some cases, a sign-on bonus or a retention bonus may be needed to attract and retain the employees. Otherwise, the employees may refuse to transfer to the purchaser.

17.4 Information and consultation requirements

The law does not require the transferor to obtain the consent of a local labor authority or the employees’ representative organization before the asset sale, nor does it require the transferor to give prior notice to the labor authority. Employee consent is required if employees are to be transferred, as they must agree to terminate their employment contracts with the seller and enter into new employment contracts with the purchaser. If a lay-off is to be conducted before or after the transaction, the applicable employer must comply with the requirement for consultation with the employees’ representative organization/ group and notification to the employee and the labor authority applicable to redundancies, as outlined in **15.10**.

17.5 Protections against termination

In cases where the transaction results in employee lay-offs, the law requires the applicable employer to go through a statutory set of procedures and formalities, which includes formulation of a labor usage plan, consultation with the employees’ representative organization/group and notification to the labor authority and the affected employees — see further at **15.10**. Certain employees may also have protection under the Labor Code — see further at **15.8**.

17.6 Other considerations

The parties to a transaction in the case of an employee transfer often agree that any severance or termination entitlements owed to the employees will not be cashed out upon transfer, but instead the accrued obligations will be transferred to the acquirer. However, this is not in accordance with Vietnamese law. Even if employees sign a waiver signifying their agreement to this practice and agreeing not to hold their former employer liable for the severance or termination entitlements, such waiver may not be enforceable as employees cannot contract out of their rights under the Labor Code. Moreover, if severance obligations are carried forward to the acquirer, when the employee's employment with the acquirer ends and severance is paid, the tax authority will not recognize the severance payment as such. Instead, the tax authority would consider the payment an *ex gratia* payment, subject to tax, whereas severance allowance is tax exempt.

17.7 Other information and consultation obligations

Please refer to **17.4** above.

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