

CHAPTER 12 HUMAN RESOURCES AND TRAINING

OVERVIEW

The EuroCham Human Resources and Training Sector Committee would like to express our sincere appreciation for the positive changes and the efforts taken by the Government and relevant Ministries in terms of improving regulations regarding labour, employment, and training over recent years. We fully support the increased dialogue and consultation with the business community.

Vietnam's Socio-Economic Development Strategy (SEDS) 2021-2030 defines promoting high-quality human resources/skills development as one of the three strategic breakthrough areas. The lack of necessary skills in primary industries and sectors remains the most significant challenge for Vietnamese workers, although training investment is increasing each year. Improving training, education, and the legal systems for managing labour will help meet the demand for a skilled workforce, improve productivity and promote a competitive and healthy investment environment.

We are very interested in the ongoing progress of labour quality, labour rights and labour commitment, especially since Vietnam has actively participated in global integration, signing and implementing many Free Trade Agreements (FTAs), including the EU-Vietnam Free Trade Agreement (EVFTA) with the European Union.

The EVFTA contains a robust and comprehensive chapter on Trade and Sustainable Development which deals, inter alia, with labour matters relevant to trade relations between the EU and Vietnam. The objective is to promote mutual supportiveness between trade, investment and labour policies as well as to ensure that increased business relations do not come at the expense of workers' rights. In this context, Vietnam has committed to the ratification and effective implementation of the fundamental International Labour Organisation (ILO) Conventions, of which only one remains to be ratified (Convention 87 on freedom of association). Under Decision 121¹ of the Prime Minister, such Convention will be ratified in 2023.

In order to effectively implement the EVFTA, Vietnam also needs to improve the country's working environment throughout preparations and enforcement of existing regulations (as presented in detail below) and passing new legislation.

PART 1: LABOUR AND HUMAN RESOURCES

I. LABOUR ORGANISATIONS AT ENTERPRISES AND TRADE UNION FEES

Relevant authorities: Ministry of Labour, Invalids and Social Affairs (MOLISA), and Vietnam General Confederation of Labour (VGCL)

Issue description

For the first time, Vietnam has introduced the concept of "labour organisations at enterprises" (or new labour organisations) as defined under the Labour Code 2019², came into effect as of 1 January 2021. This is alongside the grassroots trade union (or "traditional union") part of the Vietnam General Confederation of Labour (VGCL) system. EuroCham's Human Resources & Training Sector Committee (HR&T SC) appreciates this remarkable effort to align Vietnam's labour laws with global standards and uphold employees' right to "freedom of association". As assigned by the Prime Minister, since 2020 MOLISA has been drafting a decree to guide the the Labour Code 2019 regarding

¹ Decision 121/QĐ-TTg dated 24 January 2019 of the Prime Minister on the Approval of the Plan to implement the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)

² Labour Code 45/2019/QH14 dated 20 November 2019 of the National Assembly (Labour Code 2019).

employees' representative organisations at the grassroots level (Draft Decree). The Prime Minister recently issued an official letter urging MOLISA to expedite this and asked the Ministry of Justice to provide an update on the status of this document's issuance in August 2023.³ As of now, the Draft Decree has not been made available for public comments.

Potential gains/ concerns for Vietnam

Legislation on guiding the new labour organisations has been drafted for over three years and the Draft Decree hasn't been presented for public input. As a result, even the Labour Code took effect from 1 January 2021, no new labour organisation has been established due to the absence of comprehensive legal framework.

Moreover, the Labour Code 2019 doesn't clarify the relationship between a "new labour organisation" and a "traditional union", if both organisations exist within the same enterprise.⁴ In principle, since employees can choose their representative organizations freely, both types of organisations should have equal rights to represent their members. These roles would encompass all responsibilities and rights related to representation, such as (i) consulting on internal regulations, documents and processes relating to the employment relationship as required by law, (ii) attending and representing employees in communications, dialogue and discussions with the employers and with other union organisations, and (iii) collecting, utilising, and managing trade union fees and union membership fees. However, there is no provision under the Labour Code 2019 to indicate the relationship between the two types existing in the same enterprise, nor on their roles in representing employees. In the relevant laws it should be explicitly stated that the unions will have equal rights and obligations in representing the employees, depending on the ratio of their member employees, and provide mechanisms for cooperation between a "new labour organisation" and a "traditional union" in matters relating to employment relationships.

Financing for the "new labour organisations" is also ambiguous in the Labour Code 2019. Article 174 regulates that their charter must include contents on "Membership fees, source of property and finance, and its usage and management of the organisation", and that "the Government shall detail regulations of this Article".⁵ As such, it is unclear on the level of discretion that a "new labour organisation" would have in deciding its financing structure. According to the current Law on Trade Union, the employer has to contribute monthly trade union (TU) fees equal to 2 per cent⁶ of the total payroll used for the calculation of social insurance to the upper-level trade union, even if there is no trade union within their organisation. Furthermore, according to VGCL^{7,8}, an enterprise can only retain part of such an amount when there is a grassroots trade union within their organisation. This does not align with the principles of employees' freedom to collect, manage and use their financing structure.

In this light, it is important to ensure trade union laws indicate that the monthly employer-contributed trade union fees should go directly and entirely to the employees' representative organisations at a grassroots level, including both "new labour organisations" and "traditional unions", and the funds should not be shared with the upper-level traditional trade union. These funds should also be distributed between each union organisation based on the ratio of member employees it represents. The employees' representative organisations at the grassroots level should have the right to use the entire trade union fees contributed by employers and union membership fees contributed by their member employees. Furthermore, if no employees' representative body exists yet, employers should hold onto the trade union fees and then transferred to the corresponding employees' representative organisations once such organisations are established. The trade union fees borne by the employer should be revised by carrying out an actual survey of the opinions of enterprises, balancing the budget of the trade union system and considering reducing the rate from 2 per cent to 1 per cent of the payroll of local employees used for the calculation of social insurance; and the payroll of foreign employees should not be used as a basis to calculate monthly trade union fees.

3 Official Letter No. 692/TTg-PL dated 31 July 2023 of the Prime Minister

4 Clause 3, Article 3, Labour Code 2019.

5 Section g, Clause 1, Article 174, Labour Code 2019.

6 Clause 2, Article 26, Law on Trade Union 12/2012/QH13 dated 20 June 2020 of the National Assembly (Law on Trade Union).

7 Decision 1908/QĐ-TLĐ dated 19 December 2016 of the VGCL on Promulgation of Regulations on Management of Trade Union Budget, the Trade Union Assets, Collection and Distribution of Revenues, Rewards and Penalties Related to Trade Union Revenues and Expenditures.

8 Guidance 2212/HD-TLĐ dated 6 November 2018 of the Vietnam General Confederation of Labour (VGCL) on preparation of 2019's Trade Union Financial Estimates.

Recommendations

We would like to make the following recommendations:

- Announce the Draft Decree for public feedback.
- Clarify the role and relationship when both a “new labour organisation” and a “traditional union” coexist within a same enterprise in guiding regulations of the new Labour Code 2019 and the amended Law on Trade Union.
- Amend the financing regulations for both types of organisations to ensure clarity, prudence, equality and correctly reflect the rights of employees’ representative organisations.

II. WORK PERMITS FOR FOREIGN WORKERS

Relevant authority: Ministry of Labour, Invalids and Social Affairs (MOLISA)

Issue description

We commend the efforts of the Government’s and MOLISA in releasing Decree 70⁹ which amends Decree 152¹⁰ regarding work permits for foreign workers. This change has simplified the work permit application process, notably by (i) loosening the definitions of “expert” and “technician”, (ii) recognising a prior work permit as evidence for work experience, (iii) reducing the time for submitting foreign labour demand report, and (iv) providing more exemptions from obtaining a foreign labour demand approval. These modifications may expedite the work permit application process.

Yet, Decree 70 introduces additional challenges in the work permit application, such as new job post requirements, complex documentation for managers/ executive directors, and ambiguity in the roles of MOLISA and Departments of Labour, Invalids and Social Affairs (DOLISAs) in granting work permits. These challenges warrant immediate review and rectification.

Potential gains/concerns for Vietnam

First, from 1 January 2024, Decree 70 mandates employers to post a recruitment notice for Vietnamese candidates for roles that foreign employees are anticipated to fill on MOLISA or Employment Service Centre (ESC)’s website or relevant governmental portals at least 15 days before filing a foreign labour demand report. This new requirement adds another layer to the process, lengthening and complicating the application procedure, which could hamper business operations, especially when there is a pressing need for employing foreign employees.

Second, Decree 70 demands more intricate documentation to validate Manager/ Executive Director positions. Previously, depending on the requirements of each local DOLISA, the sponsoring entity can provide a certified copy of the establishment license or a document confirming the Manager/ Executive Director position or the enterprise charter to prove that the foreign employee is the Manager/ Executive Director. However, now three specific documents are mandated, including: (i) company charter or operating regulations; (ii) enterprise registration certificate or establishment certificate or establishment decision or other equivalent legal documents; and (iii) resolution or appointment decision. This requirement is not only cumbersome compared to prior practice but also impractical for entities because (i) several types of employers such as representative offices or branches do not have their own charter or operating regulations, and (ii) an establishment certificate normally states the name of the legal representative and/or the head of the organisation only, without mentioning other executive positions. Thus, the required documents for branches or representative offices should be more simplified.

⁹ Decree 70/2023/ND-CP dated 18 September 2023 of the Government on amending Decree 152/2020/ND-CP on foreign workers working in Vietnam and recruitment and management of Vietnamese workers working for foreign employers in Vietnam (Decree 70)

¹⁰ Decree 152/2021/ND-CP dated on 30 December 2021 of the Government on foreign workers working in Vietnam and recruitment and management of Vietnamese workers working for foreign employers in Vietnam (Decree 152)

Third, Decree 70's clarity on which body, MOLISA or local DOLISAs, has the authority to issue work permits remains ambiguous. Although Decree 70 provides that (i) MOLISA will grant work permits to foreign workers working for employers having their licenses issued by the Government, the Prime Minister, ministries or central authorities (for example: banks which are licensed by the State Bank of Vietnam, insurance companies which are licensed by the Ministry of Finance etc.); and (ii) local DOLISAs will grant work permits for the remaining cases.

Decree 70 is also unclear on whether MOLISA or DOLISA will have the authority to grant work permits if the employers having both licenses issued by central authorities and an enterprise registration certificate issued by the local Department of Planning and Investment.

This lack of clarity, coupled with the need for physical submission, can lead to unnecessary travel time and expenses for organisations seeking permits from MOLISA.

Recommendations

We would like to make the following recommendations to streamline the work permit application in Vietnam:

- Forego the recruitment post prerequisite before submitting foreign labour demand reports.
- Simplify required documentation for Manager/ Executive Director position at branches and representative offices.
- Allocate the authority to local DOLISAs to issue work permits in all scenarios.

III. EXPANSION OF TERMINATION RIGHTS FOR EMPLOYERS

Relevant authority: Ministry of Labour, Invalids and Social Affairs (MOLISA)

Issue description

Vietnam's labour regulations tend to favour employees, particularly concerning employment termination rights. Employees can easily end their contracts unilaterally, often without a reason or without proper notice in some cases.¹¹ While the Labour Code 2019 has extended circumstances where employment can be terminated and bolstered employers' rights, these rights remain limited. It is imperative to revisit and refine certain labour law provisions, especially those pertaining to redundancy terminations and dismissals for cause.

Potential gains/ concerns for Vietnam

Redundancies

Both the previous and current Labour Code dictate that retrenchment should be based on limited legal grounds, such as changes to the organisational structure or technology or economic reasons. In reality, reasons for redundancies are more varied than what's prescribed by law. Redundancy due to business optimisation activities is not clearly provided as a justifiable termination ground under the law, while it is a common basis for redundancy in various companies. For example, if a foreign-invested company decides to shift their management position from Vietnam-based to regionally-based for centralised management and optimisation of their personnel system, certain employees will no longer report to a Vietnam-based manager, but directly to management personnel in the region. This business optimisation activity results in the redundancy of the Vietnam-based manager's position, and thus triggers the need to retrench the position due to redundancy. This kind of business optimisation isn't explicitly recognised as valid grounds for redundancy. Such terminations risk legal challenges.

In general, we have observed that the authorities and courts would view an organisational restructuring as the elimination or change/restructuring of certain unit(s) within the organisational structure/chart of the employer, resulting in the elimination of the employees' job positions. For business optimisation activities, the company/

¹¹ Section dd, Clause 1, Article 5, new Labour Code.

employer, however, may not undergo any actual or structural changes; nor the elimination of any department(s)/ unit(s). Thus, in such cases, businesses would encounter difficulties in justifying their retrenchment.

Further, both the former and current Labour Code only address retrenchment as a mass lay-off which “affects multiple employees” (i.e., 2 or more employees). Therefore, this only sets out the procedures for the retrenchment of multiple employees. However, there is no guidance on the procedure for making one employee redundant, which leads to different interpretations of several authorities on the retrenchment procedure of one employee. Some authorities uphold the redundancy of one employee as long as the procedures strictly follow those applicable to multiple employees. On the other hand, others find that the redundancy of one employee is illegal since this procedure is not provided under the law.

Dismissal

Nowadays, termination for cause or “dismissal”, resulting from an employee’s misconduct is happening more often and in a more sophisticated way. The Labour Code 2019, however, restricts dismissals to specific acts of misconduct, excluding many scenarios companies encounter.¹²

While former and current Labour Code do allow an employer to dismiss an employee based on the extent of damages caused, there is no clarity on what constitutes “seriously detrimental” or “posing a seriously detrimental threat”. This vagueness leads to varied interpretations by local DOLISAs during the registration of internal labour regulations, making the application of dismissal more difficult in practice. Moreover, for many acts of serious misconduct, it is not possible to prove material financial damages.¹³

Furthermore, the limited time frame to gather evidence and complete disciplinary actions, especially for covert misconducts, poses significant challenges for employers. The statute of limitations for settling a labour disciplinary action varies from six to 12 months from the date the misconduct occurred. An employer must gather evidence, hold a disciplinary hearing, and issue a dismissal decision within this limitation period. The general limitation period applicable to employee misconduct is six months. This is extended to 12 months where the act of misconduct is directly related to finance, assets, and disclosure of technological or business secrets. This statute of limitations is problematic because employees carry out their acts of misconduct in a secretive manner, so the employer only learns about it after the limitation period has already expired. Another problem is that it often takes a considerable amount of time to gather evidence of the employee’s misconduct, and employers have difficulty completing all the disciplinary procedures within the limitation period.

Recommendations

We would like to make the following recommendations:

- Revise regulations to recognise retrenchments stemming from a company’s business optimisation activities.
- Introduce a provision that allows retrenchment of one employee given the company adheres to legal procedures applicable to retrenchment of multiple employees.
- Expand the scope of acts of misconduct subject to immediate dismissal, such as fraud, giving or receiving bribes or kickbacks or aggressive, hostile, and violent behaviour or having violated the internal safety rules which lead to potential risk to human life.
- Extend the statute of limitations for settling labour disciplinary actions from 12 months to 24 months¹⁴ and this period should commence from the date the employer becomes aware of the misconduct.
- Provide clear benchmarks to determine what qualifies as “seriously detrimental” or “posing seriously detrimental damages”, potentially by specifying a monetary threshold.

12 For instance, acts of aggression and hostility, fraud, giving or receiving bribes or kickbacks and violent behavior (including intimidation, attempts to instil fear in others or subjecting others to emotional distress) should also be subject to dismissal.

13 For further analysis, please refer to the Human Resources & Training Chapter, EuroCham’s Whitebook 2020. Available at: <www.eurochamvn.org/whitebook2020>, last accessed on 30 December 2020.

14 Law on Cadres and Civil Servants No. 22/2008/QH12 of the National Assembly dated 13 November 2008.

IV. SOCIAL INSURANCE CONTRIBUTIONS FOR FOREIGN EMPLOYEES

Relevant Government authorities: Ministry of Labour, Invalids and Social Affairs (MOLISA), and Vietnam Social Security (VSS)

Issue description

As stipulated in Article 2.2 of the Law on Social Insurance¹⁵ and Article 2 of Decree 143¹⁶, from 1 January 2018, foreign employees in Vietnam are mandated to contribute to Social Insurance (SI) if they possess a valid work permit or practicing license and have a labour contract of at least one year. This SI scheme for foreigners parallels the one of Vietnamese citizens, encompassing five areas: sickness, maternity, labour accident, pension, and survivorship allowance. While contribution of the first three short-term regimes (sickness, maternity, and labour accidents) began on 1 December 2018, the latter two long-term regimes (pension and survivorship allowance) kicked in from 1 January 2022.

Foreign employees can claim a lump-sum SI allowance for the contribution period upon ending their contract or when their work permit expires, provided they no longer reside or work in Vietnam. This allowance and the process to claim it resemble the provisions for Vietnamese employees. However, the SI rules and claim procedures applicable for foreign employees appear impractical and warrant a review.

Currently, MOLISA is drafting an amendment to the Law on Social Insurance, scheduled for National Assembly's approval in 2024 (Draft SI Law). Regrettably, this Draft SI Law seems to retain the existing regulations on foreign employees' social insurance.

Potential gains/concerns for Vietnam

Mandating contributions to all five SI regimes may not be equitable or feasible for foreign employees who continue contributing to their home countries' SI. While the Government has been negotiating several bilateral agreements recognising social security contributions with certain countries and signed the social security totalization agreement with several countries (such as South Korea), none takes effect. This leads to augmented costs for both employers and employees, coupled with administrative hassles.

Furthermore, even if the Government could secure more bilateral agreements, they won't cover all nations from which foreign employees originate. Typically, foreign employees work in Vietnam for limited durations, often due to stringent oversight when Vietnamese authorities assess and approve labour quotas prior to work permit issuance. Although Decree 143 suggests these employees can request a lump-sum payment before departing Vietnam, the associated procedures will amplify administrative burdens for all parties involved. Also, the requisite documentation for foreign nationals, mandated to be translated into Vietnamese and notarised, can be lengthy.

These challenges, in terms of heightened costs and administrative hurdles, could detract from Vietnam's appeal as an investment destination.

Recommendations

The Draft SI Law should provide for the followings:

- Making contributions to the pension and survivorship regimes voluntary for foreign workers.
- Introducing a bilingual template for the lump-sum SI allowance application and facilitate online submission of the related application dossier.

¹⁵ Law on Social Insurance No. 58/2014/QH13 of the National Assembly dated 20 November 2014 (Law on Social Insurance).

¹⁶ Decree 143/2018/ND-CP dated 15 October 2018 of the Government elaborating on Law on Social Insurance and Law on Occupational Safety and Hygiene regarding Compulsory Social Insurance for Employees who are Foreign Nationals Working in Vietnam (Decree 143).

PART 2: EDUCATION AND TRAINING

I. STRATEGIC ENHANCEMENT OF EDUCATION AND TRAINING IN VIETNAM FOR A PROSPEROUS DIGITAL ECONOMY

Relevant Government authorities: Ministry of Education and Training (MOET), Ministry of Labour, Invalids and Social Affairs (MOLISA)

Issue description

Quality Technical Education

Quality technical education is pivotal, and the necessity of imparting essential skills that align with workplace demands cannot be overstated. This implies the necessity to maintain a reservoir of skilled educators and propagate an environment conducive to learning and growth. It involves the incorporation of progressive teaching methodologies and the embracement of IT skills and e-learning as crucial elements in the education landscape to sustain a well-trained and adept workforce.

Advocating Gender Diversity in Technical Disciplines

To truly realise a strong and diverse workforce in the tech industry, it is crucial to identify and address gender disparities within technical fields. Proposed legislative measures should encourage more girls in Vietnam to enter into disciplines during primary and secondary school which will lead them to tech careers.

Executive Education: The Catalyst for Change

The growth trajectory of Vietnam is intricately linked to foreign capital, emphasizing the quintessential subjects of “Added Value” and “Competitive Advantages.” The resolutions from the XII and XIII Congresses in 2016 and 2021 have delineated the strategic framework for transforming the historical model of business development in Vietnam. The executive education programs, offered by universities, business schools, and specific companies, serve as critical channels for enhancing the quality/ value of products/ services and are synonymous with the government’s priorities of “Added Value.”

Potential gains/concerns for Vietnam

Addressing the metamorphic effects of rapid digital development on the employment landscape is a complex endeavour. The wave of digital transformation is perceived as a double-edged sword, where on one side, it can lead to employment alterations, and on the other, it allows industries to gain a strategic advantage if effectively harnessed. Regions that cultivate strong educational infrastructure will have the capability to reap substantial benefits from digitization in the coming years.

Vietnam, with its high secondary enrolment rates, experiences a stark contrast when it comes to the pursuit of higher education, lagging significantly behind regional peers. The education quality, despite improvements, remains relatively low and is incongruent with the skills necessitated by the transforming economy. The education sector is yet to attain the targeted state budget spending of 20 per cent, with the total education expenditures between the public and private sectors remaining equivalent over the years.

Recommendations

We would like to make the following recommendations:

- Promulgate Gender-Inclusive Policies: Support legislative measures to create an environment that is conducive to learning and free from gender bias in tech-related subjects from an early age.
- Foster Extracurricular Technological Programs: Encourage programs focusing on technology and coding to develop interest and passion among girls in the field.

- Enhance Accessibility to Resources: Offer equal learning opportunities, scholarships, and incentives to facilitate and motivate girls to explore technical disciplines.
- Create Synergy with Tech Corporations: Leverage partnerships for facilitating
- Embrace and Customize Executive Education: Implement non-degree courses, aligning with market needs and offered at local pricing, to advance resolutions of the XII and XIII Congresses effectively.
- Elevate Education Quality and Accessibility: Aim for the attainment of the government's targeted education sector expenditure and elevate tertiary gross enrolment rates to align with regional counterparts.

II. PROMOTION OF EDUCATIONAL EXCELLENCE AND TECHNOLOGICAL INNOVATION

Relevant Government authorities: Ministry of Education and Training (MOET), Ministry of Labour, Invalids and Social Affairs (MOLISA)

Issue description

In line with Section II of the Labour and Human Resources part above, the international school sector is particularly vulnerable to hurdles and lack of clarity regarding work permits, both its customer base and for the teachers and school employees. Vietnam has done an excellent job in recent years in inviting FDI in the education sector. These institutions depend on a balance of Vietnamese and international students to provide the quality educational experience Vietnam seeks. We thus concur and reiterate Section II as it relates to the education and training sector, and hope Vietnam will continue to be an attractive destination for FDI investors and their families, as well as experienced and dedicated educators. Air quality also remains a concern for the education sector, for students and educators of all ages, and a deterrent to international families moving to Vietnam.

Potential gains/concerns for Vietnam

Vietnam's impressive, continued development can be reinforced through the intertwining of strong internet connectivity, competent skills development, investment in quality education, and dynamic governmental policies. The sturdy framework of a resilient digital economy is underpinned by secure and stable Internet connectivity, serving as its central nervous system. This infrastructure is crucial, delivering connectivity through 4G/5G mobile networks and fibreoptic networks to schools, corporations, and urban and rural communities. However, addressing and resolving the aspects of accessibility and affordability are vital to eschew the risk of a digital divide, ensuring that all segments of the population can benefit from digital advancements.

By meticulously implementing our extensive recommendations, Vietnam can significantly augment its educational ecosystem, leading to the cultivation of a technologically proficient and diversified workforce, thereby solidifying its position as a beacon of educational excellence in the rapidly evolving digital landscape.

Recommendations

We would like to make the following recommendations:

- Streamline Work Permit Procedures to support the continued inflow of qualified foreign workers and their families
- Augment Network Infrastructure: Enhanced nationwide connectivity and equitable access to 4G/5G networks are fundamental to avoiding a digital divide.

- › Fortify Regional and Provincial Cooperation: Encourage local authorities to collaborate with local digital competence centres to extend support widely.
- › Elevate Local Teacher Capabilities: Initiate collaborations with international institutions for teacher training and professional development, fostering an environment conducive to lifelong learning.
- › Prioritize Environmental Health: Enhancement of air quality in financial centres will accentuate the attractiveness of the education sector, promoting fruitful international collaborations.

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EuroCham Human Resources & Training Sector Committee

