

You're fired: terminating employees under Vietnam's Labor Code

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One of the many reasons Vietnam is an attractive destination for foreign investment is its abundant and economical labor force. However, one matter to keep in mind when planning and designing an employment implementation scheme is the challenge of terminating employees. While the Labor Code of Vietnam, enacted in 1994 and amended in 2002 and 2007, provides methods for termination both by the employee and employer, termination by the employer is quite difficult.

This short note focuses on unilateral termination of labor contracts for purposes other than serious and criminal violations. We will briefly touch on

unilateral termination by the employee; and then discuss termination rights of the employer with a focus on: termination for poor performance; organizational restructuring or technology changes of a company; and merger, consolidation, division, separation or transfer of the ownership, management right or right to use the assets of a company. We conclude the article with practical suggestions for successfully ending an employee-employer relationship.

Unilateral termination by employee

The Labor Code provides that either party to a labor contract may terminate the contract, however, it is much easier for an employee to do so.

Generally, if there is no cause for termination, an employee with an indefinite term contract may terminate the contract unilaterally at any time provided the employee gives the employer 45 days prior notice¹. The employee may face penalties and restrictions when leaving earlier than the notice period including: no severance allowance, compensating the employer, and compensation for costs of any relevant training².

When there is due cause for termination, an employee may terminate a labor contract, both definite and indefinite, unilaterally with an advance notice period between three to 30 days only, depending on the seriousness of such cause. Causes

¹The Labor Code distinguishes between: (i) "seasonal" labor contracts for a specific or seasonal job with a duration of less than twelve (12) months; (ii) "definite" labor contracts, where the two parties determine the term and the time for termination of the validity of the contract for a period of twelve (12) months to thirty six (36) months; and indefinite labor contracts, where the two parties do not determine the term and the time for termination of the validity of the contract.

² We note in a draft Labor Code currently under consideration, such costs are limited to the training costs agreed in the training contract and entered into by the two parties.



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Gide Loyrette Nouel has been present in Vietnam since 1994 and was the first French law firm to be permitted to set up a formal branch office in the country.

for unilateral termination by an employee include: not being paid as specified in the labor contract; maltreatment or forced labor; receiving treatment for illness (over specific periods of time depending on the duration of a labor contract); inability to continue performing the contract for personal or family reasons; appointment or election to public office.

Unilateral termination by employer for poor performance

The most commonly attempted form of unilateral termination in Vietnam is through “poor performance”. Indeed the Labor Code provides that an employee may be terminated when cumulative conditions are met indicating “poor performance”. Such conditions include: (i) failure to perform assigned work levels or tasks due to the employee’s own consciousness rather than external elements; (ii) a written reminder must be given to the employee or the failure recorded (in such case the employee must be informed of such record) at least twice within one month; after which the employee does not remedy the failure. Furthermore, levels constituting failure to perform work must be recorded in his/her labor contract, the company’s collective labor agreement or the company’s internal labor rules. We note that several companies do not have internal rules or collective labor agreements, which poses a problem to evidence “poor performance” when attempting to terminate an employee.

Once the above cumulative conditions have been satisfied, the employer must convene the executive committee of the relevant trade union to reach an agreement; if there is no agreement, both parties will submit a

report to the local Department of Labor, War Invalids and Social Affairs, or DoLISA for short. Thirty days from the date of notification to DoLISA, the employer may issue a decision of termination. The employer must provide notice of termination to the employee 45 working days for an indefinite term contract; 30 working days for a definite term contract (12 months to 36 months); and three working days for all other contracts.

In practice, termination for “poor performance” is quite difficult. For example, in a case which went before the Court of Ho Chi Minh City, a Korean national, “Mr. T”, was employed as a ship captain for Company HV in Vietnam. His labor contract stated that his working time would be based on the “working situation of Company HV” and that the Company was entitled to terminate the labor contract if Mr. T did not comply with instructions of the Company. After five years on the job, Company HV instructed Mr. T to sail a ship to a port for repair. Mr. T did not comply with this instruction and vacated the ship. Company HV issued a notice of immediate termination of the labor contract without giving prior notice as required by law. The Court considered that although Company HV had due cause for termination of the labor contract having listed a definition for “poor performance” in the labor contract, the termination was nonetheless illegal since Company HV did not give prior notice to Mr. T. Company HV was ordered to compensate Mr. T for wrongful termination.

In the event an employee is terminated for poor performance, the employee is entitled to severance payment equal to half a month’s salary plus any wage allowance per each year worked,

calculated at the average salary during the six months immediately preceding the termination. The severance allowance and any outstanding amounts must be settled within seven days from the date of termination (this period may be extended exceptionally by up to 30 days)³.

Lay-offs

The Labor Code also permits that an employer may unilaterally terminate labor contracts in cases in which technology or process leads to an increase in productivity but requires less labor; and in which the re-organization of the structure of a company eliminates the need for labor⁴.

However, a procedure must be followed in order to terminate labor contracts in such a case. First, the employer is responsible for the occupational retraining of terminated employees who have worked for at least 12 months, in order to be employed in new jobs⁵. An agreement with the executive committee of the trade union regarding the employees whose contracts are to be terminated must be executed (a similar procedure to that of poor performance). A termination notice must be given to the local labor authority and immediately upon giving such notice the termination can be implemented. Advance notice to the employee is not required but an allowance for loss of work must be provided: one month salary for every year employed with a minimum of two months’ salary.

An example of a termination for organizational restructuring took place in 2004, when the security department of a foreign invested soft drink company, “DrinkCo”, was dissolved to limit operational costs, and security services were outsourced from a

³ Excludes time after January 1, 2009 (unless the employer has not contributed towards an unemployment fund on behalf of the employee).

⁴ Currently, an economic crisis is not a permitted circumstance however under the new draft Labor Code it is, provided that certain methods are implemented prior to termination.

⁵ There is no definition of the extent of “occupational retraining.” The law does not provide specifications (time, method, content etc.) therefore it is difficult to implement and can easily lead to disputes.

professional security company. DrinkCo paid a loss of employment allowance higher than required for organizational restructuring. The relevant employees still took legal action against DrinkCo for illegal unilateral termination. The employees argued that the security department was still part of the company and not part of an organizational restructuring and thus the termination was wrongful. After a series of appeals, the final review court rejected the claims of the employees explaining the dissolution of a security department is allowed by law as part of organizational restructuring. DrinkCo re-arranged the personnel in all sections in the company, with no new jobs created.

In the event of a merger or acquisition of a company the succeeding employer must continue to perform the employees' labor contracts. If it is not possible for all employees to be reassigned to a new job, a comprehensive plan for labor usage must be drawn up and include: (i) the number of employees who will be employed, retrained, retire and whose labor contracts will be terminated; and (ii) the respective responsibilities of the former and succeeding employers regarding employees' rights.

The succeeding employer will participate with the executive committee of the trade union in preparing the labor usage plan. The new draft Labor Code explicitly places the responsibility of drawing up this plan on the succeeding employer. The State administrative body in charge of labor at the provincial level must be notified, when the plan is implemented.

The applicable allowance for an employee's labor contract being terminated in this scenario is the equivalent to one month's salary for every year employed with a minimum of two months' salary.



Production of garment items in Viet Thanh joint-stock company, Thanh Hoa city.
Photo: Dinh Hue/VNA

This is a relatively untested method of termination.

Unlawful termination

As noted above, even with some cause for termination, the labor courts will not rule in favor of the employer unless all elements necessary for termination are met. The penalties and consequences for "illegal termination" are quite severe.

If an employer is found to have unlawfully unilaterally terminated a labor contract, the employer must: re-employ the employee to the position stipulated in the signed labor contract; pay compensation equal to the amount of salary and allowances (if any) for the period that the employee was not allowed to work; and pay at least two months' salary and allowances⁶.

In case an employee does not wish to return to work, the employer must pay the severance allowance and the compensation amount mentioned above. If the employer does not wish to re-employ the employee, in addition to the above compensation, the two parties must agree on an additional compensation amount for the

employee. If the employee does not agree, the employer must re-employ him/her.

Practical Advice

The option of unilateral termination must be considered very cautiously by the employer. When drafting the labor contract, special attention must be paid to describing tasks assigned to the employee. Further, unequivocal and supportive evidence and an obvious breach must be identified as well as meticulously following the relevant procedure for termination. It is important to keep in mind that legal proceedings brought as a result of a contested termination may be more costly and likely to affect an employer's reputation. Unilateral termination carries the risk that a court could subsequently declare the termination illegal (weak evidence and/or breach of the step-by-step mandatory procedure).

The alternative option of negotiation is therefore highly recommended. Mutual agreement with compensation for the employee could potentially save time, money and legal risks for the company. □

⁶ The new draft Labor Code makes a minor amendment to this provision by differentiating between the types of contracts (two months' salary for fixed and indefinite term contracts; and one month's salary - for seasonal work or a contract for a specific job of under 12 months).