



LAC DUY & ASSOCIATES

# NEWS LETTER 07/2023

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**NEED TO PREPARE FOR A  
SCENARIO THAT SENIOR  
EXECUTIVES MAY BE  
DISMISSED**

**DRAFT ON PRECEDENT NO  
12/2023 – DECISION ON  
ARBITRATION JURISDICTION  
OF COMMERCIAL  
ARBITRATION REGARDING  
CONFIDENTIALITY AND NON-  
COMPETITION AGREEMENTS**

**NEW POINTS OF LAW ON  
IMPLEMENTATION OF  
GRASSROOTS-LEVEL  
DEMOCRACY 2022 RELATING  
TO EMPLOYERS WHO ARE  
ORGANIZATIONS**

# NEWSLETTER

## 07/2023




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Dear Clients,

**Lac Duy & Associates would like to send you the legal newsletter of July 2023 with some notable updates and articles as follows:**

- Need to prepare for a scenario that senior executives may be dismissed
- New points of Law on Implementation of Grassroots-Level Democracy 2022 relating to employers who are organizations
- Draft on precedent No 12/2023 – Decision on arbitration jurisdiction of commercial arbitration regarding confidentiality and non-competition agreements
- Legal Document in 07/2023



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**The ultimate purpose of the dismissal decision is to terminate the labour contract with the employee who violates the discipline, so the enterprise needs to act cautiously and properly to avoid unnecessary confrontation with the disciplined person and possible large compensations from unlawful dismissal procedure.**

### **Need to prepare for a scenario that senior executives may be dismissed**

**By Quynh Chi**

*The article was published on The Leader dated 20 July 2023*

This is the warning given by Ms. Lac Thi Tu Duy, Managing Partner of Lac Duy & Associates when referring to the noisy lawsuits that have occurred recently when enterprises were sued by employees for being dismissed in violation of the law. In fact, it is common to find judgments favouring the employees rather than those on the side of the employers.

#### ***What are the common reasons leading to the dismissal of senior executives that you have witnessed?***

**Lawyer Lac Thi Tu Duy:** During my practice of consulting or resolving disputes between enterprises and senior executives, I have found that behaviours causing conflicts of interest is the most common reason leading to enterprises having to dismiss their senior executives. In particular, I emphasize the two behaviours: (i) Disclosure of enterprise secrets and (ii) Establishment of "backyard" enterprises.

These two behaviours of senior executives always damage and threaten to cause direct and huge damage to enterprises. And obviously, this is a taboo for the enterprise's owners.

Once it is discovered that there is a violation by senior executives related to these acts, conducting dismissal, terminating the labour relationship as quickly as possible is the purpose of many enterprise owners. In addition, according to the provisions of Article 125 of the Labour Code 2019, these acts can all be the basis for consideration of labour discipline in the form of dismissal.

#### ***How can these acts of violation of senior executives be done?***

**Lawyer Lac Thi Tu Duy:** In an enterprise, the higher a person's position is, the more likely he is to have access to the secrets of the business.

With this in mind, some rival enterprises with unfair competition practices have offered better salaries, remuneration policies or other benefits to invite/bribe senior executives of rival enterprises to obtain secrets that are beneficial to themselves or harmful to their rivals.

Meanwhile, a "backyard" enterprise can be understood as an enterprise established in which senior executives, through their confidants or family members, conduct business acts with business lines related to the enterprise they are leading, make opportunity for these enterprises to become suppliers, contractors of the company, thereby acquiring benefits from the enterprise unequally compared to other partners and causing damage to the company.



In many cases, these enterprises are even the competitors to the company, holding a competitive advantage or sharing benefits in enterprise activities by obtaining internal information from the enterprise or the benefit from the decisions of these executives.

*Starting from the fault of the employee, but as you once shared, the majority of judgments in labour discipline disputes in the form of dismissal in which the employee wins are often higher than those in which the advantage is in favour of the employer. What is the reason?*

**Lawyer Lac Thi Tu Duy:** Part of the reason is that the majority of lawsuits have plaintiffs who are employees. In fact, employees often research and consult quite carefully with their lawyers or people who have knowledge about labour law before deciding to sue for illegal dismissal of the enterprises. On the other hand, many enterprises are often in a passive position when they receive the court's notices of the petitions. As the dismissals have already been done, the need-to-do job for the employers at this time

is just trying to find the appropriate legal bases to defend their decisions.

For disputes related to the dismissal of senior executives, the rate of cases in which enterprises are the plaintiffs is usually higher, because the dismissals of these employees often involves claims for compensation to the enterprises.

However, the reality shows that, not because of "changing role" to become the plaintiffs, the winning rate of the employers is higher than that of the employees. The reason lies in the fact that enterprises often have difficulties in proving actual damages from the violations of employees as well as difficulties in convincing the trial panels of the reasonableness and accuracy of their compensation claims.

Not to mention, before that, in order to bring a dispute over compensation for damage from the labour relationship to the court, a enterprise needs to go through the procedure according to the labour law on determining the compensation for damage in the labour relationship according to Article 129, Article 130 and Article 131 of the Labour Code 2019. Ignoring or improperly performing this procedure, the employer's petition for lawsuit may be dismissed by the court.

Unlike civil relations in general, in labour relations, when there is a dispute about illegal dismissal, even if as a defendant, the burden of proof always belongs to the employer, that is, the enterprise must show that the dismissal is completely legal, as a basis for the court to consider and accept. This is something that not all enterprises can do when disciplining employees in the form of dismissal.

On the side of the court, when adjudicating disputes related to the decision to dismiss employees (including employees who are executives) of enterprises, besides examining the grounds of the dismissal decision, the consideration of the employer's compliance with legal procedures is always a top priority. The omission or improper performance of one of the steps required by law can easily serve as the basis for the court to declare an illegal dismissal.

Not to mention, in many cases, besides complying with the requirements on the order and procedures for dismissal, proving the actual damage suffered by the enterprise from the employee's violation becomes a mandatory requirement for considering whether or not this decision to discipline the employee is lawful. In other words, if the enterprise fails to show the actual value of damages from an employee's

violation as the basis for the dismissal decision, it is likely that the court will consider it as an illegal dismissal. For example, in a dispute related to the disclosure of enterprise secrets, the court often requires the enterprise to prove how much money the enterprise has suffered from the violation of the dismissed senior executives.

Meanwhile, besides material damages, what enterprises care about also includes image, reputation with partners, internal stability of the enterprise are affected by violations of senior executives.



*The conduct of discipline, especially the discipline of dismissing senior executives who are Vietnamese and those who are foreigners, is there any difference that should be noted?*

**Lawyer Lac Thi Tu Duy:** The conduct of labour discipline in general and labour discipline in the form of dismissal in particular against an employee in an enterprise requires the participation of a representative organization of employees (i.e. trade union) in many related procedures. However, according to the law, foreign employees will not be allowed to join trade unions of Vietnam. Therefore, when imposing labour discipline for senior foreign executives in Vietnam, including dismissal, the law does not require the participation of internal trade union representatives.

In addition, in enterprises, the disciplinary dismissal of senior personnel who are also members of the trade union executive committee requires complicated procedures and processes in accordance with Labour Code 2019 and Law on Trade Union 2012. This will likely cause enterprises to "falter" and hesitate when making related decisions. However, for foreign employees, the Trade Union Law 2012 does not allow them to join the executive committee of the Trade Union in Vietnam. Therefore, enterprises will not have to worry about the complicated process and procedures for terminating labour contracts like when it comes to Vietnamese employees.

Another point for noting when employing foreign employees (including senior executives) is that besides the labour contract, the employee must have a work permit (except for the case specified in Article 154 of Labour Code 2019). According to the labour law, the labour contract with foreigners will terminate when the work permit expires. As a lawyer, I consider that the provision of duration of the contract depends on the duration of the work permit is a clear advantage for enterprises in employing senior foreign employees.

Specifically, when there is a conflict situation between the two parties and deems it necessary to terminate the labour relationship, the employer only needs not to extend the work permit when it expires.

In addition, because the maximum duration of the work permit is only two years, in case the enterprise "carelessly" dismiss or unilaterally terminate the labour contract illegally, the damages suffered by the enterprise will generally be much lighter than the illegal dismissal of a Vietnamese senior executive with an indefinite-term labour contract.

### *What advice do you have for enterprises in dismissing senior executives?*

**Lawyer Lac Thi Tu Duy:** Dismissal is the most severe form of labour discipline that the law allows enterprises to apply when imposing disciplinary measures. Experience shows that the more severe a discipline measure is applied, the more careful and thoughtful movement is required on the part the enterprise to avoid or reduce the risk of confrontation between the disciplined person and the enterprise. Meanwhile, the last purpose of the dismissal decision is to terminate the labour contract with the employee who violates the discipline.

To this end, the employer may apply other “softer” measures, including agreeing to terminate the contract without taking any disciplinary action against the employee. Risky options are always at the bottom of the priority list.

However, like it or not, preparing for a scenario in which a senior executive committing violation is dismissed becomes inevitable and necessary in every enterprise.

### NEW POINTS OF LAW ON IMPLEMENTATION OF GRASSROOTS-LEVEL DEMOCRACY 2022 RELATING TO EMPLOYERS WHO ARE ORGANIZATIONS

Currently, the implementation of democracy is scattered across various legal documents, including:

(i) Law on Democracy at the grassroots level in communes, wards, and towns in 2007 (expired on July 1, 2023); (ii) Decree No. 04/2015/ND-CP on the implementation of democracy in the activities of state administrative agencies and public non-business units; (iii) Decree No. 145/2020/ND-CP detailing and guiding the implementation of certain provisions of the Labour Code regarding labour conditions and labour relations. In order to consolidate these regulations and establish specific provisions to facilitate access and understanding for people, the Law on Implementation of Grassroots-

Level Democracy No. 10/2022/QH15 ("**Law on Implementation of Grassroots-Level Democracy 2022**") was enacted by the National Assembly on November 10, 2022, and will take effect on July 1, 2023. One of the aspects that people are particularly concerned about in this matter is the provisions and principles related to the implementation of democracy in employers who are organizations. Specifically:



#### 1. Principles of implementing of grassroots-level democracy in employing organizations

Article 3 of the Law on Implementing of Grassroots-Level Democracy 2022 regulates six general principles of implementing of grassroots-level democracy, including employing organizations, as follows:

- Ensuring the rights of employees to be informed, participate in giving opinions, decide and supervise the implementation of democracy in employing organizations.



- Ensuring the leadership of the Party, the management of the State, the pivotal role of the Vietnam Fatherland Front, and other political-social organizations in implementing democracy employing organizations.
- Implementing democracy in employing organizations within the framework of the Constitution and laws; ensuring order, discipline, and not obstructing the normal operation of employing organizations.
- Protecting the legitimate rights and interests of employing organizations and employees.
- Ensuring transparency, openness, and enhance accountability in the process of implementing democracy in employing organizations.
- Respecting the contributions and opinions of employees, promptly handle their suggestions and feedback.

## 2. Implementing of democracy in employing organizations

Chapter IV (from Article 64 to Article 82) of Law on Implementing of Grassroots-Level Democracy 2022 specifically provided the implementing of democracy in employing organizations, being divided into two sections with main provisions as follows:



Section 1: Implementation of Democracy in State-owned Enterprises:

- Regarding the content that must be made public in state-owned enterprises: Based on Article 64, except for information classified as state secrets or business secrets not yet publicly disclosed in accordance with the law, state-owned enterprises must disclose the following basic information: (i) The business and production situation of the enterprise;(ii) Labour regulations, salary scales, wage tables, and other regulations related to the rights and interests of

employees; (iii) Labour agreements that the enterprise has participated in; (iv) The allocation and use of reward funds, contributions to trade unions, and social insurance contributions; (v) The regulations on the implementation of democracy within the enterprise; (vi) Other information related to the financial status and personnel affairs of the enterprise.

- Regarding the form and timing of information disclosure in state-owned enterprises: According to Article 65, the methods of making information public may include posting information, announcements at labour conferences, written notices, announcements through responsible individuals, the Trade Union Executive Committee at the enterprise, internal information systems, telecommunications networks, social networks, etc. The information that must be disclosed in state-owned enterprises should be made public no later than 15 days from the date of the decision or document issued by the authorized person regarding the content of the disclosure, except in cases where other laws have different provisions.

- Concerning the participation of employees in state-owned enterprises in discussions and decision-making: In accordance with Article 67, the topics that labourers may discuss and decide upon include: (i) Matters related to collective bargaining; (ii) Establishment of various funds and the collection and use of contributions from labourers; (iii) Electing or dismissing members of the People's Inspection Committee; (iv) Resolutions made during labour conferences. Based on Article 68, employees engage in discussions and decision-making during labour conferences based on proposals put forth by the Trade Union Executive Committee at the enterprise or through opinion polls in cases where a labour conference cannot be organized.

- Regarding to the participation of employees in state-owned enterprises in expressing their opinions: Based on Article 71, the subjects on which employees can provide opinions include: (i) The development, modification, and supplementation of labour regulations and rules; (ii) The establishment, modification, and supplementation of salary scales, wage tables, and labour norms; (iii) Measures to improve working conditions, protect the environment, prevent fires and explosions, and combat corruption; (iv) Draft procedures for settling labour disputes and handling labour discipline; (v) Draft regulations on the implementation of democracy within the enterprise. According to Article 72, employees can express their opinions through direct participation, representation by labour representatives, participation in dialogue conferences at the enterprise, or submitting opinions through suggestion boxes or hotlines provided by the enterprise.

- Regarding the participation of employees in state-owned enterprises in inspection and supervision: Based on Article 75, employees are entitled to inspect and supervise the matters that the collective of employees has discussed and decided upon, as well as the implementation of democracy at the grassroots-level within the enterprise, and the compliance with policies and laws by the leadership and management. According to Article 76, employees can directly carry out inspection and supervision through their work and production activities within the enterprise, by observing and communicating with individuals in positions, accessing publicly available information, and participating in labour conferences and dialogues within the enterprise. In addition to direct forms of inspection and supervision, employees can also exercise their rights through the activities of the People's Inspection Committee as stipulated in Articles 77, 78, and 79 of this Law.

Section 2: Implementation of Democracy in enterprises and other organizations hiring and using labour under labour contracts in the non-state sector, as stipulated in Article 82 of the Law on Implementing of Grassroots-Level Democracy 2022:

- Enterprises and other organizations hiring and using labour under labour contracts in the non-state sector shall implement the general provisions of Chapter I of this Law. At the same time, they shall comply with the provisions of labour laws regarding the implementation of democracy in the workplace (Decree No. 145/2020/ND-CP) and other relevant legal regulations.

- Enterprises and other organizations hiring and using labour under labour contracts in the non-state sector have the right to choose to apply the provisions on the implementation of democracy in state-owned enterprises as specified in Section 1 mentioned above.

### **3. Prohibited activities in implementing of democracy in employing organizations**

The Law on Implementing of Grassroots-Level Democracy 2022 inherits the prohibited behaviors stated in the Law on Democracy at the Commune, Ward, and Town Levels in 2007 and adds some additional prohibited behaviors under Article 9, such as:

- Creating difficulties, harassment, obstruction, or threats against employees who are exercising democracy in employing organizations.

- Concealing, obstructing, suppressing, or being irresponsible in handling petitions, complaints, or reports; disclosing information about the accuser or the provider of information related to violations of democracy in employing organizations.
- Abusing the implementation of democracy in employing organizations to engage in actions that violate national security, social order, public safety, infringe upon the interests of the State, the legitimate rights and interests of the employing organizations, or other individuals.
- Abusing the implementation of democracy in employing organizations to spread propaganda, fabricate stories, incite violence, discriminate based on regions, areas, gender, religion, ethnicity, and cause harm to individuals, agencies, units, and employing organizations.
- Falsifying documents, cheating, or using other means to distort the results of discussions, decisions, or the expression of opinions by employees.

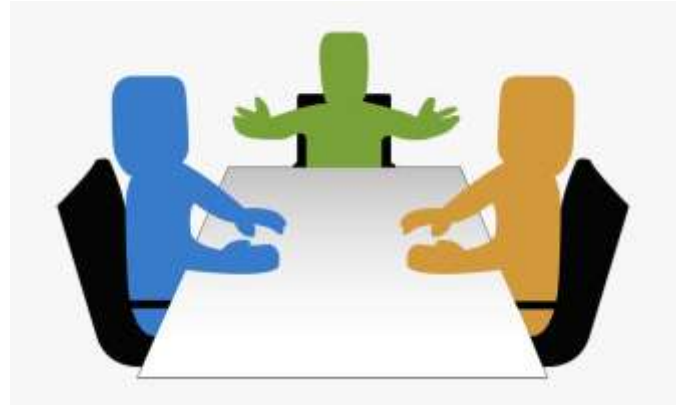
#### **4. Handling violation on implementing of democracy in employing organizations**

The Law on Democracy at the Commune, Ward, and Town Levels in 2007 and Decree No. 04/2015/ND-CP on the implementation of democracy in the activities of state administrative agencies and public non-business units do not have specific provisions regarding the handling of violations in the

implementation of democracy at the grassroots level. Article 10 of the Law on Implementing of Grassroots-Level Democracy 2022 sets out the measures for handling violations of the law on democracy in organizations that employ labour. Depending on the nature and severity of the violation, the following penalties may be imposed: administrative sanctions, criminal liability, compensation for damages, and disciplinary actions.



### **DRAFT ON PRECEDENT NO 12/2023 – DECISION ON ARBITRATION JURISDICTION OF COMMERCIAL ARBITRATION REGARDING CONFIDENTIALITY AND NON- COMPETITION AGREEMENTS**



#### **1. Source of precedent**

Decision No. 755/2018/QĐ-PQTT ("**Decision**") dated 12 June 2018 of the Ho Chi Minh City People's Court on "Request for annulment of an arbitral award"; the petitioner is Ms. Do Thi Mai T, and the related party with rights and obligations is R Co., Ltd.

**2. Position of precedent:** Paragraph 8 of the "Court's Assessment" section of the Decision.

#### **3. General content of precedent:**

The employee and employer signed an agreement on confidentiality and non-competition, which prohibits the employee from engaging in similar or competitive work with the employer for a certain period after the termination of the labour contract. In case of disputes, the matter will be resolved through Commercial Arbitration. This agreement is separate and independent from the labour contract previously signed. **In this case, the Court must determine that the dispute over the confidentiality and non-competition agreement between the two parties is a matter independent of the labour contract and falls within the jurisdiction of Commercial Arbitration.**

#### **4. Relevant legal provisions to precedent:**

- Article 2.2, Article 13, and Article 35.4 of the Law on Commercial Arbitration 2010;



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- Article 3.2 of the Civil Code 2015;
  - Article 6 of Resolution No. 01/2014/NQ-HDTP dated 20/3/2014 of the Supreme People's Court guiding the implementation of the Law on Commercial Arbitration.
5. **Decision reference:** <https://congbobanan.toaan.gov.vn/2ta161738t1cvn/chi-tiet-ban-an>

### LEGAL DOCUMENT IN 07/2023

NO.	EFFECTIVE DATE	NAME
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#### TRANSPORTATION

1.	01/09/2023	Circular 10/2023/TT-BGTVT on Economic - technical norms for management and maintenance of inland waterways issued by the Minister of Transport
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#### HEALTH

1.	26/06/2023	Decision 2671/QD-BYT, 2023 on Guidelines for diagnosis and treatment of COVID-19 issued by the Minister of Health
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#### GOVERNMENT

1.	14/08/2023	Decree 42/2023/ND-CP on adjustment of pension, social insurance allowance and monthly allowance
2.	01/07/2023	Decree 44/2023/ND-CP regulating the value-added tax reduction policy under Resolution 101/2023/QH15
3.	01/07/2023	Decree 46/2023/ND-CP guiding the Law on Insurance Business
4.	01/09/2023	Decree 47/2023/ND-CP amending Decree 62/2017/ND-CP guiding the Law on Property Auction
5.	15/09/2023	Decree 48/2023/ND-CP amending Decree 90/2020/ND-CP on assessment and quality classification of cadres, civil servants and public employees

#### FINANCE

1.	27/08/2023	Circular 48/2023/TT-BTC guiding the management, use and exploitation of Public Asset Management Software issued by the Minister of Finance
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### CURRENCY - BANK

1.	28/06/2023	Circular 06/2023/TT-NHNN amending Circular 39/2016/TT-NHNN regulating activities of lending transactions of credit institutions and foreign bank branches with customers issued by Governor of State bank of Vietnam
2.	07/07/2023	Consolidation document 16/VBHN-NHNN in 2023 consolidating Circular on licensing, organization and operation of non-bank credit institutions issued by the Governor of the State Bank of Vietnam
3.	12/07/2023	Consolidation document 18/VBHN-NHNN in 2023 consolidating Circular regulating activities of lending transactions of credit institutions and foreign bank branches with customers issued by the State Bank of Vietnam

### INDUSTRY AND TRADE

1	22/06/2023	Consolidation document 16/VBHN-BCT in 2023 consolidating elaborating Government's Decree 40/2018/ND-CP on regulatory framework for multi-level marketing issued by the Ministry of Industry and Trade
2	12/07/2023	Consolidation document 18/VBHN-BCT in 2023 consolidating Circular guiding Decree 107/2018/ND-CP on rice export business issued by the Ministry of Industry and Trade

### INSPECT

1	15/08/2023	Decree 43/2023/ND-CP elaboration of some articles and measures for enforcement of Law on Inspection
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### TAX

1	14/07/2023	Decision 970/QD-TCT in 2023 on the Tax Inspection Process issued by the Director of the General Department of Taxation
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