



LAC DUY &amp; ASSOCIATES

# Newsletter 01/2021

PUBLISHED BY LAC DUY &amp; ASSOCIATES LLC

## OUTSTANDING NEW POINTS OF DECREE NO. 145/2020/ND-CP

- 1 Disciplinary procedures
- 2 Changes in the contents of Internal Labour Regulations
- 3 Employee book and employment report
- 4 Prior notice period upon unilateral termination
- 5 Severance allowance, Redundancy allowance
- 6 Salary, bonus, overtime, night work pay
- 7 Employee's consent to overtime work
- 8 Calculation of annual leave days

### Contact Us



<http://lacduy-associates.com>



[lacduy@lacduy-associates.com](mailto:lacduy@lacduy-associates.com)

On December 14<sup>th</sup>, 2020, The Government of the Socialist Republic of Vietnam promulgated the Decree No. 145/2020/ND-CP ("**Decree 145**") defining and guiding the implementation of some Articles of the Labour Code No. 45/2019/QH14 ("**Labour Code 2019**") which officially takes effect on January 1<sup>st</sup>, 2021. Decree 145 comprises of many critical issues and shall come into effect from February 1<sup>st</sup>, 2021; replacing 13 (thirteen) legal documents on labour as mentioned in Article 114 of this Decree; there are some outstanding new points in this Decree that enterprises should pay attention to, specifically as follows:

## Scope & regulated entities of Decree 145

According to Article 1 of Decree 145, this Decree provides detailed guidelines on how to implement some contents about labour conditions and labour relations specified in the Labour Code 2019, including: (1) Labour management under Article 12.3; (2) Labour contracts under Article 21.4, Article 35.1 (d), Article 36.2 (d), Article 46.4, Article 47.4 and Article 51.3; (3) Labour outsourcing under Article 54.2; (4) Dialogue in the workplace and implementation of internal workplace democracy regulations under Article 63.4; (5) Salaries under Article 92.3, Article 96.3 and Article 98.4; (6) Working time and rest periods under Article 107.5, Article 113.7 and Article 116; (7) Labour discipline and material liability under Article 118.5, Article 122.6, Article 130.2 and Article 131; (8) Female employees and gender equality under Article 135.6; (9) Domestic worker under Article 161.2; (10) Settlement of labour disputes under Article 184.2, Article 185.6, Article 209.2 and Article 210.2.

Decree 145 is applied to: Employees, trainees, apprentices, and employers defined in Article 2 of the Labour Code 2019 and other agencies, organizations and individuals related to the implementation of this Decree.

## Some outstanding new points of Decree 145

### 1 Disciplinary procedures

Similarity in disciplinary procedures between the Labour Code 2019 and the Labour Code 2012

**Firstly**, the employee's violation of labour discipline can be detected directly or indirectly. In case an employee's violation is caught red-handed (direct detection), the employer shall prepare a violation record and inform the internal employee representative organization of which the employee is a member, the employee's legal representative if the employee is under 15. In case an employee's violation is discovered after it is committed (indirect detection), evidence to prove fault of the employee must be gathered. It should be noted that these actions need to be done within the statute of limitations for disciplinary procedures as prescribed in Article 123 of the Labour Code 2019.

**Secondly**, the employer shall notify the mandatory participants of the contents, time and location of the meeting, full name of the employee facing disciplinary procedure and his/her violations. The participants mentioned in Article 122.1 of the Labour Code 2019 include: (1) the employer; (2) the representative of the representative organization of employees; (3) the employee; (4) the lawyer or the representative organization of employees to defend the employee (if any) and (5) the legal representative (if the employee is a person under 15 years of age).

**Thirdly**, the meeting minutes needs to be made. In case a person refuses to sign the minutes, the minutes taker shall specify his/her full name and reasons for refusal in the minutes.

#### Difference in disciplinary procedures between the Labour Code 2019 and the Labour Code 2012

The most remarkable difference in the disciplinary procedures between the Labour Code 2019 and the Labour Code 2012 is the competence to initiate disciplinary procedures. Specifically, according to Article 30.4 of Decree No. 05/2015/ND-CP, *"The persons concluding contracts prescribed at Points a, b, c and d, Clause 1, Article 3 of this Decree shall be the persons entitled to make decision on handling violations against labour discipline imposed on employees. Persons authorized to conclude contracts may only handle violations against labour discipline in the form of reprimands"*. This was later amended by Article 1.12 of Decree No. 148/2018/ND-CP, accordingly *"The person that concludes the employment contract on the employer's side also has the power to issue the disciplinary decision"*. However, it is not clear whether the person authorized to conclude labour contracts has the authority to handle the violation against labour discipline or not. Therefore, inheriting and completing the provisions of Decree 148/2018/ND-CP, Decree 145 stipulates in a more detailed manner the competence to initiate disciplinary procedures, specifically according to Article 69.2 (i), persons having the power to take disciplinary actions include:

- (1) Persons having the power to conclude labour contracts on behalf of the employers as prescribed in Article 18.3 of the Labour Code 2019: (i) The legal representative of the enterprise or an authorized person as prescribed by law; (ii) The head of the organization that is a juridical person, or an authorized person as prescribed by law; (iii) The representative of the household, cooperative groups or an organization that is not a juridical person, or an authorized person as prescribed by law; (iv) The individual who directly hires the employee; and
- (2) Specific persons specified in the ILRs.

## **2 Major changes in the statutory contents of the ILRs**

When compared with the Labour Code 2012, Article 118.2 of the Labour Code 2019 stipulates 3 (three) more contents that need to be added to the ILRs: (i) Actions against sexual harassment in the workplace; procedures for taking actions against sexual harassment in the workplace; (ii) Specific cases in which employees may be temporarily reassigned against their employment contracts: specifying cases where due to reasons of business and production demands, the employer may temporarily assign an employee to do other work different from the labour contract according to the law; (iii) The person having the competence to take disciplinary measures

Decree 145 specifically guides 03 (three) points above in Article 69. Although not until February 1st, 2021 does Decree 145 come into effect, we recommend enterprises whose current ILRs do not include these content should amend and supplement them to comply with the provisions of these soon-to-be effective labour regulations. In addition, there are other issues needing to be changed in the internal labour regulations that the Labour Code 2019 has point out clear, thus Decree 145 does not provide further guidelines.

## **3 Employee book and employment report of enterprises**

According to Article 12.1 and Article 12.2 of the Labour Code 2019, employers are responsible for preparing employee books and employment reports. Guidelines on these issues as stipulated in Article 3 and Article 4 of Decree 145 do not change much when compared to Decree 03/2014/ND-CP and Circular 23/2014/TT-BLDTBXH. Employers need to note that, in terms of time, they shall submit biannual reports before June 5th and annual reports before December 5th (compared to May 25th and November 25th respectively in the past). Thus, enterprises now have more time to prepare and submit reports. Form of the employment report can be found in Form No. 01/PLI Appendix I issued with Decree 145.

## **4 Prior notice period upon unilateral termination of labour contracts in special works and lines of business**

The Labour Code 2019 has introduced a new provision on the notice period before unilaterally terminating the labour contract for special works and lines of business in Article 35.1 (d) and Article 36.2 (d). The question needs answering is what are called special works and lines of business. Article 7 of Decree 145 answers this question. Accordingly, special works and lines of business include: (a) Aircrew members; aircraft maintenance technicians, aviation repairmen; flight coordinators; (b) Enterprise managers defined by the Law on Enterprises; the Law on Management and use of State Investment in Enterprises (for this guide, when applicable, Article 4.24 of the Enterprise Law 2020 and Article 3.7 of the Law on Management and use of State Investment in Enterprises are reference sources); (c) Crew members working on Vietnamese vessels operating overseas; crew members dispatched to foreign vessels by Vietnamese dispatching agencies; (d) Other cases prescribed by law.

According to Article 7.2 of Decree 145, when an employee working in special works and lines of business or his/her employer unilaterally terminates the labour contract, a prior notice shall be provided: (a) At least 120 days before the termination date if the labour contract has an indefinite term or a term of at least 12 months; or (b) At least one fourth (1/4) of the labour contract duration if the duration is less than 12 months.

## **5 Severance allowance, redundancy allowance**

The issue of severance allowance and redundancy allowance is of great concern, especially in the context of Viet Nam being affected by the Covid-19 epidemic, so the number of employees made redundant is increasing. In terms of nature, Article 8 of Decree 145 guiding Article 46 and Article 47 of the Labour Code 2019 do not have many changes compared to the previous guidance on this issue in Article 14 of Decree 05/2015/ND-CP. We only need to note one point about the time to calculate severance allowance and redundancy allowance as follows: From 1 February 2021, the time to calculate the payment of severance allowance and redundancy allowance is from the date of the probation. This new guidance goes back to the original provisions of Decree 05/2015/ND-CP that have not been amended by Decree 148/2018/ND-CP (Accordingly, the time to calculate the severance allowance and redundancy allowance will be from the date of signing the labour contract). Therefore, if during the probation period, the employer has not paid unemployment insurance for the employee or has not paid a sum of money equivalent to the amount of contribution to unemployment insurance, the employer will be obliged to pay the severance allowance or the redundancy allowance for the probationary period if the employee quit or loses the job.

## **6 Salary, bonus, overtime pay, night work pay**

Compared to previous regulations, this issue has not changed much. The formula for calculating salary, bonus, overtime pay, night work pay, and overtime pay at night guided in Decree 145 is not different from the formula for calculating these amounts guided in detail in Article 6, Article 7, and Article 8 of Circular 23/2015/TT-BLDTBXH.

However, we need to pay more attention to the contents related to the time periods included in paid working hours as specified in Article 58 of Decree 145 which can be mentioned as (i) Rest breaks and work-specific breaks; (ii) Breaks that are necessary and accounted for in productivity norms due to natural human needs; (iii) Rest periods to which female employees that are pregnant, raising a child under 12 months of age or during menstruation are entitled; (iv) Work suspension periods through no fault of the employees; (v) Periods of meetings, learning, training required or accepted by the employer.; (vi) Time periods over which trainees and apprentices directly perform or participate in performance of work.

## **7 Employee's consent to overtime work**

According to Articles 107 and 108 of the Labour Code 2019, the employer only has the right to request an employee to work overtime on any day without limitation on overtime hours in some special cases regulated by the Labour Code 2019. In other cases, between the employer and the employee, there must be an agreement with each other and the consent of the employee must be obtained. Decree 145 specifically guides this issue in Article 59, which sets out the form No. 01/PLIV in Appendix IV to be applied in case the employee's consent is obtained in a separate document. Thus, at present, there is a specific form of document that contributes to the adjustment and minimization of disputes in labour relations on the issue of overtime work of employees.

## 8 Computation of annual leave days (annual leave)

The method of computing the number of annual days off is specified in Article 113 and Article 114 of the Labour Code 2019, which is guided in more detail by Decree 145 for some special cases in Articles 66 and 67. Basically the formula for computing the number of Annual leave under Decree 145 is similar to the formula specified in Decree 45/2013/ND-CP but with more detail. According to Article 66 of Decree 145, there is an important issue to most pay attention to is the case of computing the number of days off each year in case the employee is not working full months. Then, if the total number of working days and paid leave days of an employee accounts for 50% of the normal working days in a month or more, it is counted as 01 working month. In addition, for employees working at state organizations and state-owned enterprises, the entire working time is counted on the increase of annual leave if the employee continues to work at state organizations and state-owned enterprises.

Under the guidance in Article 67 of Decree 145, the salary used as a basis to pay employees on public holidays, New Year holidays, annual leave, and personal leave is the salary written in the labour contract that is effective at that time. On the other hand, the salary as a basis to pay the employee for the days without annual leave or the number of annual leave is not fully paid is the salary written in the labour contract of the month preceding the month in which the employee resigns or losses job. This is a point to distinguish clearly to avoid confusion in the application process.

It should be added that the effective date of Decree 145 is February 1<sup>st</sup>, 2021 while the Labour Code 2019 will take effect on January 1<sup>st</sup>, 2021, thus, to catch up with the new regulations of the Labour Code 2019, enterprises will have to start preparing now and maybe the "warping" each other on the effective time between such regulations and guidelines will cause confusion for enterprises.

In the scope of this article, Lac Duy & Associates can only present some of the most general issues, most remarkable for readers to have an overview of the changes in legislation governing industrial relations in Vietnam before the New Year. Interested readers can visit the website <http://lacduy-associates.com> and follow the next legal newsletter numbers for more information on each specific issue mentioned or has not been mentioned in this article. In addition, in case of any questions or need assistance related to labour law, readers can contact by phone at +84 (28) 3622 1603 or email [info@lacduy-associates.com](mailto:info@lacduy-associates.com) or [lacduy@lacduy-associates.com](mailto:lacduy@lacduy-associates.com) for prompt support.

## LEGAL DOCUMENTS UPDATE IN JANUARY, 2021

NO.	EFFECTIVE DATE	DOCUMENT NAME
<b>ENTERPRISE</b>		
1.	20/01/2021	Decision 52/QD-BNV on the Action Plan to implement Resolution 02/NQ-CP on continuing to perform the main tasks and solutions to improve the business environment and improve national competitiveness on 2021 is issued by the Ministry of the Interior
<b>ACCOUNTING - AUDITING</b>		
2.	28/01/2021	Decision 04/2020/QD-KTNN providing for the list of audit records; the regime of filing, preserving, exploiting and canceling audit dossiers issued by the State Auditor
<b>TRAFFIC – CARRIAGE, RESOURCES – ENVIRONMENT</b>		
3.	29/01/2021	Circular 32/2020/TT-BGTVT amending Circular 29/2018/TT-BGTVT regulating quality inspection, technical safety and environmental protection of railway vehicles and Circular 31/2018 / TT-BGTVT regulates the assessment and certification of system safety for urban railways issued by the Ministry of Transport.
<b>INSURANCE</b>		
4.	21/01/2021	Circular 143/2020/TT-BQP guiding Decree 146/2018 / ND-CP guiding the Law on Health Insurance for subjects under the management of the Ministry of National Defense
<b>TAX-FREE-FEE</b>		
5.	22/01/2021	Circular 106/2020/TT-BTC regulating the rates, collection, payment, management and use of fees for assessment and issuance of electricity activity licenses issued by the Ministry of Finance.
<b>EDUCATION</b>		
6.	23/01/2021	Decree No. 141/2020/ND-CP providing for the election regime for ethnic minority students
<b>ADMINISTRATION</b>		
7.	20/01/2021	Decision 51/QD-BNV in 2021 on the Plan to build a question and response bank to be used in the exam for public servant rank promotion, issued by the Ministry of Home Affairs.
8.	20/01/2021	Guideline 169-HD/BTGTW 2021 on propagating the election of deputies to the 15th National Assembly and deputies of the People's Councils at all levels for the term 2021-2026, issued by the Central Propaganda Department
9.	20/01/2021	Guideline 36-HD/BTCTW in 2021 on personnel work of the 15th National Assembly and People's Councils at all levels for the term 2021-2026 issued by the Central Organizing Committee
<b>SPORTS - MEDICAL</b>		
10.	20/01/2021	Decision 403/QD-BYT in 2021 on the Action Plan to implement the Healthcare for the elderly until 2030 issued by the Ministry of Health
11.	22/01/2021	Circular 44/2020/TT-BCT providing for suspension of trading in temporary import for re-export of medical masks, medical gloves and epidemic prevention clothes, issued by the Minister of Industry and Trade.