

NEWSLETTER
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Dear Clients,

Lac Duy & Associates would like to send you the newsletter of March 2021 03 with some outstanding new point and article as:

- Remarkable new points of Circular 10/2020/TT-BLDTBXH regarding labor contracts and confidentially agreements between enterprises and employees
- Article: Labour arbitration: Should business “Kinh nhi vien chi” – Dr. Le Thi Anh Nguyet
- Monthly legal documents update in March 2021



REMARKABLE NEW POINTS OF CIRCULAR 10/2020/TT-BLDTBXH REGARDING LABOR CONTRACTS AND CONFIDENTIALITY AGREEMENTS BETWEEN ENTERPRISES AND EMPLOYEES

NEW POINTS OF DECREE NO. 10/2020/TT- BLDTBXH

- 1. Regarding the contents of the labor contract**
- 2. In respect of the agreement to protect business and technology confidentiality**

The Ministry of Labor, War Invalids and Social Affairs has issued Circular No. 10/2020/TT-BLDTBXH ("**Circular 10/2020**") dated November 12, 2020 on elaborating and guiding certain articles of the labor code concerning employment contracts, collective bargaining council and jobs which having negatively affected to the function of birth giving and children raising. Having come into force at the same time as the Labor Code 2019 ("**LC 2019**"), Circular 10/2020 elaborated in further detail about the contents of confidentiality agreements, the anti-competitive agreements between enterprises and employees and the procedures of labor disciplines thereof . However, the Circular have generally remained some unsolved issues, difficulties which causing trouble for both enterprises and employees when to be applied in practice.

1. The main contents of the labor contract

According to Clause 1, Article 21 of the LC 2019 and Article 3 of Circular 10/2020, in general, the main contents of the labor contract remains the same as the correspondent provisions of the Labor Code 2012 ("**LC 2012**") and Decree 05/2015/ND-CP dated January 12, 2015 of the Government detailing and guiding certain articles of the labor code ("**Decree 05/2015**"). Accordingly, the labor contract shall be obliged to cover the following main contents:



- Information on the name and address of the employer and **full name and title of the person who signing the labor contract** on the employer's side. In particular, the subject of the labor contract on the employer's side is the person who belongs to one of the following cases: (i) The legal representative of the enterprise or the authorized person as *prescribed by law*; (ii) *Heads of agencies or organizations have legal status as prescribed by law or person who authorized as prescribed by law*; (iii) *Representatives of households, cooperative groups or other organizations without legal status or person who authorized as prescribed by law*; and (iv) *Individuals who directly employed and assign job to employees*.
- Information on full name, date of birth, gender, place of residence, citizenship card or identification card or passport of the person who signing the labor contract on the employee's side and some other information.
- Work and work location. In Decree No. 05/2015, it should be noted that if the employee works in many different locations, the contract must write **the main places** where the employee works; so in Circular 10/2020, if the employee works regularly in many locations, the contract must **fully** show those locations.
- Duration of the labor contract: the executing time of the labor contract (number of months or number of days), the start and the end of the labor contract (for a *definite-term labour contract*); the start of the processing time the labor contract (for an *indefinite-term labor contract*).
- Salary by job or title, form of payment, pay term, allowance and other supplements. In addition, for regimes and other benefits **such as** bonuses, initiative bonuses; mid-shift meals; gasoline, telephone, travel, housing, childcare, child support; support when workers have relative's death, employees who have relative's wedding, employee's birthday, subsidies for workers who have a difficult circumstance in case of occupational accidents, occupational diseases and other supports and subsidies, they should be recorded **separately in labor contracts**.
- Regime of higher scale and raise salary: according to the agreement of the two parties on conditions, time and salary after upgrading, raising wages or complying with collective labor agreements, regulations of employers.
- Working time, rest time: as agreed by the two parties or agreed to comply with labor regulations, regulations of employers, collective labor agreements and provisions of law.



- Labor protection equipment for employees: types of means of personal protection in labor as agreed by the two parties or as agreed with collective labor agreements or regulations of employers and regulations of the law on occupational safety and hygiene.
- Social insurance, health insurance and unemployment insurance: in accordance with the regulation of the law on labor, social insurance, health insurance and unemployment insurance.
- Training, retraining and improving levels and professional skills: rights, obligations and interests of employers and employees in ensuring the time and funding for training, retraining and improving levels and professional skills.

In addition, in the field of agriculture, forestry, fishery, salt industry, for simple nature jobs, carried out in the short term or seasonally that the two parties can reduce the contents of the agreement on upgrading specified at Point e, Clause 1 of Article 121 and training, nurture and improve professional qualifications and skills specified at Point k, Clause 1, Article 21 of the LC 2019. For jobs and working locations which directly affected by natural disasters, fires and weather, the two parties can agree in the labor

contract about the contents of the mechanism for sedating the performance of the labor contract in accordance with the actual conditions and provisions of law such as the terms of the event of non-resistance, the rights and obligations of each party when a non-viable event occurs, making the contract impossible to perform ...

2. Agreement to protect business and technology secrets

When the employees work related to business secrets directly, technological secrets as prescribed by law, the employer shall have the right to make an agreement with the employee on the content protection of business secrets and technological secrets in labor contracts or the other documents as prescribed by law. In essence, the right to make an agreement on the protection of business secrets and technological secrets isn't a new regulation that was mentioned in the LC 2012 and therefore, the fact that there have been documents related to the information security and didn't work for competitors, are established between employees and employers to protect information security such as: production lines, customer lists, formulas, business strategies ... These documents are often referred to as the Non-Disclosure Agreement & Non-Competition



time, these agreements were only deterrent mainly to workers but there was no legal Agreement (NCA & NDA). However, at that document guiding in detail, specific, such as the agreement included what are contents? How is the order and procedures for handling violations when revealing business secrets and technological secrets? These are issues which causing controversy and legal barriers of the NDA and NCA in practice until Circular No.10/2020 is issued and takes effect January 1, 2021.

Related to these agreements, in mid-2018, the People's Court of Ho Chi Minh City **issued a** verdict to recognize the validity of a decision of an arbitration panel from the Vietnam International Arbitration Center (VIAC). Accordingly, VIAC has accepted the request of the employer, forcing the former employee to pay a compensation amount of more than VND 205 million to the company, equivalent to 3 months of salary as the employee had violated his commitment not to work for rival enterprises within 12 months after quitting their job.

Although a Court ruling had been rendered to recognize the legal validity of the NDA and the NCA, this judgement only reflected the inner beliefs of the adjudicator. There would be no guarantee for the same result, if the dispute is resolved by

another arbitral tribunal, judge or adjudicator, because there have been no legal documents to guide in a unified way on this issue.

Therefore, recognizing the above defects in Circular No. 10/2020, guiding regulations should be adopted to ensure the legal loopholes to be effectively handle to protect the legitimate rights and obligations of business and technology secrets.

Firstly, the agreement on protection of business and technological secrets includes the following main contents: (i) List of business and technological secrets; (ii) Scope of use of business and technological secrets; (iii) Time limit for protection of business and technological secrets; (iv) Methods of protection of business and technological secrets; (v) Rights, obligations and responsibilities of employees and employers during the period of protection of business and technological secrets; and (vi) Handling violations of agreements on protection of business and technological secrets.

Secondly, regarding the order and procedures for handling compensation, when detecting that the employee violates the agreement on protection of business and technological secrets, the employer may request the



employee to pay compensation as agreed upon by the two parties. In case of detecting that the employee has committed a violation within the duration of the labor contract, the order and procedures for handling shall comply with the provisions of the Labor Code 2019 on handling of compensation for damage. In case of detecting that the employee has committed a violation after the termination of the labor contract, he/she shall handle it in accordance with the provisions of civil law and other relevant laws, which can be mentioned herein as the Law on Intellectual Property and the Law on Competition.

Thirdly, for business secrets and technological secrets on the list of State secrets, the provisions of law on state secrets protection shall comply with the law on state secrets protection.

Thus, from January 1, 2021 – the time when Circular 10/2020 officially takes effect, businesses, managers ... in particular, employers in general have stronger grounds and tools to strengthen the legality of the NDA, NCA, contributing to protecting their legitimate rights and interests against information security risks in business.



LABOR ARBITRATION SHOULD BUSINESS “KINH NHI VIEN CHI”?

Dr. Lê Thị Ánh Nguyệt / Thesaigontimes No. 6-2021*

Since January 1, 2021, the Vietnam Labor Code (“**Labor Code**“) 2019 has enabled enterprises and employees to settle their individual labor disputes by labor arbitration (“**Labor Arbitration**”). This is expected to be an impartial and coherent mechanism and at the same time, private enough to balance the legitimate rights and interests of the parties. However, the labor arbitration mechanism still has remained some unsolved problems. This article will analyze the successes and limitations in order to contribute to “release defilements” for businesses and employees.

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For the first time, Vietnam turned the green light to the labor arbitration to settle individual labor disputes

Unlike the United States, since the 1925, the Federal Arbitration Act has given arbitrators the right to accept and resolve individual labor disputes. In fact, in the *Cruise v. Kroger Co.* (2015), when fired, plaintiff Cruise sued Kroger Company to court on the

grounds that it violated principle of non-discrimination against employees and, therefore, the company unlawfully discharged the plaintiff. However, the company succeeded in asking the court to return the lawsuit and forcing the plaintiff to settle this dispute by arbitration because the labor contract had incorporated the arbitration clause so that the labor arbitration had the jurisdiction to resolve the labor

relationship between the parties.^[1]

In Vietnam, with the Labor Code 2019 (“**Labor Code**“) 2019 and Decree 145/2020/NĐ-CP detailing and guiding the enforcement of a number of articles of the Labor Code 2019 regarding working conditions and labor relations (“**Decree 145**“), Vietnam, for the first time, allowed the competent labor



arbitration to have the authority to resolve individual labor disputes “*The following agencies , organizations and individuals have the competence to settle individual labor disputes: (1) labor mediators; (2) Labor Arbitration Councils; (3) The People’s Court.*”^[2] Accordingly, an individual labor dispute means a dispute over rights, obligations and interests among the parties during the establishment, execution or termination of labor relation.^[3]

From the perspective of businesses and employees, we believe that this regulation will also contribute to protecting the reputation and interests of both parties against detrimental information that can be exposed in the process of resolving individual labor disputes. For example, if the court resolves labor disputes where employees are fired by theft, and/or sexual harassment ... then the image and reputation of both corporations and employees in these disputes will be abused, smeared. On the corporation side, the images of an

individual sexually abusing employee will also more or less have affected those of the company and, from there, affected the legitimate rights and interests of other employees who have been working at the same corporation because the court resolves the dispute on the principle of publicity for a long time through many different levels of first – instance and appellate trial. In addition, from a state management perspective, we find that this provision is also consistent with the new generation international treaties because this will have increased the freedom of expression of the disputing parties. In the context that more and more foreign individuals and organizations have invested and worked in Vietnam, labor arbitration will also contribute to increase the confidence of foreign individuals and organizations about the harmony of the laws of Vietnam with the laws of the countries in which they hold nationality and/or are established.

Labor arbitration to resolve individual labor disputes: Who are you?

According to the Labor Code 2019, labor arbitration is a general term used to describe the roles and duties of two groups of individuals involved in resolving individual labor disputes. *Firstly*, the Labor Arbitration Council includes no more than 15 arbitrators (including 05 labor arbitrators nominated by the provincial labor authority; 05 arbitrators nominated by the provincial trade union and At least 05 arbitrators nominated the representative organizations of employees in the province.). And, *secondly*, the arbitration Tribunal directly resolves individual labor disputes (including 01 or 03 arbitrators). In general, labor arbitrators must be Vietnamese citizens (Clause 1), can be civil servants or officials but in no case, they could be judge, prosecutor, investigator, executor or official of a court, the



People's Procuracy, investigation authority or judgment execution authority.^[5]

These arbitrators operate on a full-time or part-time basis, depending on the position of the arbitrator as president, secretary or member (Article 101 of Decree 145). Regarding salaries and wages, Decree 145 also recognizes that arbitrators receive salaries from the state budget *"each day of studying case files, collecting evidence and attending meetings to settle labor disputes as assigned shall be received an allowance of 5% of the average of applicable monthly minimum wage of all regions for employees working under labor contracts as stipulated by the Government from time to time or higher if the People's Committees of provinces may propose to People's Councils of the same provinces within the budget of their provinces"*.^[6] Regarding the working hours, Decree 145 further explains that arbitrators will be facilitated by the agency, unit and organization where they are

working to provide an appropriate time to participate. In our opinion, the above characteristics of labor arbitration according to Vietnam labor laws have changed the ordinary nature of arbitration. Specifically, **in terms of arbitration fees**, arbitrators always receive arbitration fees from the expenses of the disputing parties, not from the state budget, even though operating as a member of a center arbitration or acting on an individual's behalf for a certain incident (also known as ad-hoc arbitration). In addition, regarding **the choice of arbitrators**, Vietnam labor laws has limited the right to appoint labor arbitrators from individuals "empowered" by Vietnamese state agencies, rather than allowing the parties to automatically appoints arbitrators based on the disputing parties' perception of the arbitrator's capacity and qualifications that they might think suitable for the dispute content and their financial ability. This can be beneficial for the employee because employee may for a number of reasons, such

as financial constraints, especially being fired or being disciplined to prolong the payroll period, will may accept to appoint one or more members of the arbitral tribunal from the list of pre-selected *"civil servants, officials"* without paying the arbitration fee. However, through receiving salaries from the state budget, in some cases businesses may worry that the arbitrator is an extended arm of state agencies. If so, businesses argue that they will need to be given more opportunities to implement their right to freedom to conduct a business including the right to choose more independent and objective dispute resolvers. In other words, if enterprises do not want to choose civil servants or officials which are on state payroll as Labor Code 2019 and Decree 145 request, what should enterprises do? Viet Nam's labor laws have been silent in this regard.



If the dispute resolution decision of the labor arbitration is not enforced then the parties will bring it to court: Why should waste more time and costs?

It should be added that, just like commercial arbitration, labor arbitration has no natural jurisdiction and when an arbitration agreement is reached, it excludes the jurisdiction of the court. In particular, labor arbitration also has the authority to resolve individual labor disputes when the parties reach an arbitration agreement “*The parties are entitled to, by consensus, request the Labor Arbitration Council to settle. When the Labor Arbitration Council settle the disputes, the parties must not simultaneously request the courts to settle the disputes*” (Article 189 Labor Code 2019).

However, Vietnamese labor laws have developed a labor arbitration regime that is very different from the usual nature of arbitration; it is, *in case a disputing party fails to comply with the decision of the arbitral*

tribunal, the parties are entitled to bring the case to court(Article

189 Clause 5 Labor Code 2019). So, the question now is why the parties do not enforce the dispute settlement decision issued by labour arbitration? And, when the labor arbitration has finished, but the parties have not executed and transferred to the court, what will the jurisdiction of the court now be? Would the court re-resolve all aspects of individual labor disputes that the labor arbitration had resolved? This is also not explicitly stated in the Labor Code 2019 and Decree 145.

As such, Labor Code 2019 and Decree 145 do not create the appropriate mechanisms for decisions on dispute resolution of labor arbitration to be enforced. The parties of the individual labor dispute have no right to request any governmental agency to enforce the dispute resolution decision of the labor arbitrator. Enterprises and employees are

just supposed to wait for labor arbitration to issue notices of acceptance of disputes; prepare relevant documents and evidence to participate in meeting sessions with labor arbitration and, after that, continue to wait and see if the arbitration settlement decision is enforced, if it is not enforced, they have to initiate further lawsuits in court? In our opinion, this is unreasonable, it will take time and effort of enterprises, employees and in particular, will also destroy the enthusiasm of the human resources department in the state agencies that “legalized” the humanity mechanism of labor arbitration for individual labor disputes.

Therefore, Vietnam should have a circular guiding the implementation of Decree 145 in the direction of adjusting the enforcement mechanism of the dispute settlement decision of labor arbitration. For example, supplementing the rights of individual labor dispute parties



to request judgment enforcement agencies to enforce decisions on settlement of individual labor disputes issued by competent labor arbitrations to limit cases where the parties do not enforce them, but wait for lawsuits to be initiated in court. In particular, Vietnamese labor law should inherit other important features of commercial arbitration such as the obligation of the court not to re-settle the entire dispute if the arbitration has accepted and settled. Instead, the court should just stop at the consideration of whether the labor arbitration has complied with the order, the proceedings or seriously violated this order and procedures and if the labor arbitrator violated the proceedings, the court shall cancel the arbitral award. In any case, if the labor arbitrator already settle the dispute, the court shall not settle this individual labor dispute entirely from the beginning.

If enterprises and employees must untangle by themselves, why don't we just “kinh nhi vien chi”?

To a certain extent, the Labor Code 2019 and Decree 145 have shown Vietnam's efforts to encourage businesses and employees to use labor arbitration to resolve individual labor disputes, especially for Disputes are very sensitive, easy to “tinh ngay ly gian”^[7] such as sexual harassment, stealing corporate property. However, if we do not solve the problem as analyzed above, we are concerned that Vietnam's efforts to protect businesses and employees from irony, “bad news has wings” situation in individual labor dispute are not enough to convince enterprises and employees to stand up and troubleshoot for themselves. At this time, how can we stand to see enterprises and employees choose “kinh nhi vien chi”^[8] to face labor arbitration institutions?

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^[1]Cruise v. Kroger Co. (2015).

^[2]Article 187.

^[3]Article 179.

^[4]Article 185.

^[5]Article 98 Decree 145.

^[6]Article 103 Decree 145.

^[7]“Tinh ngay ly gian” is the Vietnamese idioms on the state of being innocent but having the evidence against oneself.

^[8]“Kinh nhi vien chi” is the Vietnamese idioms on how people have reacted to things that they might think good but troublesome and they have chosen to keep away from it.



MONTHLY LEGAL DOCUMENTS UPDATE IN MARCH 2021

NO.	EFFECTIVE DATE	DOCUMENT NAME
ENTERPRISES – STATE FINANCE		
1.	17/03/2021	Decision No. 378/QD-TTg on supplementation of funding for human resource development support for small and medium-sized enterprises in 2021 issued by the Prime Minister
2.	16/03/2021	Resolution No. 32/NQ-CP on government guarantee limits and loan limits on on-lending in 2021 issued by the Government
INFORMATION TECHNOLOGY		
3.	15/03/2021	Decision No. 1095/QD-BNN-TCTS 2021 approving the plan for application and transfer of science and technology for the restructuring of the fishery sector in the period of 2021-2025 issued by the Ministry of Agriculture and Rural Development
TRANSPORTATION		
4.	15/03/2021	Decision No. 373/QD-BGTVT on plan to examine the law enforcement situation on handling of administrative violations in 2021 by the Ministry of Transport
Trade		
5.	17/03/2021	Decision No. 386/QD-TTg 2021 approving the Domestic Market Development Project associated with the "Vietnamese preferential use of Vietnamese goods" campaign for the period 2021-2025 issued by the Prime Minister



		CRIMINAL RESPONSIBILITY, CULTURAL AND SOCIAL LIABILITY
6.	17/03/2021	Decision No. 928/QĐ-BVHTTDL on the plan for implementation of the project "Prevention of crimes and prevention of law violations in cultural, sports and tourism activities" in 2021 issued by the Ministry of Culture, Sports and Tourism
		RESOURCES – ENVIRONMENT
7.	17/03/2021	Decision No. 379/QĐ-TTg 2021 approving the National Disaster Prevention and Control Strategy to 2030, with a vision to 2050 issued by the Prime Minister
		SPORTS – HEALTH
8.	19/03/2021	Decision No. 1639/QĐ-BYT 2021 on additional documents on prevention, screening, early detection and management of breast cancer and cervical cancer in the community under Project 818 to 2030 issued by the Minister of Health
9.	18/03/2021	Decision No. 1624/QĐ-BYT 2021 guiding temporary screening for PRE-vaccination against COVID-19 by the Ministry of Health
		PROCEDURES
10.	12/03/2021	Decision No. 42/QĐ-CA of 2021 promulgating the precedent issued by the Supreme People's Court