



LAC DUY & ASSOCIATES

NEWSLETTER

04/2023

**POSSIBLE LEGAL RISKS WHEN
UNILATERALLY TERMINATE THE
LABOUR CONTRACT WITH AN
EMPLOYEE WHO REGULARLY
FAILS TO PERFORM THE WORK**

**CASELAW NO. 61/2023/AL ON
THE TERMINATION OF
ADOPTION WHEN THE
ADOPTED CHILD IS UNDERAGE**

**PUBLISHED BY LAC DUY & ASSOCIATES
CONTACT WITH US**

🌐 : <http://lacduy-associates.com>

✉ : lacduy@lacduy-associates.com

☎ : +84917275572/+842836221603

**📍 : 6th Floor, Centec Tower, 72-74 Nguyen Thi Minh Khai Street,
Vo Thi Sau Ward, District 3, Ho Chi Minh**



Dear Clients,

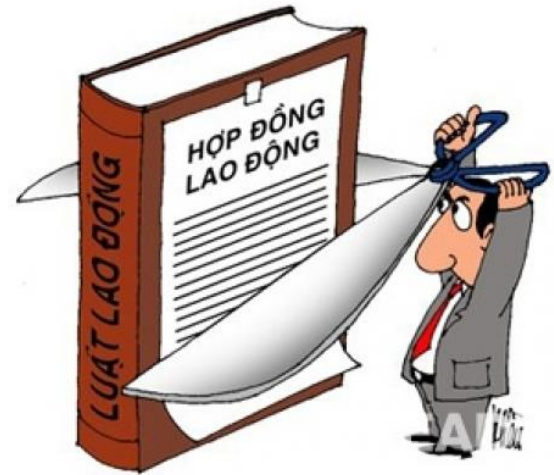
Lac Duy & Associates would like to send you the legal newsletter of April 2023 with some notable updates and articles as follows:

- Possible legal risks when unilaterally terminate the labour contract with an employee who regularly fails to perform the work
- Caselaw No. 61/2023/AL on the termination of adoption when the adopted child is underage
- Legal Document in 04/2023





POSSIBLE LEGAL RISKS WHEN UNILATERALLY TERMINATE THE LABOUR CONTRACT WITH AN EMPLOYEE WHO REGULARLY FAILS TO PERFORM THE WORK



1. Experience from an actual case – Judgment 03/2021/LD-PT dated 23 June 2021

According to Article 36.1.a of the Labour Code 2019:

“The employer has the right to unilaterally terminate the labour contract in the following cases: The employee regularly fails to perform his/her work according to the criteria for assessment of employees’ fulfillment of duties established by the employer. The criteria for assessment of employees’ fulfillment of duties shall be established by the employer with consideration taken of opinions offered by the representative organization of employees [...]”

Despite such regulations, in practice, not all enterprises develop "the criteria for assessment of employees’ fulfillment of duties" and therefore, the unilateral termination of the labour contract with an employee for the reason that he/she regularly fails to complete the work becomes an illegal decision on the part of the employer. For reference purposes, the Judgment 03/2021/LD-PT dated 23 June 2021 on the dispute of unilaterally terminating the labour contract points out the mistakes that employers often make: The Company and Mr. Lam Van A. concluded a labour contract with the term of 01 year. During his time at the Company, Mr. Lam Van A and Mr. Vu Duc N (his manager) were competing for a management position, making Mr. A fail to fully cooperate to comply with the Company's regulations in performing his duties. The Company based on the internal meeting minutes on 18 May 2019 and 22 June 2019 as well as the report of Mr. Vu Duc N dated 05 June 2019 to argue that Mr. A regularly failed to complete his tasks. Accordingly, the Company unilaterally terminated the labour contract with Mr. A.

The High-Level People's Court in Ha Noi has observed that *"these minutes of meetings are just internal meeting minutes with many contents, including content reminding Mr. A failure to cooperate while*



*performing his duties, arbitrarily making plans without the manager's approval, not regularly submitting reports, and having a negative attitude. Therefore, this is essentially the monthly internal meeting minutes, not the minutes of Mr. A's frequent failure to perform his work as agreed in the contract; in the internal meeting minutes, the content of reveal company secrets was mentioned, but did not confirm who had revealed this secret, but only suggested considering and clarifying the reason. Therefore, there is no ground to confirm that Mr. A is the person who has revealed the secrets of the Company, violated the labour contract. Moreover, the Company believes that Mr. A often fails to perform his work, **but can not present evidence of the criteria for assessment of employees' fulfillment of duties** as a basis for comparing Mr. A's violations, but still unilaterally terminated the labour contract with Mr. Lam Van A, which is against the provisions of Article 38 of the Labour Code and Article 12 of Decree No. 05/2015/ND-CP dated 12 January 2015 of the Government” .*

Besides, according to Article 91.1.(b) of the Civil Procedure Code 2015: “[...] *The employee initiates a lawsuit for unilateral termination of the labour contract in the case the employer is not allowed to exercise the right to unilaterally terminate the labour contract or the case is not handled with labour discipline against the employee, according to the provisions of the labour law, the burden of proof belongs to the employer*”.

Thus, in the case of unilaterally terminating the labour contract due to the frequent non-completion of work, if the employee files a lawsuit, the employee will not be obliged to prove that he/she has completed the job as requested, while the enterprise will have the responsibility to prove that the employee really “regularly fails to perform the work”. Otherwise, the court will declare that the unilateral termination of the contract is illegal and compel the enterprise to compensate the employee according to Article 41 of the Labour Code 2019. Therefore, it can be seen that, even if the enterprise has developed the criteria for assessment, if the regulations are too sketchy and not sufficient to make thorough comparison and affirmation of the failure of the employee, it is likely that the court will not accept this position of the employer and the enterprise may face the risk of losing the case.





2. Notes for enterprises to limit legal risks when unilaterally terminating the labour contract with an employee who regularly fails to perform the work

From the above analysis, enterprises should be aware of the following issues to minimize risks when unilaterally terminating the labour contract due to the frequent non-completion of work of their employees:

(i) There must be criteria for assessment of employees' fulfillment of duties in the policy established by the employer with consideration of the opinions offered by the representative organization of employees.

Article 41 of Decree 145/2020/ND-CP has specific provisions on taking of opinions offered by the representative organization of employees when issuing criteria for assessment of employees' fulfillment of duties. Currently, there is no specific regulation that there must be a consent or an approval of the representative organization of employees in order for a criteria for assessment of employees' fulfillment of duties to be effective and legally valid. Therefore, in principle, it can be understood that criteria for assessment of employees' fulfillment of duties only need to be considered and commented by the representative organization of employees at the grassroots level as a way to show publicity and transparency, but in no case it is required to have the approval or consent of the representative organization of employees to such criteria.

In addition, enterprises should also note Article 12.3 and Article 6.1 of Decree 12/2022/ND-CP stipulating administrative penalties from 10 to 20 million dong for enterprises failing to take opinions of the representative organization of employees at the grassroots level into consideration when issuing the criteria for assessment of employees' fulfillment of duties.

(ii) Must notify the employee in advance that the employer will unilaterally terminate the labour contract with the employee who regularly fails to complete the work as prescribed in Article 36.2 of the Labour Code 2019.

(iii) Must perform the obligations of the employer when terminating the labour contract as prescribed in Article 48.1 of the Labour Code 2019.



CASELAW NO. 61/2023/AL ON THE TERMINATION OF ADOPTION WHEN THE ADOPTED CHILD IS UNDERAGE

Source of the case law: First instance Decision No. 87/2019/QDST-HNGD dated 24 April 2019 of the People's Court of Trang Bom District, Dong Nai Province on “Requesting the termination of adoption”, the petitioner is Mr. Tran Cong T (the adoptive father), the persons with related rights and obligations are Mr. Nguyen Thanh H and Ms. Tran Thi Thao T1 (the biological father and mother).

Location of the case law’s content: Paragraph 7, 8 of “Assessment of the Court”.

Summary of the case law’s content:

- **The case law’s situation:** The biological father, mother and the adoptive father, mother agreed to hand over the adopted child when the adopted child was underage to the biological father or mother for continued care and nurturing; the adopted child wished to return to live with his or her biological father or mother and the adoptive father or mother had a request to terminate the adoption.
- **Legal solution:** In this case, the Court must accept the request to terminate the adoption.

Provisions of law related to the case law:

- Article 25, 26 and 27 of the Law on Adoption 2010;



- Article 78 of the Law on Marriage and Family 2014.

Analysis of the case law:

In 2015, Mr. Tran Cong T and Ms. Nguyen Thi Q adopted Nguyen Minh Khanh H1 (born in 2003), the biological child of Mr. and Ms. Nguyen Thanh H (Ms. Nguyen Thi Q's younger brother) and Ms. Tran Thi Thao T1, the parties have made a legal adoption dossier and the parties have fully exercised their rights and obligations in accordance with the law. While living at his uncle's house, the child lived and studied well and still kept in touch with his family. In 2009, H1 wished to live with his biological parents and was approved by his adoptive parents, Mr. T, Ms. Q and his biological parents, Mr. H and Ms. T1, so Mr. T and Ms. Q made an application to the Court to terminate the adoption.

According to Clause 1, Article 25 of the Law on Adoption 2010, two conditions for the adoption to be terminated are (1) the adopted child is an adult, and (2) the adoptive parent voluntarily terminates the adoption. At the time of 2019, Nguyen Minh Khanh H1 is underage (15 years old), so in principle, this adoption relationship cannot be terminated. Even H1 cannot unilaterally request termination of adoption as prescribed in Article 26 of this Law. **However, in the context of the biological father, the biological mother and the adoptive father, the adoptive mother agreed to hand over him to the biological father and mother for continued care and nurturing; the adopted child wished to return to live with his biological father or mother and the adoptive father or the adoptive mother requested to terminate the adoption; based on the principle of "respecting the child's right to live in the original family environment" as provided in Clause 1, Article 4 of the Law on Adoption 2010.** Therefore, the Court accepted the request to terminate the adoption of Mr. Tran Cong T, Ms. Nguyen Thi Q with her nephew Tran Minh Khanh H1.

Thus, the above Case Law solved the case of conflict between the legal provisions and the case practice when 02 (two) conditions could not be satisfied for the adoption to be terminated but fully complied with the principle of "**respecting the child's right to live in the original family environment**" stipulated in Clause 1, Article 4 of the Law on Adoption 2010, according to which the Court's acceptance of Mr. Tran Cong T's request to terminate the adoption and choosing to apply the above principles for settlement is satisfactory and consistent with reality.

**LEGAL DOCUMENT IN 04/2023**

NO.	EFFECTIVE DATE	NAME
TRANSPORTATION		
1.	01/5/2023	Circular No. 01/2023/TT-BGTVT on guidelines for production, approval, and announcement of list of projects; methods and criteria of bid and proposal evaluation in bidding for investors of road traffic service works issued by the Minister of Transport
2.	22/3/2023	Circular No. 02/2023/TT-BGTVT amending Circular 16/2021/TT-BGTVT regulations on inspection of technical safety and environmental protection of road motor vehicles promulgated issued by the Minister of Transport
3.	23/3/2023	Decision No. 305/QD-BGTVT announcing the amended and supplemented administrative procedures in the field of registration under the management functions of the Ministry of Transport
HEALTH		
1.	01/5/2023	Circular No. 05/2023/TT-BYT regulate the regime of periodical reporting on HIV/AIDS prevention and control activities issued by Minister of Health
2.	13/3/2023	Decision No. 1342/QD-BYT approval of the plan for disaster prevention and control and search and rescue in 2023 issued by the Ministry of Health
REAL ESTATE		
1.	11/3/2023	Resolution No. 33/NQ-CP on certain solutions to resolve difficulties and promote the real estate market to develop safely, healthily, and sustainably issued by the Government
ENVIRONMENT		
1.	12/9/2023	Circular No. 01/2023/TT-BTNMT on National technical regulation on ambient quality issued by the Minister of Natural Resources and Environment



FINANCE – BANKING

1.	15/3/2023	Decision No. 313/QD-NHNN on refinancing interest rate, rediscount interest rate, overnight lending rate in interbank electronic payment and loan to cover capital shortfall in clearing payment of the State Bank of Vietnam for organizations, credit institutions, foreign bank branches issued by the State Bank of Vietnam
2.	15/3/2023	Decision No. 314/QD-NHNN on the maximum short-term lending interest rate in Vietnam dong of credit institutions, foreign bank branches for borrowers to meet capital needs for a number of economic sectors and industries as regulated in Circular No. 39/2016/TT-NHNN issued by the Governor of the State Bank of Vietnam
3.	05/5/2023	Circular No. 18/2023/TT-BTC stipulating the procedures for collecting and paying fines, deducting the difference in fines, receipts for fine collection and funding from the State budget to ensure the operation of the armed forces administrative sanctions issued by the Minister of Finance

CONSTRUCTION

1.	17/3/2023	Decision No. 258/QD-TTg on approving roadmap for application of Building Information Modeling (BIM) in construction sector issued by the Prime Minister
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GOVERNMENT

1.	21/3/2023	Directive No. 07/CT-TTg on strengthening policy communication issued by the Prime Minister
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EXPORT/ IMPORT

1.	22/3/2023	Decision No. 691/QD-BCT on the extension of the application of safeguard measures to imported long steel products issued by the Ministry of Industry and Trade
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HOME AFFAIRS

1.	10/5/2023	Circular No. 02/2023/TT-BNV stipulates the reporting regime for statistics of the Department of Home Affairs issued by the Minister of Home Affairs
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