GLG

Global Legal Group

The International Comparative Legal Guide to:
Employment & Labour Law 2011

A practical cross-border insight into employment and labour law

Published by Global Legal Group, with contributions from:

Afridi & Angell
Anderson Mori & Tomotsune
Andreas Neocleous & Co LLC
Bloomfield-Advocates & Solicitors
Cardenas & Cardenas Abogados
CASTEGNARO
Gerlach Rechtsanwälte
Heenan Blaikie LLP
Hogan Lovells
Homburger
HopgoodGanim Lawyers
KALO & ASSOCIATES
Khaitan & Co
KhattarWong
Koep & Partners
Littler Mendelson, P.C.
Lydian
Matheson Ormsby Prentice
Nikos Frangakis & Associates
Pachiu & Associates
Randl Partners
Shin & Kim
Shook, Hardy & Bacon L.L.P.
Simpson Grierson
Soewito Suhardiman Eddymurthy Kardono
VNA Legal
Yigal Arnon & Co.

Chapter 35

Vietnam

Konrad Hull

Nguyen Thi Xuan Trinh

VNA Legal

1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

The Labour Code of Vietnam, issued by the National Assembly on 23 June 1994 (as amended 2 April 2002, 29 November 2006, and 2 April 2007) together with its implementing legislation. Please note that the Labour Code is due for amendment later this year.

1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

The Labour Code is stated to apply to all workers, and organisations or individuals utilising labour on the basis of a labour contract in any sector of the economy and in any form of ownership. The law also applies to trade apprentices, domestic servants and various other forms of labour stipulated in the Labour Code. Specifically, in relation to foreign investment and foreigners, Vietnamese citizens who work in an enterprise with foreign-owned capital in Vietnam or in a foreign or international organisation operating in the territory of Vietnam, and a foreigner who works in an enterprise or organisation or for a Vietnamese individual operating in the territory of Vietnam, are subject to Labour Code, except where the provisions of an international treaty to which Vietnam is a signatory provide otherwise. Certain State employees and officials are governed by other legislation and only certain provisions of the Labour Code apply to them.

There are three forms of labour contract governed by the Labour Code: (i) an indefinite term labour contract – where the parties do not determine the term and the time for termination of the contract; (ii) a definite term labour contract – where the parties determine the term and the time for termination of the contract as a period of between twelve to thirty six months; and (iii) a labour contract for a specific or seasonal job with a duration of less than twelve months.

1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

Pursuant to the Labour Code, a labour contract has to be entered in writing in duplicate with each party retaining one original. However, an oral contract may be entered into in respect of certain temporary jobs which have duration of less than three months and in respect of domestic helpers. In the case of oral agreements, the parties must still comply with the provisions of the Labour Code.

1.4 Are any terms implied into contracts of employment?

A labour contract must contain the following main provisions: work to be performed; working hours and rest breaks; wages; location of job; duration of contract; conditions on occupational safety and hygiene; and social insurance for employees. Additionally, the Labour Code and its implementing legislation set minimum employee rights in many areas, including working hours, rest breaks, overtime, annual leave, personal leave, maternity leave, termination etc. and such rights cannot be contracted out of. Where the whole or part of a labour contract provides to the employee less rights than those stipulated in the laws on labour, in any collective labour agreement or the existing internal labour regulations of the enterprise, or limits other rights of an employee, the whole contract or relevant parts must be amended or added to accordingly.

1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

The Labour Code sets down numerous minimum terms and conditions that an employer must observe, including but not limited to working hours, rest breaks, overtime, annual leave, personal leave, maternity leave, termination etc. Additionally, minimum salaries are also set by law, which salaries vary from locality to locality and also whether or not the employer is a Vietnamese or foreign enterprise.

1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

The Labour Code allows collective labour agreements to be entered into between a labour collective and the employer in respect of working conditions and utilisation of labour and the rights and obligations of both parties in respect of labour relations. A collective labour agreement is negotiated and signed by the representative of the labour collective (i.e. the representative of the executive committee of the trade union of the enterprise or a temporary trade union organisation) and the employer but the terms and conditions of the collective labour agreement must not be inconsistent with the Labour Code and other legislation.

A collective labour agreement can only be signed if the negotiated content of such agreement is approved by more than fifty percent of the members of the labour collective in the enterprise.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

It is the responsibility of the local trade union and industry trade union to establish trade unions at enterprises and employers are responsible for facilitating the establishment of such trade unions. Any act which obstructs the establishment and activities of a trade union at an enterprise is strictly prohibited. In practice, many organisations do not have a trade union established, although certain sectors (i.e. the manufacturing sector) often do.

2.2 What rights do trade unions have?

Pursuant to law, trade unions look after and protect the rights of employees, and inspect and supervise the implementation of the provisions of the laws on labour such as inspecting the observance of the law on labour contracts, recruitment, wages, labour safety, social insurance and policies in relation to the rights, obligations and interests of the employees. Depending on the form of disciplinary action being taken against an employee, an enterprises' trade union should be represented at relevant disciplinary meetings and detailed provisions governing labour discipline and the role of the trade unions are set out in law. The law does not adequately deal with the situation where an enterprise does not have a trade union and how disciplinary procedures should be conducted in such circumstances.

Additionally, the trade union of an enterprise represents the employees in signing collective labour agreements with the employer and a representative of the trade union should attend and state his/her opinions where a labour dispute is resolved by an authority or heard by the court.

2.3 Are there any rules governing a trade union's right to take industrial action?

The rights of a trade union to take industrial action are governed by the Labour Code. Pursuant to the Labour Code, a trade union or labour collective representative can issue a written decision on a strike and prepare written demands when there is agreement from more than fifty percent of the total number of employees in the case of an enterprise or section of an enterprise with less than 300 employees, or above seventy five percent of the total number of people from whom opinions were taken in the case of an enterprise or section of an enterprise with three hundred or more employees (i.e. where an enterprise has three hundred or more employees, opinions are not taken directly from employees but from members of the executive committee of the trade union of the enterprise, from the leader of the union group and from the leader of the manufacturing group; where there is no trade union, opinions are taken from the leader and deputy leader of the manufacturing group).

2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

A labour conciliation council of an enterprise shall be established in enterprises which have a trade union or a provisional executive committee of a trade union. A labour conciliation council of an enterprise shall conduct conciliation of labour disputes including individual labour disputes between an employee and the employer and a collective labour dispute between a labour collective and the employer.

The membership of the labour conciliation council shall consist of an equal number of representatives of the employees and of the employer. The two parties may agree on a selection of additional members of the council. The labour conciliation council shall work on the basis of the principle of reaching a unanimous agreement.

2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

Labour conciliation councils are established to conduct conciliation of labour disputes only.

2.6 How do the rights of trade unions and works councils interact?

As noted above, labour conciliation councils are established to conduct conciliation of labour disputes only; the rights of trade unions and work councils are separate.

2.7 Are employees entitled to representation at board level?

No, they are not.

3 Discrimination

3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

The Labour Code specifies that every person shall have the right to work, to choose freely the type of work or trade, to learn a trade and to improve his/her professional skill without being discriminated against on the basis of gender, race, social class, beliefs or religion. Additionally, the Labour Code sets out specific rights for female employees. Specifically, the Labour Code provides that the State shall ensure that the right to work for a woman is equal in all aspects with that of men. Additionally, employers are strictly prohibited from conduct which is discriminatory towards a female employee and employers must implement the principle of equality of males and females in respect of recruitment, utilisation, wage increases and wages. Employers must give preference to a female who satisfies all recruitment criteria for a vacant position which is suitable to both males and females in an enterprise. An employer is prohibited from dismissing a female employee or unilaterally terminating the labour contract of a female employee for reason of marriage, pregnancy, taking maternity leave or raising a child under twelve months' old, except where the enterprise ceases operation. During pregnancy, maternity leave or raising a child under twelve months, a female employee is entitled to postponement of unilateral termination of her labour contract or to extension of the period of consideration for labour discipline, except where the enterprise ceases operation.

Pursuant to the Labour Code, employers are prohibited from prejudicing employees because the employee has formed, joined or participated in the activities of a trade union.

Additionally, pursuant to the Labour Code, the State will protect the right to work of the disabled and encourage the recruitment of and creation of jobs for the disabled. Tax incentives and other

preferential treatment may apply to enterprises that employ disabled persons.

3.2 What types of discrimination are unlawful and in what circumstances?

Please see question 3.1 above.

3.3 Are there any defences to a discrimination claim?

No specific defences are specified under Vietnamese law.

3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

A discrimination complaint could be made to the Department of Labour, War Invalids and Social Affairs ("DOLISA"), the Ministry of Labour, War Invalids and Social Affairs ("MOLISA") or to the Vietnamese courts. Employees can settle claims before they are initiated and parties to all forms of dispute are actively encouraged to settle claims.

3.5 What remedies are available to employees in successful discrimination claims?

Remedies will depend on the nature of the discrimination and could include re-instatement, where an employee is terminated for discriminatory reasons, as well as monetary compensation. Additionally, the acts of discrimination must cease and the infringing party may be forced to make a public apology and restore the honour and all material interests of the employee.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

Female employees are entitled to 4 months' maternity leave when they perform jobs under normal working conditions, 5 months' leave if they perform heavy hazardous or dangerous jobs (as prescribed by MOLISA and the Ministry of Health) and 6 months' leave for disabled employees according to the provisions of law on disabled persons. Where a female employee gives birth to twins or more, she shall be entitled to an additional 30 days' leave for each additional child.

4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

As with sick leave, maternity leave entitlements are paid from the social insurance fund and not by the employer, although, in practice, they are usually paid by the employer and then reimbursed by the social insurance fund to the employer. Employees are entitled to full maternity leave from the first day of employment and there is no minimum period they must have worked. On maternity leave, employees are paid 100% of their average salary of the preceding six (6) months.

4.3 What rights does a woman have upon her return to work from maternity leave?

Parents are entitled to take paid leave for a sick child in accordance with the following (i) up to 20 days for a child below 3 years of age; or (ii) up to 15 days for a child between 3 to 7 years of age. When both the mother and father are participating in the social insurance regime, if their child is still sick after either of them has spent their entire entitlement, the other parent is entitled to the said regime. Parents will be entitled to 75% of their monthly salary from the social insurance fund.

4.4 Do fathers have the right to take paternity leave?

In case of the mother's death, the father or person directly nursing the child is entitled to the maternity regime.

4.5 Are there any other parental leave rights that employers have to observe?

Pursuant to law, when taking a leave of absence: to attend a pregnancy examination; to carry out family planning programmes or to have medical treatment for miscarriage; to attend to a sick child under seven years of age; or to adopt a newborn baby, a female employee is entitled to social insurance benefits or to be paid by the employer a sum equal to the amount of social insurance benefits. The duration of the leave of absence is determined by the government. By implication, female employees are therefore entitled to take leave for such periods.

4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependents?

As noted above, employees are entitled to take paid leave (paid from the social insurance fund) where they need to attend to a sick child under seven years of age but there is no general entitlement to work flexibly, except by agreement of the parties.

5 Business Sales

5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

Pursuant to the Labour Code, where an enterprise merges, consolidates, divides, separates or transfers ownership of, right to manage, or right to use assets of the enterprise, the succeeding employer shall be responsible to continue performance of the labour contracts of the employees and the succeeding employer shall be responsible for payment of wages and other benefits to the employees transferred. Where all available employees are unable to be utilised, there must be a plan for labour usage in accordance with law. Further, an employee whose labour contract is terminated as a result of the above, shall be entitled to termination allowances for an organisational restructuring (i.e. one month's salary for each year of employment, but not less than two months' salary, subject to our comments at question 6.5 below on the unemployment insurance regime). Additional provisions are provided under the Law on Enterprises and its implementing legislation in relation to divisions, separations, consolidations, mergers and conversions of companies.

5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

All rights of a transferring employee under their labour contract transfer on a business sale unless their employment is terminated. In cases where an enterprise merges, consolidates, divides,

separates, transfers ownership of, right to manage, or right to use the assets of the enterprise, the employer and the executive committee of the trade union of the enterprise shall, based on the labour usage plan, consider the continuance of performance of, amendment of or addition to the collective labour agreement, or entering into a new one.

5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

In cases where an enterprise merges, consolidates, divides, separates, transfers ownership of, right to manage, or right to use the assets of the enterprise, and all of the current employees are unable to be utilised, there must be a plan for labour usage containing the following basic principles:

(i) the number of employees who will continue to be employees;

(ii) the number of employees who will be re-trained in order that they are able to continue employment;

(iii) the number of employees who will retire;

(iv) the number of employees whose labour contracts will be terminated; and

(v) the former employer and the new employer are responsible to resolve the rights of employees, including specifying responsibility for funding for training and for funding for loss of work allowances for employees whose labour contracts will be terminated.

The trade union of an enterprise must participate in preparation of the plan for labour usage, and when the plan is implemented, it must be notified to the State administrative body for labour at the provincial level.

Timing varies depending on the industry and the number of employees involved and whether or not the enterprise has a trade union and the law does not adequately deal with the situation where the enterprise does not have a trade union.

A fine of between fifteen to thirty million Vietnamese dong may apply for failure to comply with the above procedures.

5.4 Can employees be dismissed in connection with a business sale?

Yes, please see question 5.1 above.

5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

For transferring employees, the succeeding employer is responsible for continuing performance of the labour contracts and is responsible for the payment of wages and other benefits to the employees transferred. Conditions of employment pursuant to such labour contract could only be changed by agreement of the parties. However, conditions of employment of any collective labour agreement could be changed (please see question 5.2 above) following relevant procedures.

6 Termination of Employment

6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

Yes, employees have to give notice of termination of their employment and the period and rights to terminate depend on the type (i.e. term) of contract. Employees under a definite term labour contract (i.e. with a term of between 12 to 36 months) or a seasonal or specific job with a duration under 12 months can only terminate their labour contract under the following circumstances set out in the Labour Code:

(a) the employee is not assigned to the correct job or work place or ensured the work conditions as agreed in the contract – in which case they must provide at least 3 working days' written notice;

(b) the employee is not paid in full or in time the wages due as agreed in the contract – in which case they must provide at least 3 working days' written notice;

(c) the employee is maltreated or is subject to forced labour – in which case they must provide at least 3 working days' written notice;

(d) due to real personal or family difficulties (as detailed in law), the employee is unable to continue performing the contract – in which case they must provide at least 30 working days' written notice in the case of a definite term labour contract, or at least 3 days' written notice in the case of a seasonal or specific job with a duration of less than 12 months;

(e) the employee is elected to full-time duties in a public office or is appointed to a position in a State body – in which case they must provide at least 30 working days' written notice in the case of a definite term labour contract, or at least 3 days' written notice in the case of a seasonal or specific job with a duration of less than 12 months;

(f) a female employee is pregnant and must cease working on the advice of a doctor – by written notice, with the period of notice depending on the period determined by the doctor; and/or

(g) where an employee suffers illness or injury and remains unable to work after having received treatment for a period of three consecutive months in the case of a definite term labour contract (with a duration of 12 to 36 months) or for a quarter of the duration of the contract in the case of a labour contract for a specific or seasonal job with a duration of less than 12 months – in which case they must provide at least 3 working days' written notice.

An employee under an indefinite term labour contract has the right to terminate the contract provided that he/she gives the employer at least 45 days' written notice or, where the employee has suffered illness or injury and has received treatment for a period of 6 consecutive months, such employee can terminate on at least 3 days' written notice.

6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?

Vietnamese law is silent on this issue but provided the employee is still employed and paid then this would not be contrary to law. However, as noted above, an employee can unilaterally terminate a definite term labour contract on three days' notice where they are not assigned to the correct job or work place or ensured the work conditions as agreed in the contract (which could arguably be used to terminate a contract in such circumstance depending on how the provision was drafted) or on 45 days' notice for an indefinite term contract (i.e. at any time during the "garden leave", the employee could choose to terminate the contract earlier). It would be unlikely that Vietnamese courts would enforce any provision that circumvented such rights even if agreed to by the parties.

6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

An employer has the right to unilaterally terminate a labour contract only in the following circumstances:

(a) The employee repeatedly fails to perform the work in accordance with the terms of the contract.

(b) An employee is disciplined in the form of dismissal where an employee: (i) commits an act of theft, embezzlement, disclosure of business or technology secrets, or other conduct which is seriously detrimental to the assets or well-being of the enterprise (which conduct and the consequences for such conduct need to be spelt out either in the employee's labour contract or the employer's internal labour regulations); (ii) is disciplined by extension of the period of wage increase or transfer to another position, re-commits an offence during the period when he is on trial or re-commits an offence after he is disciplined in the form of removal from office; and/or (iii) takes an aggregate of 5 days off in one month or an aggregate of 20 days off in one year of his own will without proper cause.

(c) Where an employee suffers illness and remains unable to work after having received treatment for a period of 12 consecutive months in the case of an indefinite term labour contract, or six consecutive months in the case of a definite term contract with a duration of 12 to 36 months, or more than half the duration of the contract in the case of a contract for a specific or seasonal job.

(d) The employer is forced to reduce production and employment after trying all measures to recover from a natural disaster, a fire or another event of *force majeure* as stipulated by the government.

(e) The enterprise, body or organisation ceases operation.

Relevant notice periods, as noted in question 6.1 above, must be given.

In addition to the methods of termination noted above an employer can terminate a labour contract as a result of an organisational restructuring or technological changes. Specifically, the law provides that where as a result of organisational restructuring or technological changes an employee who has been employed in a business for a period of 12 months or more will become unemployed, the employer has an obligation to try to retrain and assign the employee to a new job but, if a new job cannot be created, the employer can terminate the employee's employment.

Where an employer unlawfully terminates a labour contract, the employer must re-employ the employee for the position stipulated in the contract and pay compensation equal to the amount of wages and wage allowances (if any) for the period the employee was not allowed to work, plus at least two months' wages and wage allowances (if any). Where the employee does not wish to return to work, the employee shall be paid the compensation noted above and any termination allowances that may apply under law. Where the employer does not wish to re-employ the employee and the employee so agrees, in addition to the compensation noted above and any termination allowances that may apply under law, the two parties must agree on an additional amount of compensation for the employee.

Consent from a third party is not required before an employer can dismiss but extensive procedures specified in the law must be followed and the law predicates the relevant trade union representative being present at disciplinary meetings. The law is silent on what happens where the enterprise does not have a trade union established and therefore the procedures cannot be followed to the letter of the law where there is no trade union, which is a well noted shortcoming in the law.

6.4 Are there any categories of employees who enjoy special protection against dismissal?

An employer is not permitted to unilaterally terminate a labour contract in any of the following circumstances:

(a) The employee is suffering from an illness or injury caused by a work-related accident or occupational disease and is being treated or nursed on the advice of a doctor other than in the circumstances specified in question 6.3(c) and (d).

(b) The employee is on annual leave, personal leave of absence, or any other type of leave permitted by the employer.

(c) The employee is female and for reasons of marriage, pregnancy, taking maternity leave or raising a child under 12 months' old, except where the enterprise ceases its operation.

6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?

Please see question 6.3 above for the various grounds for unilateral termination by an employer.

The severance allowance payable under Vietnamese law depends on the specific circumstances pursuant to which the employee's employment has been terminated. However, generally speaking, where an employee resigns in accordance with the law or is terminated in accordance with the law and the employee has been working for the employer for twelve months or more, the employer will be obligated (subject to our comments on unemployment insurance below) to pay the employee a termination allowance equal to the aggregate amount of half of one month's salary for each year of employment, except if the employer has contracted for additional benefits, in which case the employer will have to pay the amount contracted. "Salary" for the purpose of calculating termination allowances is calculated based on the average salary (including seniority and position allowances but excluding other allowances) earned in the six months immediately preceding termination. In cases where an employee has worked more than 6 months in any one year, the number of years of service must be rounded up. Probationary periods, annual leave, public holidays and training courses must be taken into account in determining the period of employment. Please note that for the purpose of determining termination allowances, the term "Salary" does not include social and health insurance payments, bonuses or clothing allowances. However, if the employee has not resigned in accordance with law (i.e. the employee has not given the requisite notice period), no severance allowances will be payable. As well as severance allowances, an employee will also be entitled to be paid any unpaid accrued wages and untaken accrued annual leave. Additional entitlements could also be specified in the relevant labour documentation and different payments apply for termination due to an organisational restructuring.

From 1 January 2009, Vietnam introduced a form of unemployment insurance, which replaces termination allowances specified in the Labour Code in certain circumstances. Where employees are covered under the unemployment insurance regime they will receive unemployment insurance from the social insurance fund (at the rates specified by law) for the period that they have been making contributions thereto (and will not be entitled to termination allowances for that period) but for periods prior to the introduction

of the insurance regime, they will receive termination allowances from the employer. Those employees not covered under the unemployment insurance regime will still be entitled to termination allowances. Employers required to participate in the unemployment insurance regime (with contributions thereto being made by both the employer and employee) are those employers who employ ten or more employees and sign labour contracts with such employees (other than labour contracts with less than a twelve-month term). Employers employing less than ten employees are not required to participate in the unemployment insurance regime or make contributions thereto and termination allowances will be payable for employees working for such employers.

6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

Yes. The Labour Code and its implementing legislation set out extensive procedures that must be followed for all forms of disciplinary action including dismissal.

6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

Please see question 6.3 above.

6.8 Can employers settle claims before or after they are initiated?

Yes, employers can settle claims before and after they are initiated and are encouraged by dispute resolution procedures and the courts to do so. Employers are recommended to seek legal advice before terminating any employee and are generally encouraged to negotiate a termination as opposed to following the termination procedures due to the limited grounds for termination provided under law and the difficulties in practice in enforcing these rights.

6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

Please see question 6.3 above for the various grounds for unilateral termination by an employer and for termination due to an organisational restructuring or technological changes.

In the circumstances of an organisational restructuring or technological changes, which could impact on a number of employees, the employer is under an obligation to try to retrain employees and to create a new job for employees who have been employed in the business for a period of twelve (12) months or more, although they can dismiss such employees where they are unable to do so.

6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

Employees generally enforce their rights through the courts, although they could seek the assistance of relevant Vietnamese authorities such as DOLISA or MOLISA. Pursuant to the law, the remedy for unfair dismissal is re-instatement with relevant compensation (see question 6.3 above).

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

Whilst there is nothing legally to prevent the parties from agreeing restrictive covenants, in practice these will almost always be unenforceable where they extend beyond the term of employment. Whilst there is no legal basis for this, the labour authorities view a labour contract as only being able to deal with matters during the term of employment and the courts generally view disputes in favour of employees and are likely to take a similar approach. Whilst they may not be able to be enforced in practice, restrictive covenants are common and still recommended as they alert employees to expectations and may be able to be enforced in some circumstances. However, employers should be aware of their limitations.

7.2 When are restrictive covenants enforceable and for what period?

Generally restrictive covenants relating to confidentiality issues will be enforceable during the term of the labour contract but may not be enforceable thereafter. Restraints on secondary employment whilst the employee is working for the employer will not be enforceable and neither will restrictions on employees seeking employment (whether or not limited in time, geography or industry etc.) after termination of employment.

7.3 Do employees have to be provided with financial compensation in return for covenants?

No, they do not.

7.4 How are restrictive covenants enforced?

Restrictive covenants during the term of the employment could be enforced through disciplinary procedures under Vietnamese law and in accordance with the employee's labour contract and the employer's internal labour regulations or through the courts. After termination of employment, enforcement would need to be sought through the courts.

8 Court Practice and Procedure

8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

The District People's Courts have first instance jurisdiction to resolve individual labour disputes between an employee and an employer in cases provided by the Civil Proceedings Code. The Labour Court of the Provincial People's Courts have first instance jurisdiction to resolve collective labour disputes between a labour collective and an employer in cases provided by the Civil Proceedings Code.

The Labour Court of the Provincial People's Court rehears cases in which the judgment of the District People's Court of first instance is being appealed against. The Appellate Court of the Supreme People's Court rehears cases in which the judgment of the Provincial People's Court of first instance is being appealed against.

Composition of a council of adjudicators with first instance jurisdiction comprises of one judge and two people's jurors. In special cases, the council of adjudicators with first instance jurisdiction may comprise of two judges and three people's jurors.

Composition of a council of adjudicators with appellate jurisdiction comprises of three judges.

8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?

Individual labour disputes between an employee and an employer (except for: disputes relating to disciplinary actions in the form of dismissal or disputes which arise from the unilateral termination of a labour contract; disputes relating to payment of compensation for loss between an employee and employer; disputes relating to payment allowances upon termination of a labour contract; and disputes relating to social insurance stipulated by the laws on labour) should go through reconciliation by the labour conciliatory council of an enterprise or a labour conciliator of the body in charge of the State administration of labour in a district, town, or provincial city before proceeding to the courts. Collective labour disputes between a labour collective and employer should be resolved by the labour arbitration council in a province and city under a central authority before proceeding to court.

Disputes relating to disciplinary actions in the form of dismissal or disputes which arise from the unilateral termination of a labour contract or disputes relating to payment of compensation for loss between an employee and employer, payment allowances upon termination of a labour contract or disputes relating to social insurance stipulated by the laws on labour may be taken straight to court.

In order to commence proceedings at court, the applicant must lodge an application and enclose documents and evidence to the competent court for settlement of the case. Within five working days from the date of receipt of the application, the court shall consider to carry out the procedures for acceptance of the case or not. Upon receipt of an application and the enclosed documents and evidence, the court shall immediately notify the applicant to come to the court to carry out the procedures for payment of a court fee deposit in the case where applicable. Within a period of fifteen (15) days from the date of receipt of the notification note on payment of a court fee deposit from the court, the applicant must pay the court fee deposit. The court shall accept the case when the applicant submits a receipt for the payment of a court fee deposit.

During the period of preparation for trial at first instance, the court shall carry out conciliation to enable the parties to reach an agreement on settlement of the case, except for certain cases for which conciliation is not permitted or is unable to be carried out as stipulated by law (such as claims for compensation causing damage to State property, a defendant who has been properly summonsed by the court intentionally fails to appear twice or any concerned party cannot participate in the conciliation due to proper reasons).

8.3 How long do employment-related complaints typically take to be decided?

The maximum time-limit of preparation for trial is stated by law to be five months from the date of acceptance of the case. Although in certain cases this can be extended and, in practice, often is.

8.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?

Yes, it is possible to appeal a first instance decision.

An appeal application can be lodged within the time-limit of fifteen days from the date of pronouncement of the judgment. If the concerned parties are absent from the trial, the time-limit is calculated from the date a copy of judgment is delivered to them or from the date the judgment is displayed.

The maximum time-limit of preparation for an appeal hearing is five months from the date of acceptance of the case.

Konrad Hull

VNA Legal
Tenth Floor, Bitexco Office Building
19-25 Nguyen Hue Street
District 1, Ho Chi Minh City
Vietnam

Tel: *+84 8 3914 0074*
Fax: *+84 8 3914 3820*
Email: *konrad.hull@vnalegal.com*
URL: *www.vnalegal.com*

Konrad is admitted as a Barrister and Solicitor of the Supreme Court of Western Australia and is a Partner of VNA Legal and based in Ho Chi Minh City. He has extensive international and local experience and has been practicing law for approximately 14 years, with almost 9 years in Vietnam, where Konrad was previously a partner in LWA Vietnam (formerly Lucy Wayne & Associates) and head of the HCMC Legal practice of DFDL Mekong.

Before coming to Vietnam, Konrad worked in the corporate/commercial and M&A practices with Minter & Ellison in Australia and Simmons & Simmons in Hong Kong. Since moving to Vietnam, Konrad has gained a vast amount of foreign direct investment experience, regularly advising clients on structuring both direct and indirect investments into Vietnam and has an extensive employment law practice.

Nguyen Thi Xuan Trinh

VNA Legal
Tenth Floor, Bitexco Office Building, 19-25
Nguyen Hue Street
District 1, Ho Chi Minh City
Vietnam

Tel: *+84 8 3914 0074*
Fax: *+84 8 3914 3820*
Email: *trinh.nguyen@vnalegal.com*
URL: *www.vnalegal.com*

Trinh is a Vietnamese qualified lawyer and partner of VNA Legal, based in Ho Chi Minh City. Prior to establishing VNA Legal, Trinh was a partner of LWA Vietnam (formerly Lucy Wayne & Associates) and has more than 12 years' experience practicing law and providing legal services to foreign clients. She was trained in the UK for legal practice from 2002 to 2005. In addition to a law degree and legal practice degree, she has also obtained a finance-banking degree, completed the Vietnamese securities course and international contract course in Bangkok.

Trinh advises on a broad range of direct and indirect foreign investment in Vietnam and has considerable experience in investment structuring and re-structuring as well as general corporate, oil and gas, infrastructure, maritime, construction, real estate, M&A, employment, litigation, IP, commercial, taxation, banking, project financing and securities.

Languages: Vietnamese (native) and English (fluent).

VNA Legal has two Vietnam-based partners (1 Australian and 1 Vietnamese). The partners lead a team of foreign lawyers, foreign-trained lawyers, Vietnamese lawyers, law trainees, experienced legal translators and administrators. The firm also works with Vietnamese lawyers from associated Vietnamese law firms, as required.

VNA Legal provides advice in all areas of industry and commerce to multi-national and Vietnamese corporate, financial and industrial clients for both local and cross-border commercial transactions. Our extensive experience in Vietnam has been gained from our lawyers' work on hundreds of major projects throughout Vietnam in most fields of practice. VNA Legal is a full service firm dedicated to offering its clients international standard legal services combined with practical local knowledge and experience. The Partners of VNA Legal collectively have over 20 years of experience within Vietnam, structuring and negotiating high profile deals and transactions as well as extensive international experience gained at leading law firms in both Hong Kong and Australia.

The International Comparative Legal Guide to:
Employment & Labour Law 2011

Other titles in the ICLG series include:

- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Commodities and Trade Law
- Competition Litigation
- Corporate Governance
- Corporate Recovery & Insolvency
- Corporate Tax
- Dominance
- Enforcement of Competition Law
- Environment & Climate Change Law
- Gas Regulation
- International Arbitration
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Patents
- PFI / PPP Projects
- Pharmaceutical Advertising
- Product Liability
- Public Procurement
- Real Estate
- Securitisation
- Telecommunication Laws and Regulations

To order a copy of a publication, please contact:

Global Legal Group
59 Tanner Street
London SE1 3PL
United Kingdom
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk