



ClientAlert

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Introduction

Dear Reader,

This month saw a handful of new regulations that affect business in Vietnam. We've briefed them and outlined the most important changes from each new regulation. They cover topics ranging from social insurance to stock market actions to real estate trading floors.

We also take a look at Rule of Law issues in Indochina and why it's important that you have the best local advice.

As always we hope you find this month's Client Alert helpful and wish you prosperity in the coming month. We look forward to working with you.

Kind regards,
Indochine Counsel

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New Aspects of Compulsory Social Insurance

Following the birth of the Social Insurance Law, dated 20 November 2014 ("**Social Insurance Law**"), and Resolution No. 93/2015/QH13, dated 22 June 2015 ("**Resolution 93**"), on the implementation of the policy on lump-sum social insurance premiums applicable to laborers, the Government issued Decree No. 115/2015/ND-CP ("**Decree 115**") detailing a number of articles of the Social Insurance Law on compulsory social insurance on 11 November 2015. Here are some of the most prominent features of Decree 115.

First of all, Decree 115 is concerned with Vietnamese officials, public servants and laborers working under labor contracts. Others who are not Vietnamese will be governed by a separate document.

Compulsory social insurance premiums are based on monthly salary of employees who pay the social insurance premiums according to the employer-decided salary regime under Article 89.2 of the Social Insurance Law as specified in Article 17 of Decree 115, as follows:

- (i) Since 1 June 2016 to 31 December 2017, the monthly salary on which the social insurance premiums are based is the salary plus wage allowance under the provisions of the Labor Law stated in the labor contract.
- (ii) Since 1 January 2018 onwards, the monthly salary on which the social insurance premiums are based will be the salary plus wage allowance and 'other additional amounts' as prescribed in the Labor Law stated in the labor contract
- (iii) The monthly salary on which the social insurance premiums are based for salaried managers of enterprises is the salary awarded by the enterprise, except for public employees in charge of the management of a State-owned one-member limited liability company.
- (iv) The monthly salary on which the social insurance premiums are based for salaried managers of cooperatives is the salary decided by the Member Council.

The wage allowance is referred to as the amount of compensation for factors on working conditions, work complexity, living conditions, employment attraction levels that the salary levels in the labor contract have not been accounted for or are incompletely calculated.

The 'other additional amounts' as mentioned above include the fixed and regularly paid additions in each payroll period and the unidentified and regularly or irregularly paid additions in each payroll period associated with the work progress and the work result of employees.

However, the following amounts are not interpreted as the wage allowance or other additional amounts: namely bonuses for initiatives; shift meals; subsidies for gasoline, telephone, transportation, housing, childcare, raising children, monetary support for employees whose relatives die, get married, who have birthdays, suffer from difficulties because of labor accidents and occupational diseases.

The second highlight of Decree 115 is the monthly pension to which the employee is entitled as provided in Article 56 of the Social Insurance Law. Specifically, the monthly pension of workers is calculated by the ratio of monthly pension multiplied to the average monthly salary for social insurance, wherein the lowest pension rate is 45% and the highest is 75%. The rate is determined based on a number of years of paying compulsory social insurance, for example:

- (i) For retirement from 1 January 2016 to earlier 1 January 2018: The rate of 45% is corresponding to 15 years of social insurance contributions and a maximum of 75% if 30 years for male and 25 years for female.
- (ii) For female retirement from 1 January 2018 onwards: The rate is 45% for 15 years, and 75% for 30 years.
- (iii) For male retirement, the rate of 45% is determined in accordance with the retirement years, such as for the year of 2018 must be 16 years, 2019 must be 17 years ...

Some other highlights of Decree 115 relating to the regimes for surrogate mothers, mothers having surrogate pregnancy, and lump-sum social insurance premiums.

Decree 115 took effect 1 January 2016.

Granting of Work Permits

On 3 February 2016 the Vietnamese Government issued Decree No. 11/2016/ND-CP detailing the implementation of a number of articles of the Labor Code on foreign employees working in Vietnam (“**Decree 11**”) replacing Decree No. 102/2007/ND-CP, dated 5 September 2013 (“**Decree 102**”).

The first procedure for obtaining a work permit is that the employer must submit the notification on its demand for recruitment of foreign employees (the “**Notification**”) to the Department of Labor - Invalids and Social Affairs to which the employer belongs at the provincial People Committee level (the “**DOLISA**”). The employer must obtain approval from DOLISA as a basis for further procedures (if any) to enable it to recruit foreign employees. Decree 11, for the first time, provide some exceptions to this rule.

In respect of exemption from work permit Decree 11 provides cases in which a foreign employee is not required to apply for the work permits but must submit proper application dossiers for the certification of or exemption from work permit at least seven working days prior to the proposed working date of the foreign employee. However, in the event of circumstance as stipulated in Articles 172.4 and 172.5 of the Labor Code 2012 and Article 7.2.e of Decree 11, foreign employees are not required to apply for a certificate of exemption from work permit.

Regarding title “expert” which foreign employee could apply to work in Vietnam, Decree 11 is more open than Decree 102 when providing that a foreigner who holds (i) a confirmation letter from the abroad organization/ agency/company or (ii) university degree and has at least three (3) years of experience working in his/her respective fields is eligible to work in Vietnam as an expert.

With regards to the procedures for obtaining work permits, at least 15 working days prior to the proposed working date of the foreign employee, the employer must submit the proper application dossier to the DOLISA. The DOLISA shall issue the work permit within seven working days from the receipt of a proper dossier, which is shorter than the statutory duration of issuance of work permit under regulations of Decree 102. The term of a work permit shall not exceed two years. Then, the parties must sign the labor contract prior to the proposed working date of such foreign employee and send the certified copy thereof to the DOLISA within five working days from the signing date. At least five working days prior to expiry of a work permit, the employer shall submit the application to the DOLISA for renewal. The DOLISA shall issue a new work permit within three (3) working days from the receipt of the proper dossier.

Foreigners illegally working in Vietnam (such as working without work permit or documents proving exemption from work permit) shall be expelled from the territory of Vietnam according to the laws of Vietnam.

Decree 11 takes effect on 1 April 2016.

Establishment of Non-Bank Credit Institutions

On 25 December 2015 the State Bank of Vietnam issued Circular No. 30/2015/TT-NHNN (“**Circular 30**”) providing regulations on issuing the license, organization and operation of non-banking credit institution. Some important contents of this Circular are summarized below:

Form of establishment

Under Circular 30 the non-bank credit institution (“**NBCI**”) includes finance company and finance leasing company. Such NBCI may be established and organized in one of the following forms:

- (i) Form of Joint Stock Company established by local shareholders only, including local individuals and at least 2 founding shareholders being organizations;
- (ii) Form of One-Member Limited Liability Company established by one local commercial bank or one foreign credit institution (being a bank, finance company, finance corporation or finance leasing company);
- (iii) Form of Two-Member Limited Liability Company with two members or more, established by (i) local commercial banks; (ii) local enterprises and local commercial bank(s) in which there is one commercial bank holding at least 30% of the charter capital of the NBCI to be

established; (iii) Vietnamese parties (including one or more local commercial banks, local enterprises) and foreign parties (including one or more foreign credit institutions), on basis of a joint venture contract; or (iv) foreign credit institutions.

It is noted that all of the founding shareholders and members of the NBCI shall not be strategic shareholders, founding shareholders, owners, founding members of other credit institution(s) established and operated in Vietnam. In addition, a foreign credit institution being a finance leasing company shall be only allowed to participate in establishment of a finance lease company in Vietnam.

Financial Capacity

Under Circular 30, all of the NBCI's founding shareholders and members not being individuals have to operate profitably in three consecutive financial years prior to the year they file for licensing. As for financial conditions required for the founding shareholders and members of a NBCI, it is stipulated in Circular 30 as follows:

- (i) The founding shareholder or member being local commercial bank must have at least VND100 trillion (approx. USD4.4 billion) in assets.
- (ii) Other founding shareholders as Vietnamese enterprises shall have at least VND500 billion (approx. USD22 million) in equity capital and at least VND1,000 billion (USD44 million) in total assets for three fiscal years preceding the year of submission of applications for licensing. In case of the founding members, such required amount shall be increased doubly (i.e. VND1,000 billion in equity capital and VND2,000 billion in total assets).
- (iii) The founding members as foreign credit institutions shall have at least USD10 billion in total assets at the end of the fiscal year proceeding the year of submission of applications for licensing.

Operational Term

The operation duration of NBCI as to be recorded in the license shall not exceed 50 years. Under Circular 30, such NBCI shall carry out operation opening within 12 months since the license is granted; otherwise the State Bank shall revoke the license.

The Charter Capital

The charter capital of a NBCI is the actual capital granted by the owner or the actual capital contributed by shareholders and capital contribution members, recorded in the NBCI's Charter and at least must equal to the legal capital as stipulated by the law.

The increase or decrease in the charter capital of NBCI and the handling in case the actual value of the charter capital is lower than the legal capital shall comply with the law. The charter capital

contribution rate of capital contribution member, the charter capital ownership rate of shareholders in NBCI shall follow the law.

This Circular takes effect from 8 February 2016.

Real Estate Broker Practicing Certificates and Real Estate Trading Floors

On 30 December 2015 the Ministry of Construction issued Circular No. 11/2015/TT-BXD (“**Circular 11**”) regulating the issuance of real estate broker practicing certificates; guiding the training on real estate brokerage and operation of real estate trading floors; and regulating the establishment and operation of real estate trading floors.

Circular 11 took effect on 16 February 2016 and repeals and replaces:

- (i) Circular No. 13/2008/TT-BXD, dated 21 May 2008, of the Ministry of Construction guiding Decree No. 153/2007/ND-CP, dated 15 October 2007, of the Government regarding the guidance on implementation of the Law on Real Estate Business; and
- (ii) Decision No. 29/2007/QĐ-BXD, dated 31 December 2007, of the Minister of Construction issuing the framework training program on knowledge of real estate brokerage, property evaluation and management of real estate trading floors.

Practicing Certificate

According to Circular 11, Vietnamese citizens, Vietnamese residing overseas and foreigners are eligible to sit an exam for the real estate brokers’ practicing certificate (“**Practicing Certificate**”) provided that they satisfy the following conditions:

- (i) Have full capacity for civil acts, and are not currently subject to investigation for criminal liability or serving a prison sentence;
- (ii) Have graduated from secondary school or higher; and
- (iii) Have lodged an application file for registration and paid the fees for the exam.

The exam for the Practicing Certificate is structured with 02 sections which are (i) basic knowledge section and (ii) specialized knowledge section. Each section will last for 120 minutes and the language used in the exam is Vietnamese. If the examinee is a foreigner, he/she is permitted to use a translator. In addition, any person who has been issued with a valid Practicing Certificate by a foreign country and who requires reissuance of the Practicing Certificate in place of an expired Practicing Certificate needs to take the exam for basic knowledge only.

It is stipulated under Circular 11 that real estate brokerage certificates which were issued prior to 1 July 2015 will remain valid for 5 years as of 1 July 2015, while real estate brokerage certificates and Practicing Certificates issued after 1 July 2015 will be valid for 5 years as of issuance date.

Establishment and operation of real estate trading floors

Under Circular 11, conditions applicable to the establishment of the real estate trading floors (the “**Trading Floor**”) are specified as follows:

- (i) the organization or individual establishing the Trading Floor must establish an enterprise;
- (ii) the Trading Floor must have at least two people holding Practicing Certificates;
- (iii) the person managing the operation of the Trading Floor (“Floor Director”) must have the Practicing Certificate;
- (iv) the Trading Floor must have operational rules, name and trading address which are stable for more than a twelve (12) month period; any changes must be notified to the Department of Construction and to clients; and
- (v) the Trading Floor must have a minimum area of 50m² and must have technical equipment satisfying operational requirements.

The Trading Floor shall be either an independent enterprise or a unit directly under the enterprise. Prior to the operational commencement of the Trading Floor, the enterprise is required to submit a dossier to the Department of Construction for management.

In addition, Circular 11 also provides for the management structure of the Trading Floor which includes the Floor Director together with a specialized section consistent with the operational scale of the Trading Floor.

The Trading Floors established prior to 16 February 2016 are permitted to continue operation, but by no later than 1 July 2016, these Trading Floors must fulfill all conditions as stated in Circular 11.

Public Offers on Securities

The Ministry of Finance has issued Circular No. 162/2015/TT-BTC guiding public offer, offer for share swap and issuance of additional shares (“**Circular 162**”). Circular 162 has, among other things, several noticeable points as below:

To begin with, offering securities to the public by an enterprise must satisfy conditions and dossiers respectively applicable to such enterprise based on its business areas and the intent of offering the securities as stipulated in Section I, Decree No. 58/2012/ND-CP, dated 20 July 2012, and as amended by Decree No. 60/2015/ND-CP (“**Decree 58**”).

Furthermore, Circular 162 also restricts the time period of each offering tranche. Accordingly, the maximum period of time for each offering tranche is 90 days. If the ensuing tranche of an issuing organization is six months later than its preceding tranche, then such issuing institution must supplement dossiers which are certified by qualified audits as to its business position or spending of monies collected from its previous tranches.

Additionally, in case a public company wishing to redeem its own issued shares to be used as treasury shares, then such company shall (i) meet conditions on maximum shares allowable to redeem and regulatory procedures for redemption as specified in the Law on Enterprise dated 26 November 2014, Decree 58 and other relevant regulations, and (ii) have sufficient financial resources for conducting the redemption, which is determined on the basis of its latest audited financial statement.

And lastly, in terms of publishing information, Circular 162 regulates that an issuing institution has to publish its issuing notice on a nation-wide electronic or written paper for three consecutive issues within seven working days from the date on which its certificate of registration on public offer takes effect.

Circular 162 came into effect on 15 December 2015.

Representative Offices of Foreign Business Entities

On 25 January 2016 the Government issued Decree No. 07/2016/ND-CP (“**Decree 07**”) replacing Decree No. 72/2006/ND-CP, dated 25 July 2006 (“**Decree 72**”), on representative offices (“**Rep Offices**”) of foreign business entities. Decree 07 officially takes effect on 10 March 2016.

Some of the remarkable points provided in Decree 07 are as follows:

(i) Conditions for establishment of the Rep Office

There are no significant changes in the conditions for establishment of the Rep Office under Decree 07. However, Decree 07 provides that a foreign business entity is allowed to establish a Rep Office/Branch in accordance with commitments in international treaties which Vietnam is a member.

If the scope of activities of the Rep Office is not in accordance with commitments of Vietnam or the foreign business entity is not a member of international treaties to which Vietnam is a

member, the establishment of a Rep Office must be approved by the relevant government ministry in advance.

(ii) Scope of activities of the Rep Office

One of the key activities of “Monitoring and activating performance of contracts which have been signed between parent company and Vietnamese partner or which related to Vietnamese markets” of the Rep Office is removed under Decree 07. Particularly, the scope of activities of the Rep Office under Decree 07 include (i) to perform as a liaison office; (ii) To do market research; and (iii) to promote the opportunities for investments and business co-operation of the foreign entity in Vietnam.

(iii) Licensing authority

Under Decree 07, besides the provincial Department of Service of Trade and Industry, the provincial Management Authority of Industrial Zones is also a licensing authority to issue the establishment license in case where the Rep Office is located inside industrial zones, besides the provincial Department of Service of Trade and Industry.

(iv) Residence Requirement in Vietnam of Chief Rep

The Chief Rep of the Rep Office must reside in Vietnam. If the Chief Rep is away from Vietnam for more than 30 days, he/she must authorize in writing another person to perform his/her rights and obligations. Such authorization must be agreed by the foreign business entity in advance.

The foreign business entity must appoint another person to be the Chief Rep of the Rep Office if he/she is away from Vietnam for more than 30 days without authorization.

(v) Procedures

The timeline for issuance of the establishment license of the Rep Office is shorter than the existing regulation. Particularly, the establishment license will be issued within 7 working days from the date of submission of the proper documents instead of 10 working days.

The procedures for amendment of a Rep Office license as a result of change of name of the Rep Office, address, Chief Rep and scope of activities of the Company are required to be conducted within 60 days from the date of such change instead of 10 days as the existing regulation.

Rule of law? Whaaat!!!

Laws, laws, laws. Countless legislation sweeping yay and nay across every single aspect of society. Every country on Earth has laws. Some of them enforced more enthusiastically than others. Rule of law, it's called. A society that answers to the laws; a country where even those in power are forced to bow before. At least that's what the developed world would like to see. The Global North an entire slew of nations who have benefited from centuries of industrialization and colonialism.

It's the Global North that ranks countries by perceived corruption every year, deciding what countries look favorable to investors. A stranglehold of righteousness cowed in the veil of law.

Wherefore lawyers?

I've worked in all three countries of Indochina: Vietnam, Cambodia, and Laos. All three receive millions of dollars in international aid every year. This aid is based on compliance with international standards against corruption. And for all their ranting and raving, those Global North folks care less about the Rule of Law than they do about opening markets and a positive balance of trade.

As a lawyer in Indochina, the Rule of Law is a major issue. There is a story in Laos—though it may be apocryphal—that the French donated concrete for the construction of a new airport runway. This concrete was re-allocated to build a giant Laos version of the Arc-de-Triumph in Paris. Laos is not a place for safe investments. Especially as dissidents with guns have popped up in the last few months.

But the Rule of Law, what about that?

Turns out that the Rule of Law/corruption rankings are pretty accurate at predicting problems for investments.

In Cambodia, we were looking to foreclose on some properties, land that belonged to borrowers but that had been mortgaged for loans. Even though those court cases were filed years ago; there is still no judgment from the courts. Cambodia, then, is a frontier market and a questionable place for investment.

Vietnam, however, may be of a different ilk. Look at the thousands of laws promulgated from the National Assembly down to the province and commune level. Many of these laws are complex and contradictory. When I was in law school it was suggested that such law making behavior was intended to allow for selective enforcement. That's what lawyers are for: navigating the maze of cross-crossing regulations and determining what the law in practice might actually be.

I may have told this story before, but when I was in Laos, I negotiated a settlement with a provider. The settlement negotiations took place before an arbitrator who happened also to be the judge before

whom any trial might occur should the negotiations fail. We reached a point where the judge said that if the conflict went to court, we would lose.

That's why it's vital to have someone on your side who can tell you, not just what the Rule of Law is (like some of those international law firms that charge a grand an hour just to turn around and bill a local law firm) but what happens in practice (something that only comes to those who know the officials and can speak their language).

About Indochine Counsel

Established in October 2006, Indochine Counsel is one of the leading business law firms in Vietnam. The firm provides professional legal services for corporate clients making investments and doing business in Vietnam. The legal practitioners at Indochine Counsel are well qualified and possess substantial experience from both international law firms and domestic law firms. The firm boasts more than 35 legal professionals working at the main office in Ho Chi Minh City and a branch office in Hanoi.

Indochine Counsel's objective is to provide quality legal services and add value to clients through effective customized legal solutions that work specifically for the client. The firm represents local, regional and international clients in a broad range of matters including transactional work and cross-border transactions. The firm's clients are diverse, ranging from multinational corporations, foreign investors, banks and financial institutions, securities firms, funds and asset management companies, international organizations, law firms to private companies, SMEs and start-up firms in Vietnam.

Indochine Counsel advises clients in the following areas:

- Inward Investment
- Corporate & Commercial
- Mergers & Acquisitions
- Securities & Capital Markets
- Banking & Finance
- Property & Construction
- Taxation
- Intellectual Property
- Technology & Media
- Mining & Energy
- International Trade
- Dispute Resolution

A full list of partners, associates and other professionals is available on our website. |

Contact Us

For further information or assistance, please contact the following Indochine professionals:

Dang The Duc

Managing Partner
duc.dang@indochinecounsel.com

Luu Xuan Vinh

Managing Associate
vinh.luu@indochinecounsel.com

Le Nguyen Huy Thuy

Partner
thuy.le@indochinecounsel.com

Nguyen Hai Yen

Associate, IP&T Practice Group
yen.nguyen@indochinecounsel.com

To Xuan Tinh

Partner
tinh.to@indochinecounsel.com

Phan Anh Vu

Partner
vu.phan@indochinecounsel.com

Nguyen Thi Hong Anh

Partner, Head of IP&T Practice Group
anh.nguyen@indochinecounsel.com

Ho Chi Minh City

Unit 305, 3rd Floor, Centec Tower
72 -74 Nguyen Thi Minh Khai, District 3
Ho Chi Minh City, Vietnam
T +848 3823 9640
F +848 3823 9641
E info@indochinecounsel.com

Hanoi

Unit 705, 7th Floor, CMC Tower
Duy Tan Street, Cau Giay District
Hanoi, Vietnam
T +844 3795 5261
F +844 3795 5262
E hanoi@indochinecounsel.com

www.indochinecounsel.com

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