



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 foreign and foreign currency loans to gas regulations and JPO-NOIP patent prosecution highway pilot program.

We also take a look at land and what a foreigner can do with it.

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 Decree No. 53/2016/ND-CP provides for Labor Management, Wages, Remunerations and Bonuses in Companies where the State acts as a controlling Shareholder or Capital Contributor

Under Decree No. 53/2016/ND-CP (dated 13 June 2016 of the Government providing for labor management, wages, remunerations and bonuses in companies with the State acting as a controlling shareholder or capital contributor), employee salaries are calculated according to payroll budget and the actual work rendered, every company shall determine the piece rate for production/business operation and salary advance. The realized payroll is determined according to the payroll budget and the fulfillment of business/production targets.

The amount of salaries, bonuses paid for employee, salaries, compensation, bonuses awarded to members of Members' Council or members of Board of Management, General Director, Director, Deputy General Director, Deputy Director, the head of the Inspection Committee, Inspector and Chief Accountant (hereinafter referred to as "managers") shall be calculated according to the labor productivity, business or production effectiveness.

The realized payroll for full-time managers is determined according to the payroll budget and other criteria, and the fulfillment of profit targets. If the actual profit overshoots the profit target, the full-time manager salary shall accrue 2% for every 1% profit growth rate but not exceeding 20% of the budgeted average pay rate. The salary budget of part-time managers is determined according to the number of such managers and their actual working time; and their maximum salary shall not exceed 20% that of full-time managers.

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The budget for employee awards or welfares shall not exceed 03-month realized payroll in case the actual profit reaches the profit target. In case the actual profit overshoots the profit target, the budget for awards and welfare may be added up to 20% of the excess of the actual profit but not so as to exceed 03-month realized payroll.

The award budget shall not exceed one- and-a-half-month realized payroll in case the actual profit reaches the profit target. In case of failure to reach the profit target, the bonus shall not exceed one-month average actual profit.

This Decree takes effect from 01 August, 2016.

JPO-NOIP Patent Prosecution Highway Pilot Program

A recent effort of the National Office of Intellectual Property ("**NOIP**") is to shorten the examination time in respect of certain patent applications in Vietnam. This program is in cooperation with the Japan Patent Office ("**JPO**") to implement an accelerated patent examination procedure under a program called "Patent Prosecution Highway" ("**PPH**") which is officially piloted by the NOIP from 1 April 2016. This is the first pilot program on accelerated patent examination applied by the NOIP under a bilateral agreement between the NOIP and a foreign patent office.

As intended by the NOIP and the JPO, the PPH Pilot Program will have a duration of 3 years commencing from 1 April 2016, which may be extended, subject to a joint NOIP-JPO review and assessment of the program implementation. However, the PPH Pilot Program may be terminated if the volume of PPH requests exceeds 100 per year or for any other reason.

Under the PPH Pilot Program, an applicant may request the NOIP to apply the accelerated examination procedure for his/her patent application filed at the NOIP (**NOIP application**, including a PCT national phase application) if the following conditions are satisfied:

- (a) The NOIP application (including a PCT national phase application) is one of the following:
 - (i) An application which validly claims priority under Paris Convention to the JPO applications; or
 - (ii) A PCT national phase application without priority claim filed at JPO as receiving office, whose number begins with PCT/JP ("**PCT/JP application**"); or
 - (iii) An application which validly claims priority under Paris Convention to the PCT/JP application(s).
- (b) At least one corresponding application which forms the basis of the priority claim or is derived from a JPO application forming the basis of priority claims is examined at JPO and has one or more claims that are determined to be patentable/ allowable by JPO.
- (c) All claims of the NOIP application for examination under PPH Pilot Program must sufficiently correspond to one or more claims indicated as patentable/ allowable by JPO.
- (d) NOIP has not yet begun examination of the application in question at the time of filing request for the PPH. It means that the PPH request cannot be accepted if it is filed after issuance of a notification of substantive examination result.
- (e) A "request for substantive examination" must have been filed with NOIP either at the time of filing PPH request or previously.

A request for the accelerated examination under the PPH Pilot Program shall be in accordance with the NOIP-JPO PPH request form provided by the NOIP, and accompanied with copies of all office actions issued by the JPO for the corresponding patent application, copies of claim(s) determined patentable by the JPO, copies of references cited by the JPO examiner, and a claim correspondence table for the NOIP's reference.

The PPH Pilot Program is not applicable on the basis of JPO "utility model" applications, and at the request of the JPO, the procedure to file a request for accelerated examination at the NOIP under the PPH Pilot Program may be changed during the Program, if necessary.

New Regulation on Foreign Exchange Administration

On 26 February 2016, the State Bank of Vietnam issued Circular No. 03/2016/TT-NHNN ("**Circular 03**") providing several instructions on foreign exchange administration in respect of enterprise's foreign borrowing and foreign debt repayment. Accordingly, Circular 03 regulates for the followings:

- (a) Procedures for registration and registration for changes of enterprises' foreign loans which are not guaranteed by the Government;
- (b) Opening and use of foreign borrowing and foreign debt repayment accounts at authorized credit institutions located within the territory of Vietnam;
- (c) Fund withdrawal, debt repayment and other fund transfer transactions in relation to arrangement of foreign loans;
- (d) Foreign exchange administration in respect of transactions relating to guarantee for foreign loans;
- (e) Provision, use and administration of information posted on the website for administration of foreign borrowing and repayment of foreign loans which are not guaranteed by the Government;
- (f) Mechanism for making statistical reports on enterprises' foreign borrowing and repayment of foreign loans which are not guaranteed by the Government.

For further clarification and amendment of some regulations in Circular 03, on 15 April 2016 the State Bank of Vietnam issued Circular No. 05/2016/TT-NHNN ("**Circular 05**") on amending and supplementing a number of Articles of Circular 03.

First, Circular 05 supplements sections 3, 4, 5 and 6 of Article 4 of Circular 03 on rules for administration of foreign loans under deferred payment for import of goods. Foreign loans granted by

deferral of payment for import goods shall include imports on which the first date of disbursement precedes the last date of payment.

The date of disbursement of a foreign loan granted by deferral of payment for import goods is 90 days as from the date that transport documents are issued if the bank providing account services requires transport documents included in the payment documents; or 45 days as from the date that the examination of information in the cleared customs declaration is complete if the bank providing account services does not require transport documents included in the payment documents.

The last date of payment shall be: the final date of the payment time limit as shown in the contract; or the last date of payment in fact if the contract is not followed or does not specify any payment time limit.

The time limit of a foreign loan granted by deferral of payment for import goods shall commence on the first date of disbursement and ends on the last date of payment.

Second, Circular 05 amends section 2 of Article 24 of Circular 03 for accounts for foreign borrowings and repayment. Circular 03 regulates that if the borrower is a direct foreign-invested enterprise, a foreign borrowing and foreign debt repayment account is a direct investment capital account whereas Circular 05 regulates that for medium-term and long-term foreign borrowings of direct foreign-invested enterprises, the account for foreign borrowing and repayment is the direct investment capital account. For short-term foreign borrowing, the borrowers can use the account for a direct investment capital account or another account for foreign borrowing and repayment to carry out transactions in relation to foreign borrowings. This regulation facilitates direct foreign-invested enterprises to choose accounts for short-term foreign borrowings.

Finally, Circular 05 amends and supplements Article 32 of Circular 03 on transfer of repayments on foreign loans granted by deferral of payment for import goods. Accordingly, when transferring repayments on the principal and interest of a foreign loan by deferral of payment for import goods, the borrower shall be responsible for presenting evidence documents and papers as required by the bank providing account services whereas the evidence documents are regulated specifically in Circular 03.

The new regulations of Circular 05 regulate favorable conditions for enterprises on borrowing and repayment of foreign loans under deferred payment for import of goods and facilitates operations of Credit Institutions.

Circular 03 and Circular 05 took effect on 15 April 2016.

New Changes on Foreign Currency Loans

On 27 May 2016 the State Bank of Vietnam issued Circular No. 07/2016/TT-NHNN (“**Circular 07**”) supplementing and amending Article 3.1(c) of Circular No. 24/2015/TT-NHNN on providing foreign

currency loans by credit institutions and foreign bank branches. Accordingly, credit institutions and foreign branches which are authorized to conduct foreign exchange activities and provide the lending in foreign currency are permitted to assess and decide to make foreign currency loans for resident borrowers having foreign currency revenue from export from 1 June 2016 to 31 December 2016.

According to Circular 07, such credit institutions and foreign bank branches are permitted to make assessment and decision making for providing short-term loans to meet short-term domestic capital requirements to implement production or business plans for export of goods via Vietnamese border gates where the resident borrower's foreign currency derived from the export turnover is sufficient to repay such loans. When the lending bank disburses loan monies, the borrower must sell by way of a spot transaction such amount to the lender, except where the capital requirement of the borrower is in order to make a payment transaction which, as stipulated by prevailing law, must be made in a foreign currency.

Circular 07 took effect on 1 June 2016.

New circular guiding gas business

To have effective management for the gas trading business in Vietnam, the Ministry of Industry and Trade issued Circular No. 03/2016/TT-BCT, dated 10 May 2016, detailing a number of articles of Decree No. 19/2016/ND-CP, dated 22 March 2016, of the Government ("**Decree 19**"). Decree 19 is applied to traders under the Law on Commerce; gas importers, entities producing and processing dedicated gas for their own interest and other organizations or individuals participating in the gas business.

Circular 03 is divided into 3 Chapters. First Chapter regulates the General Provision; the Second Chapter mentions Applications for Certificates of Eligibility for Gas Business; and the Last Chapter stipulates the Implementation Organizations.

In comparison with Decree 19, Circular 03 delivers more defined terms; such as definitions of "Principal", "Agent", "LPG (short term of Liquefied petroleum gas) supply", "LPG distribution". Moreover, Circular 03 also presents the definition of LPG agency agreements and LPG selling prices as well as the procedure of Registration for dedicated gas production, importation and processing and LPG/LNG (Liquefied natural gas) import and export by LPG/LNG producing and processing entities.

Chapter 2 of Circular 03 is the highlight of this legal document since it provides specific regulations of Applications for Certificates of Eligibility for many different purposes relating to gas trading business in Vietnam. Such regulations include LPG/LNG/CNG import and export, LPG/LNG/CNG distribution, LPG Bottling, LPG/LNG/CNG vehicle filling, LPG/LNG/CNG Filling Station Operating, LPG general agents, LPG agents, selling LPG to bottled LPG shops. Chapter 2 and the Appendix within the Circular give clear instructions for all subjects in order to receive the Certificates of Eligibility for Gas Business.

The last Chapter designates and outlines responsibilities of those following units: Domestic Market Departments, relevant agencies, Departments of Industry and Trade, LPG gas traders, principals and agents that relate to the gas trading business in Vietnam.

Circular 03 took effect on May 15, 2016.

Land, Land, Land

Land. It's a beautiful thing. It's been the cause of wars and invasions, civil strife and occupations, self-criticism and all other sorts of mischief. Recently I've been studying the situation in Haiti, another developing country that is, unfortunately, much poorer than Vietnam.

But the land is the same you see. From the end of the revolution in 1804, Haiti's constitution firmly enshrined the principle of domestic land ownership. Foreigners could not own land. This rule didn't stop some enterprising Germans, though, who married local and put the land in the name of their wives. And it only lasted as long as it took for the United States to invade, which they did in 1915, before this precious land rule was rewritten and foreigners allowed to own land.

In Vietnam, the land is sacred. It belongs to the people and is managed by the Government. It used to be that a plot of land or apartment was provided to individual families pursuant to their position in the Party and participation in Government reform movements. That is no longer the case, yet private control remains an effective part of the law for those who are already in control of land.

What's relatively new, and still tentatively observed, is the granting of control of land and apartments to foreigners. As of now, a foreigner who has a legal right to be in Vietnam can lease land or an apartment for fifty years by paying the entire amount up front. While this is not fee simple ownership, it does allow for the inheritance or sale of the property at the end of the fifty years to a Vietnamese citizen.

It is also useful to note that when leasing a property in Vietnam, if a party pays for that lease on a monthly or yearly basis, she is limited in her ability to use the lease for security in other transactions, however, someone who pays for the property in lump sum may use the lease to act as security for other transactions.

It is also important to know that a foreign investor doing business in Vietnam may have the same control rights in land used for a construction project such as apartments, mixed use, or office space. Investors themselves may lease an apartment or a house for the maximum of fifty years. Unless of course they marry a Vietnamese person and the whole debate becomes, like that of the Germans in Haiti, one about marriage.

So may there be land.

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.

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- Intellectual Property
- Technology & Media
- Mining & Energy
- International Trade
- Dispute Resolution

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