

CHAPTER II

Vietnam

I. Key employment trend in major Asia's market

The COVID-19 pandemic deleteriously affected the labor market and is predicted to continue negatively influencing employment trends across Asia in the upcoming year. At the beginning of 2020, it was predicted that the unemployment rate in Asia-Pacific would remain on the low side, standing at about 4.1%. The situation changed dramatically, however, and many experts anticipate a raise in that figure. The COVID-19 pandemic also changed the way businesses are operating and the way employees work. Social distancing measures have resulted in a shift in working locations. Many companies are opting for work-from-home alternatives, allowing their employees to work remotely, as opposed to traditional work on the company's premises. Many service-oriented businesses also suffer from a loss of customers and lack of operations, especially in the travel industry. But the COVID-19 pandemic has also seen an increased demand for IT-oriented and e-commerce related jobs.

Increase in remote work

The extensive conversion to remote work has resulted in many mishaps – but also a viable option for many companies. The continuation of this exploration of remote work will be a trend in the upcoming year, even when the situation

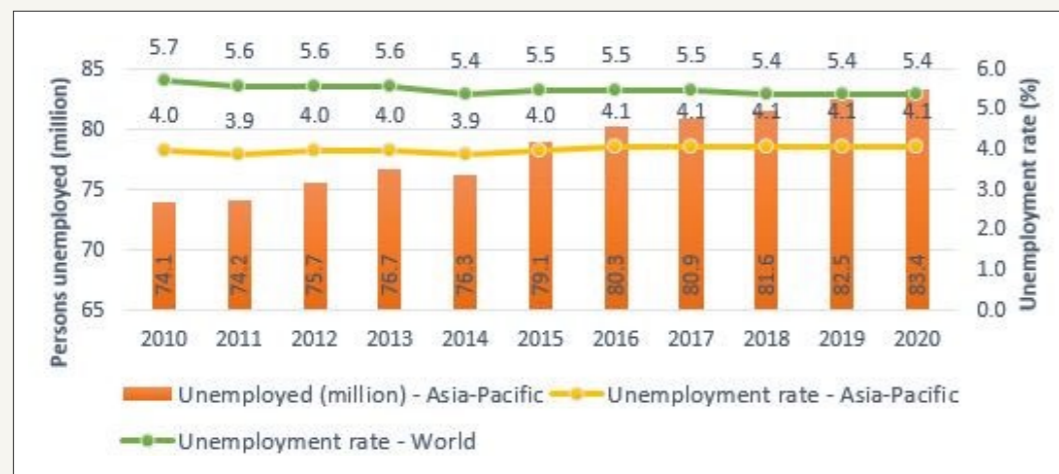
returns to normal. Remote work increases time efficiency, living cost efficiency and decreases budgets for working premises by companies.

Digital adoption

As remote work is increasingly favored, communications, performance monitoring and management will occur digitally. Traditional face-to-face interviews will likely be replaced by online interviews. This presents opportunities for data collection, cloud computing and productivity supporting apps. It is also expected that a large workload will move to cloud computing systems instead of staying on traditional hosted servers.

Cyber-security and e-commerce

Social distancing has changed the way people shop. Many new categories will join the basket of e-commerce, making every product, or service, available online. The growth will be higher in emerging economies with the rise of internet penetration and data speeds. Post-COVID-19 the e-commerce growth rate will outpace earlier levels. E-commerce will expand from B2C to B2B for companies to buy products and services for their workforces. Digital payment and digital wallets will likely see a major increase in use in the upcoming months.



Graphic on unemployment rates in Asia-Pacific across the year, source: ILO

Digital adoption will result in demand for cyber-security services. The development of safe and secure payment gateways and security walls will drive market growth.

II. COVID-19: Employers' rights and obligations

Employers all over the world, including Vietnam, are faced with unprecedented challenges after the emergence of COVID-19. They need to be able to respond rapidly and decisively to actual facts as well as government directions as they arise while maintaining compliance with legal obligations.

Under the recommendations for prevention of COVID-19 of the Ministry of Health of Vietnam (the "MoH"), employers are recommended to perform the following tasks:

- To set up places for hand sanitizing with soap or sanitizer with 60% (or more) of alcohol.
- To properly sanitize and thoroughly clean the floor and surface of items that may carry the virus, e.g. doorknobs, elevator buttons, working desks, computer keyboards, etc.
- To ensure good ventilation in the office.
- To issue internal regulations and instructions for employees to prevent contracting COVID-19. The MoH also requires workplaces that have employees in constant contact with numerous individuals to supply their employees with health masks and to instruct them on proper wearing methods, and may consider installing glass partitions in transaction counters.
- To allow employees to work from home in case they have just returned from epidemic regions/are in close contact with those from epidemic regions/show symptoms of contracting the COVID-19.

It is also required that employers report any suspected and infected cases to local health agencies within 24 hours of such detection per the Law on Prevention and Fighting of Infectious Disease (the "PFID Law"). If the employers have reason to believe employees are high risk (showing symptoms of COVID-19 including cough, fever, sore throat, shortness of breath, and fatigue), employers must inform the local health agency. Failure to do so will result in an administrative fine of VND400,000 to VND1,000,000.

- Right to disclose an employee's COVID-19 status*
Vietnam has launched a public app for health declaration. All Vietnamese citizens and foreigners living in Vietnam are advised to provide health declaration. It is not, however, permitted for companies to announce an employee's illness without their express consent. It is required that all infected individuals be isolated and identify individual contacts for checks. Employers must disclose positive cases pursuant to Article 8.3 of the PFID Law, even without consent from the infected employee, to other employees and the authorities.
- Right to require employees to work from home*
Employers are permitted to require employees to work

from home. However, it is unlikely that employers can force their employees to work from home if the employees oppose such measure.

- Rights to screen employees and visitors' temperatures*
The 2015 Law on Occupational Safety and Hygiene (the "OSH Law") provides that annually, or when necessary, employers must conduct inspection and assessment of dangerous or harmful factors in the workplace and carry out technical measures for elimination or reduction of such factors, improvement of working conditions and healthcare for employees. Employers have the right to request employees to follow internal rules, processes and measures for occupational safety and hygiene in the workplace.

In addition, the PFID Law generally recognizes enterprises' rights to prepare and implement plans to prevent and control infectious diseases on a case-by-case basis.

This provides a basis for employers to implement temperature screening for employees and visitors entering their workplaces. Many public and private entities in Vietnam have adopted precautionary measures with regard to visitors/customers including a daily check of employees' body temperature and COVID-19 symptoms, requiring visitors/customers to declare their travel history, and isolating them should they show symptoms and/or have traveled through epidemic stricken regions.

III. Company's rights and obligations toward gig workers under Vietnam's laws

Under the laws of Vietnam, the term "gig worker" is not defined. The closest concepts here are temporary/seasonal workers and independent contractors.

Temporary/seasonal workers

- Labor Agreements for seasonal workers who work on specific jobs*

Companies are permitted to employ seasonal workers who work on specific jobs by a seasonal labor agreement with a duration of less than 12 months. If the duration is less than three months, companies can make a verbal agreement with employees.

The 2012 Labor Code dictates that, regardless of duration of the contract, companies can only re-sign seasonal labor agreements one time upon the expiration of the first seasonal labor agreement. After the second seasonal labor agreement expires, if the company still wishes to retain the employee, they must negotiate an indefinite-term labor contract. Workers employed under a seasonal labor agreement are entitled to the same benefits as definite-term employees and indefinite-term employees, which include participation in statutory health insurance and social insurance for workers who enter into labor contracts with a duration of one month and above, statutory leave and severance or

job-loss allowance upon termination of employment. Companies are not entitled to require a probation period for seasonal employees. Companies must contribute 21.5% of the employee's monthly salary directly, without subtraction to their salary, to the social security fund for employees that work for more than three months.

Under the 2019 Labor Code, the concept of a seasonal labor agreement will be abolished. There will only be two types of labor agreements: an indefinite-term agreement and a definite-term agreement with the maximum duration of 36 months. There will be no minimum threshold for labor agreements. Companies that wish to employ temporary/seasonal workers will then be obliged to enter into definite-term contracts of up to 36 months. Companies will only be able to verbally employ a worker for employment relationships of up to one month. The number of times that a definite-term contract can be renewed will be unchanged, with an exception for foreign employees, elderly employees, and officers of employee representative organizations, with whom companies will be able to renew the definite-term employment contracts more than twice. A probation period shall not be applied to workers for employment relationships of up to one month.

b. *Termination of Labor Agreement*

For employment relationships of less than 12 months, under the 2012 Labor Code, companies can unilaterally terminate labor agreements by giving three day's notice on the ground that (i) the employees failed to perform works specified under the labor agreements on a regular basis, or (ii) the employees have been hospitalized for more than half of the employment duration and are not fully recovered, or (iii) the companies are forced to reduce operation scale and cut down on vacancies due to force majeure events, (iv) the employees fail to be present at the workplace after 15 days from the expiry date of the temporary suspension of a labor contract, (v) the employees provided false information during the recruitment process that affected the recruitment results.

Under the 2019 Labor Code, employers who decide to terminate labor agreements with their employees, will only have to inform their employees three days in advance of their dismissal in the cases (i), (ii) and (iii) as stated above, and (iv) if the employee is at retirement age, unless otherwise agreed. Employers will be permitted to unilaterally terminate labor agreements with immediate effect if (i) the employees are absent without excuse for five or more consecutive working days, or (ii) the employees fail to be present at the workplace after 15 days from the expiration date of the temporary suspension of a labor contract.

Independent Contractors

Independent contractors are not employees, but rather contracted through a service agreement with a company

to carry out specific tasks. The service agreement is governed by the Civil Code, no employment relationship between the parties is established and therefore they are not subject to labor regulations. Companies which enter into service agreements with independent contractors may not be entitled to request fixed hours of work, nor full-time devotion. Depending on the agreement between the parties, an independent contractor is also not required to perform their work in the company's premises.

Companies are also not obliged to grant independent contractors statutory leave, severance or job-loss allowance upon termination of the service agreement. An independent contractor is not obliged to participate in statutory social insurance, health insurance and unemployment insurance, which equates to the companies not being obliged to contribute to social security funds.

To avoid a potential issue of interpretation of such agreement as a labor contract, the terms and language of the service contract should be clear so as to not being interpreted by the contractor and/or a third party or governmental authority as an employment contract.

IV. Preventing discrimination in the workplace: Effective policies

Under both the 2012 and 2019 Labor Code of Vietnam (collectively referred to as the "Labor Code"), it is strictly prohibited to discriminate on the basis of gender, race, skin color, social class, beliefs, religion, HIV, infection, marital status, pregnancy status, or disability and sexual harassment. Employers are also obliged to ensure equal pay and not discriminate on salary due to gender discrimination.

The 2019 Labor Code clearly defines sexual harassment in the workplace. It is any behavior of a sexual nature by any person to another person in the workplace which is considered as unwanted and unacceptable by the recipient. A workplace is any place where an employee works pursuant to the agreement with or assignment by the employer. The 2019 Labor Code also provides that an employee may unilaterally terminate the labor contract immediately without giving prior notice if she/he is being sexually harassed. The prevention of sexual harassment in the workplace is a compulsory content in internal labor rules in order to effectively prevent discrimination from occurring in the workplace.

Even though regulation of internal policies with regard to non-discrimination has not yet been specified, except for sexual harassment, following are our *recommendations* of some key issues that should be considered to ensure a non-discriminatory working environment:

- a. *Employing non-discrimination recruitment schemes.* It is of vital importance that employers practice non-discrimination in recruitment of employees. To gradually eliminate discrimination in the workplace, the first step for employers to take is to dismiss all discriminatory

preferences in recruitment practices, including gender bias, race bias, disability bias, HIV bias, etc.

- b. *Developing written policies that define rules and procedures on treatment of discrimination.* Identifying discriminatory behaviors and resolving them is an important step a company should take. An employee handbook which covers a broad range of potential discriminatory acts and a clear, detailed protocol on how discrimination complaints can be filed, handled and resolved should be prepared and issued to all incoming employees.
- c. *Establishing a competent and consistent process of dealing with discrimination.* Resolving existing discrimination issues in a quick, fair and effective manner will help in maintaining workplace dynamics and employee trust. Employers should review each complaint and perform investigation procedures. A documented process is highly recommended and all protocol and disciplinary procedures should be based upon the findings of an investigation. It is important for companies to be consistent with the enforcement of such policies and continue to work towards a discrimination-free workplace.
- d. *Regularly training on equality and non-discrimination policies.* Regular training sessions on equality and non-discrimination policies should be mandatory for all staff and management personnel. It provides an opportunity to explain inappropriate language and potential triggers that can spark a hostile work environment. Team-building activities also help with communication and establish an understanding among the staff.
- e. *Maintaining direct communication with employees.* Another recommended practice to prevent workplace discrimination is to communicate with employees on a regular basis. It is helpful to gain feedback on their experiences and if they have experienced discrimination firsthand or witnessed it on the job. On-going communication will help employees feel more comfortable relaying their concerns. It also reassures them that the company has their best interest in mind.

V. Employee complaint hotlines and how to deal with whistle-blower complaints

In January 2019, the Ministry of Labor, Invalids and Social Affairs (the "MOLISA") announced the establishment of a hotline for complaints and reports of issues under its management, including employment issues. Any complaints and reports on employment issues may be made directly to the MOLISA.

Under the laws of Vietnam, the concept of a whistle-blower has yet to be regulated. The entire matter lies in the hands of the employers – whether or not they wish to establish a protocol for internal whistle-blower complaints.

Below are some of our *recommendations* on dealing with whistle-blower complaints.

- a. *Evaluating the potential impact of a complaint against the company*
The first step in handling a whistle-blower complaint is to perform an evaluation on the potential impact of a complaint on the company. At this stage, it is advisable that only a few people be involved. This will ensure that the subject of the report remains unaware, which helps preserve the integrity and credibility of the investigation process.
- b. *Conducting investigation procedures*
Generally, the complaint can be handled by either an in-house department or through external counsel's assistance. Where senior personnel or managing officers are involved, the company should engage external counsel to avoid a conflict of interest.
- c. *Response to whistle-blower complaint*
By ensuring the whistle-blower complaint is handled with diligence and respect, the company can encourage the whistle-blower to give more details. It is recommended that the company puts specific questions to help the whistle-blower fully understand and address the complaint.
- d. *Informing others at the company*
The company should protect the anonymity of the whistle-blower. The disclosure of the identity of the whistle-blower can lead to a claim of reprisal which, though not necessarily prohibited by the laws of Vietnam, may contribute to employee causes of action against the employer if the whistle-blower feels intimidated by colleagues.
- e. *Informing third parties*
It is also necessary to identify to which third party the company is statutorily required to report the complaint. This can help the company avoid significant negative consequences.

VI. Fostering physical and mental well-being in the workplace through policy

Under the OSH Law, employers should rely on the health standards for each type of job when recruiting and assigning work to employees. Employers are obligated to take care of the health and well-being of employees and conduct annual health checks for all employees including apprentices and trainees. Employers are encouraged to organize annual convalescence and health rehabilitation activities for employees performing heavy, hazardous or dangerous occupations or extremely heavy, hazardous or dangerous occupations and for employees with poor health conditions. In addition, the employer is obligated to formulate and manage occupational health records of employees and inform employees of results of health check-ups and medical examinations for the detection of occupational diseases and

annually report on the management of their employees' health to the competent state agencies.

Employers must realize that fostering physical and mental well-being in the workplace not only fulfills the employer's obligation to contribute to the socio-economic development, but also results in improvement in work quality and effect.

Many companies in Vietnam maintain measures to care for their employees' physical health by funding yearly medical exams, holding sporting events to encourage physical fitness. Yearly trips and team building activities also contribute to employees' mental well-being. Nevertheless, there is a lack of a clear well-being policy within workplaces, especially with regard to mental health.

A well-being policy should highlight the following points:

- a. Promotion of mental well-being of all staff through:
 - Providing information and raising awareness about mental well-being

- Providing opportunities for employees to look after their mental well-being
- Promoting policies and practices that promote well-being
- b. Developing skills for managers and supervisors to:
 - Promote the well-being of employees
 - Deal with issues around stress and mental health effectively
- c. Providing support to employees through:
 - providing a work environment that promotes and supports well-being for all employees
 - offering assistance, advice and support to people who experience a health problem while in employment
 - support for staff returning to work after a period of absence due to mental health problems
- d. Helping people get back to work after a period of absence due to mental illness through: recruitment practices; making reasonable adjustments; retaining staff who develop a mental health problem.

AUTHORS:



Le Nguyen Huy Thuy, Partner, thuy.le@indochinecounsel.com

Le Nguyen Huy Thuy is one of the founding partners of Indochine Counsel. With 21 years of legal experience in Vietnam, he has major experience in property & construction, mergers & acquisitions, corporate & commercial, labor & employment, inward investment and dispute resolution. He has advised and assisted a number of foreign companies and foreign funds in mergers & acquisitions and large foreign investors in property development projects. He has written extensively about foreign investment, business and property laws in Asian Legal Business and leading business newspapers in Vietnam. He is also a local contributor for "Doing Business Project - Vietnam", a World Bank publication, since 2006 and is one of the contributors for the "Corporate Governance ROSC Assessment for Vietnam."



Le Thi Khanh Hoan, Senior Associate, hoan.le@indochinecounsel.com

Le Thi Khanh Hoan joined Indochine Counsel in October 2006. She has advised on foreign investment, corporate & commercial transactions, taxation and employment issues for companies doing business in Vietnam. She has assisted various foreign companies to set up subsidiaries, branch offices and representative offices. She is also experienced in advising corporate clients and foreign contractors in compliance and regulatory issues. After graduating from Hanoi Law University, Hoan practiced law at a major local law firm for six years before she joined Indochine Counsel. She has gained substantial experience in corporate & commercial work, licensing matters, labour and taxation issues. She has acted for a number of foreign companies in labour disputes.

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Contact us



Dang The Duc
Managing Partner
duc.dang@indochinecounsel.com



Le Van Duong
Partner, Head of Hanoi Office
duong.le@indochinecounsel.com

Head Office:

Unit 305, 3rd Floor, Centec Tower, 72-74 Nguyen Thi Minh Khai District 3, Ho Chi Minh City, Vietnam
Tel: +84 28 3823 9640 | Fax: +84 28 3823 9641
E: info@indochinecounsel.com

Hanoi Office:

Unit 705, 7th Floor, CMC Tower, Duy Tan Street Cau Giay District, Hanoi, Vietnam
Tel: +84 24 3795 5261 | Fax: +84 24 3795 5262
E: hanoi@indochinecounsel.com