EMPLOYERS' POSITION PAPER

COMMENTS AND RECOMMENDATIONS TO THE LABOR CODE REVISION

Hanoi, October 2011

Based on the contents of 'The Project of Review, Amendment, Addition and Completion of the Legal Framework on Industrial Relations, the Coordination Mechanism among the Government, Business Owners and Trade Union to Resolve Problems Related to Industrial Disputes, Social Insurance and Minimum wage'[1]

Based on the contents of the MOLISA[2] *submission letter to the Government about 'the Project on the Labor Code (amendment)'*

Based on the contents of the draft Labor Code (amendment)-website version

Based on the comments on the draft Labor Code amendment of the enterprises gathered in various workshops organized by VCCI for the last months

The Vietnam Chamber of Commerce and Industry[3] hereby presents the official comments of the employers in Vietnam on the draft Labor Code, with focus on the issues where different views exist related to the rights and obligations of the employers in industrial relations. The details are described below:

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[1] Hereinafter called 'the IR Project' which has been submitted to the Politbureau
[2] The Ministry of Labor, Invalids and Social Affairs
[3] VCCI

PART ONE

INTRODUCTION

1. Rationale and objectives

This report comments on the level of reasonableness of the current Draft Labor Code Amendment[4], taking into account the balance among various interest groups in industrial relations. Specifically it assesses how various articles in the Draft contribute to improve the legal framework to reach a balance of interests among the three partners: the employees, the employers and the Government. Based on that, it makes recommendations to make the Code a more enabling legal structure for sustainable business development.

On top of that, the report assesses how practical the Draft is in overcoming the shortcomings and problems occurred when applying the previous Code in order to improve the execution of the new Code after being approved.

At the same time, the report make recommendations where relevant to ensure the alignment between the Draft and other related pieces of laws such as the Civil Code, the Civil Procedural Code, the Social Insurance Laws, the Corporate Income Tax Laws…

Based on that, the report recommends amending or adding to some articles in the Draft and explains the legal, theoretical and practical bases (reasons) for such recommendations.

2. Source of information and data used

The information and data used in this report come from comments and opinions of enterprises gathered in various workshops on the Draft Labor Code, such as *the Business Consultation Workshop on the Labor Code Amendment* organized by VCCI on 30 March 2011 in Hanoi, the workshop with title *'Discussion about the Chapter on the Labor Contract in the Draft Labor Code*

[4] Hereinafter called 'the Draft'

Amendment' organized by the VCCI Bureau for Employers' Activities in Hochiminh City on 1 April, 2011 and many other workshops… The data also come from the summary of members' comments from various business associations (Amcham in Vietnam, Japanese Business Association) and from direct comments of managers and experts in various reports and studies about the Labor Code execution. Such information and data clearly describe the shortcomings and recommend areas for improvement…

Based on the gathering of comments and assessments from the employers' point of view on the current Draft the report makes recommendations on how to amend and add to some articles.

We trust that these recommendations will be considered by the Drafting Team in order to improve the practical applicability of the Code.

Thank you very much!

PART TWO

RECOMMENDATION ON ADDING ARTICLES ABOUT THE EMPLOYERS' REPRESENTATION ORGANIZATION

1. The need for and role of the employers' representation organizations[5]

First, some articles in the Draft (*e.g. Part2 Article 8, Part1 Article 214...*) use the term *'the employers' representation organizations'*, but there is no definition, and the Draft does not either mention the functions, tasks or rights of such organizations. This term should be added to the Draft to be used later in a consistent way. The following definition is often considered: *'In the most common meaning, an employers' representation organization is an entity established with the functions and tasks to represent and protect the legal rights and interests of the employers in industrial relations. The establishment of the employers' representation organizations is based on the principle of voluntariness and freedom of association.'*[6] However, this term has not become legally valid and interpreted in a consistent way until it is codified.

Second, relating the need for EO codification, nearly 65% of enterprises (*surveyed in Lam Dong, Khanh Hoa, Nghe An, Hochiminh City*) think that it is necessary to do that in order to improve the position of the employers in industrial relations. Therefore, there is a real need to establish EOs to respond to the requests of a large number of enterprises. Most enteprises when asked reply that the Government should permit the establishment of such organizations in order to:

- *i) Protect the interests, resolve the most common problems of the employers;*
- *ii) Provide more professional services to the employers;*
- *iii) Lobby the goverment for labour policies and laws to protect the legitimate interests of the employers;*

[5] Hereinafter called 'EOs'

[6] Legalistic Research Magazine No. 97, May 2007, Ph. D. Luu Binh Nhuong

iv) *Support the employers in terms of labor law update, awareness raising in compliance and provision of practical advice;*

v) *Act on behalf of the employers to resolve problems between the employers and employees.*

Therefore, codification of the EO-related regulations is responsive to the real need and desire of all the employers in the country.

Third, in industrial relations the employees get organized in the trade union, then the employers should also have their own representation organization to gain an equal position when they get involved in resolution of industrial relations[7] issues, particularly in negotiations and conclusion of collective bargaining agreements[8]. In fact, there is a lot of pressure on the employers in a highly competitive labor market, so the legal status of their representation organizations should be recognized. It will create a legal framework to build legally harmonized industrial relations.

Fourth, a lot of business associations and organizations have been established in Vietnam. However, there is no united representation organization to take the role of the focal point in partnership with Vietnam General Confederation of Labor[9] and government bodies in resolving IR issues.

Fifth, it is necessary to establish the employers' representation organizations to bridge between the employers and employees. Based on that we can improve the potential for dialogue and goodwill cooperation between the two parties, which eventually helps develop harmonized industrial relations at the workplace and minimize their risks for disputes and strikes.

Sixth, the establishment of the employers' representation organizations help ensure the right to get organized of both the employers and employees in compliance with ILO Conventions 87 and 98.

2. The legal basis for EO regulations

[7] Hereinafter called 'IR'
[8] Hereinafter called 'CBA'
[9] Hereinafter called 'VGCL"

2.1. The current VCCI charter as approved by the Prime Minister: the charter specifies functions, tasks, organizational and management modalities and membership of the Vietnam Chamber of Commerce and Industry;

2.2. Decree 145/2004/ND-CP dated 14 July 2004 with detailed instructions about the exercution of the Labor Code relating to participation of VGCL and the employers' representatives in IR-related policy and law-making: the Decree stipulates the contents, manner and responsibilities of the employers' representative while giving opinions to the government bodies about IR-related policies and laws.

2.3. Inter-ministrial Circular No. 04. 04/2006/TTLT-BLĐTBXH – TLĐLĐVN with instructions about implementation of the Decree 145/2004/ND-CP: the Circular further details the forms of consultation and responsibilities of the branch, representative office or provincial representative of the Vietnam Chamber of Commerce and Industry and Vietnam Cooperative Alliance[10] while giving opinions to the government bodies about IR-related policies and laws.

2.4. Instruction No. 22 dated 5 June 2008 of the Secretariat about improving leadership and guidance to build up harmonized, stable and advanced industrial relations in the enterprises: the Instruction requests to further improve the legal framework and enabling environment for the representatives of the employers, business associations and professional associations to work more effectively in supporting businesses to follow the labor laws and policies, improve the responsibilities of the employers in caring for the workers' interests, material and spiritual life.

2.5. Decision 1129/QĐ-TTg of the Prime Minister to launch the Action Plan for Instruction No. 22 dated 5 June 2008: the Plan specifies the tasks of different ministries and organizations, including VCCI, such as taking the coordinator's role in preparing the Project for Improvment of EO system at the

[10] Hereinafter called 'VCA'

central level, guiding and giving instructions on how to establish industry-level and local-level EOs...

2.6. Notice of the Secretariat's View dated 18 August 2008 about the guiding instructions given by Mr. Truong Tan Sang, the Politbureau's Member, the Secretariat's Standing Member, in the meeting with VCA

2.7. Notice No. 306-TB/TW dated 3 February 2010 of the Secretariat about findings of the inspection of Instruction 22 CT/ TW implementation: the VCCI Communist Party's unit and Youth Union's unit will take the coordinator's role and cooperate with VCA Communist Party's unit and Youth Union's unit, the Communist Party's Personnel Committee of the Ministry of Home Affairs to lead the study and establishment of employers' representation organizations at the provincial/ central city level and pilot EO models in industrial parks and export-processing zones.

PART THREE

RECOMMENDED AMENDMENTS TO SPECIFIC CONTENTS AND ARTICLES OF THE DRAFT LABOR CODE

(Total: 47 recommended amendments)

ARTICLE	CURRENT WORDING IN THE DRAFT	SUGGESTED AMENDMENT/ ADDITION	REASON
CHAPTER I: GENERAL TERMS AND ISSUES **5 recommended amendments to:** **Article 3 Part3, Article 3, Article 5 Part5, Article 6 Part2, Article 7 Part2**			
Article 3 Part3	*'3. The employee collective' is the employees who work together in the same unit of an enterprise, in the same enterprise or the same industry.'*	Amend as follows: ***'The employee collective is a group of 10 (ten) or more employees, who work together in the same unit, enterprise or industry; who are linked closely in an union unit, or under the leadership of an employee collective representative committee'.***	More details should be added to the definition of ***'the employee collective'*** to distinguish between the employee collective and a group of employees without collective nature, in the following aspects: i) The minimum number of employees that an employee collective should have; ii) The organizational nature, the type of links among the employees...
Article 3	*Definitions of terms*	The following terms should be added: **- *'The employee collective representative committee is the organization that represents the employee collective in such workplaces***	To use in relevant articles

		where there are not any grassroot-level unions'; ***- 'The employers' representation organization is the organization that has been legally established to protect the legitimate rights and interests of the employers in Vietnam'*** .	
Article 5 Part 5	*'5. The employees have the obligation to fulfil the labor contract, the CBA, comply with the labor discipline and working rules, participate in the social and health insurance schemes and follow the* ***legitimate*** *orders of the employers.'*	Amend as follows: ***5. 'The employees have the obligation to fulfil the labor contract, the CBA, comply with the labor discipline and working rules, participate in the social and health insurance schemes and follow the orders of the employers.'***	Amend Part 5 Article 5: delete the word ***legitimate*** to expand the rights of the employers towards employees
Article 6 Part 2	*2. The employers have the right to form, join and operate* ***Proffesional Associations*** *in compliance with the regulations of the laws.*	Amend as follows: ***'2. The employers have the right to form, join and operate employers' organizations in compliance with the regulations of the laws.'***	To clarify the term '**Proffesional Associations**' mentioned in Part 2 Article 6 to be clearer about the roles of employers' organizations
Article 7 Part2	*'2. Employers' representation organizations cooperate with the Goverment bodies and the trade union to build harmonized and stable industrial relations,* ***supervise*** *the exercusion of the labour laws' clauses,*	Amend as follows: ***'2. Employers' representation organizations cooperate with the Goverment bodies and the trade union to build harmonized and stable industrial relations, supervise the exercusion of the labour laws' clauses***	Add: Article 8 Part 2 which reads '*Employers' representation organizations cooperate with the Goverment bodies and the trade union...* ***supervise*** *the exercusion of the labour laws' clauses.'* should

	care for and protect the legitimate rights and interests of the employers.'	***by the employers, the union at different levels, or the employee collective representative organizations at non-unionized enterprises,*** ***and care for and protect the legitimate rights and interests of the employers.'***	specificly mention ***whom to supervise?*** The employee collective, the union, or the government administrative bodies?
***CHAPTER III.* THE EMPLOYERS' REPRESENTATION ORGANIZATION** **18 recommended amendments to:** **Article 20 Part1, Article 21 Part1, Article 22 Part2, Article 22 Part3, Article 23, Article 25 Part2, Article 26 Part1 Point đ, Article 30, Article 31, Part2 Article 38 + Article 136, Article 40 Part7, Article 41 Part1, Part3 Article 41, Article 42, Part1 Article 46, Article 47 Part3, Article 47, Article 51 Part2)**			
Article 20 Part 1	*'The responsibility to sign the labor contract* *1. The employer has to sign a labor contract with the employee after recruitment.* *If the employee has worked for the employer* ***for 30 days*** *but the labor contract has not been signed, it is considered that the employee works under an indefinite-term labor contract, unless the employee undertakes a temporary job for less than 3 months.'*	Amend as follows: ***'The employer has to sign a labor contract with the employee after recruitment.*** ***If the employee has worked for the employers for 90 days but the labor contract has not been signed, it is considered that the employee works under an indefinite-term labor contract, unless the employee undertakes a temporary job for less than 3 months.'***	90 days: 60 days of the probationary period + 30 formal working days while waiting for the labor contract
Article 21 Part 1	*'The responsibility to provide information when signing the labor contract* *1. The employer has to inform the employee of the job, working conditions,*	*Amend as follows:* ***'1. The employer has to inform the employees of the job, working conditions, working and rest time, OSH, wage level and payment methods,***	Reasons for dismissing: *'The employer has to inform the employee of ...* ***business secrets****...'* in Article 21 Part 1: - It should be up to

	*working and rest time, OSH, wage level and payment methods, social and health insurance, **<u>business secrets</u>** (if any) and other issues directly related with the contract signing if the employee requires.'*	***social and health insurance, <u>business secrets</u> (if any) and other issues directly related with the contract signing if the employee requires.'***	the employer to decide whether or not inform the employees about the business secrets; - The risks of leaking information about the business confidential issues by the company's staff has to be mitigated.
Article 22 Part 2	*'Forbidden actions of the employer when signing the labor contract* *...2. Have the employee committed **<u>to honor the terms that limit the other legal rights of the employee</u>**.'*	Define clearly what are '***the terms that limit the other legal rights of the employee***."	Reasons: - Easier to implement for both parties when signing the labor contract; - To control minimize the disputes over such 'open' terms in the labor contract.
Article 22 Part 3	*'3. Require the employee to provide any type of security in terms of collateral, cash or valuable properties for the <u>labor contract implementation</u>, except otherwise permitted by the government regulations.'*	Dismiss the Article 22 Part 3.	Reasons: - The employer should have the right to take some security measures over the valuable properties when handing over them to the employee to implement the labor contract; - The wording '*security in terms of collateral, cash or valuable properties for the labor contract implementation'* can easily be misinterpreted as the measures to provide *'security to implement the labor contrct'* so it is better not to have such a

			clause; - The security types, including deposit, collateral, guarantee... can be done in compliance with the relevant clauses of the Civil Code.
Article 23	*'Signing labor contracts with multiple employers* *An employee can sign the labor contracts with many employers providing that (s)he can ensure the implementation of all the contractual committments.'*	Amend Article 23 Part 1 as follows: ***'An employee can sign the labor contracts with many employers providing that (s)he can ensure that (s)he will fulfil all the committments in every labor contract signed with every employer without adversely affecting the production and business activities of each employer'***	Reasons: - To protect the legitimate rights and interests of the employers; - To mitigate the risk of unwanted realease of the employers' business secrets; - To mitigate the risk of inequal competition against the employers in the labor market
Article 25 Part 2	*'2. When the labor contract covered in Point B and Point C of Part 1 of this Article has expired and the employee continues working for 30 days or more from the expiry date of the labor contract, the two parties have to sign a new labor contract; if not, the previous labor contract will be renewed as the indefinite-term labor contract.* *If the two parties sign a new definite-term labor contract, the new contract will last for only one term,*	Dismiss Part 2 Article 25	Reasons: - To ensure the autonomy of the employers in their workforce management and utilization; - To ensure the freedom of business of the employer in compliance with the Constitution.

	after that they have to sign a new indefinite-term labor contract if the employee continue working for the same employer.'		
Article 26 Part 1 Point đ	*'Contents of the labor contract* *1. The labor contract must include the following key contents:* *...* *đ) Salary level, allowances and support (if any), rewards and terms of payment;* *...'*	Amend as follows: ***'Basic salary level, allowances and support (if any), rewards and terms of payment'***	Reasons: - Basic salary level is different from salary level; - Include 'basic salary level' to make it convenient to agree and use the salary formula: **(Basic salary) = (Salary multiplier) x (Minimum salary)**
Article 30	*'Probationary period* *Probationary period is agreed upon by both parties based on the features and level of complexity of the job, but:* *a) must not exceed 60 working days in job titles requiring the qualification of technical highschool or higher;* *b) must not exceed 30 working days in job titles requiring the qualification of technical or professional school, technical or professional worker;* *c) must not exceed 6 working days in other job titles'*	Amend as follows: ***'Probationary period has to be agreed upon by both parties based on the features and level of complexity of the job'***	Reasons explained by Japanese employers: - In some jobs such as assembling... it is not possible to decide the level of complexity based on the final training qualification, thus it is not feasible to limit the maximum lenght of probationary period; - To give the employees the opportunities for longer probationary period when they have not been able to reach the expected skill level during the limited time for probation and consequently excluded from employment at the

			enterprise where they undertake the probation.
Article 31	*'Salary in the probationary period The salary for the employee in the probationary period is agreed upon by both parties, but it should be at least **85%** of the salary level for the title of the job and not lower than the regional minimum wage.'*	Amend Article 31 as follows: *'Salary in the probationary period The salary for the employee in the probationary period is agreed upon by both parties, but it should be at least **70%** of the salary level for the title of the job and not lower than the regional minimum wage.'*	To protect the interests of the employer because it is impossible to pre-determine the productivity of the employee's work in the probationary period.
Part 2 Article 38 + Article 136	Article 38 Part 2: *'Taking back the employee who is under temporary arrest or detainment in compliance with Part 2 Article 37 of this Code should be done as follows:* *a) If the temporary arrest or detainment of the employee is directly related to industrial relations, then as soon as the period of temporary arrest or detainment expires or the procedural bodies conclude non-violation of the laws by the employee, the employer has to take the employee back to work and pay him/ her the full salary and other benefits for the time the latter is kept under temporary arrest or detainment.*	Comments from Japanese employers: *** Skip the requirements to pay the employee who is:** - Under temporary arrest/ detainment; - Under temporary employment suspension *** Skip the requirements to take the employee back to work** *** Skip the point: '*The employee must not pay bak the advance salary payment even if (s)he is found guilty and disciplined.'***	- These articles are too biased in favor of the violating employee - Not protective enough for the legal interests of the employer - The employer should have the choice to keep the employee or not.

	b) If the temporary arrest or detainment of the employee is not directly related to industrial relations, then as soon as the period of temporary arrest or detainment expires the employer has to give him/ her the previous jobs or a new job. If the previous job no longer exists or there is no new job the employer can agree with the employee to terminate the labor contract in compliance with Part 3 Article 40 of this Code.' - Article 136: *'Temporary suspension of the employment* *1. The employer has the right to temporarily suspend the employment if the violation by the employee contains a certain level of complexity that if (s)he continues to work it will be more difficult to investigate the case, after consulting the grassroot-level trade union or the employee collective representative committee in a non-unionized enteprise.* *2. The temporary suspension must not exceed 15 working*		

	days, or 3 months in a special case. During that time the employee receives in advance 50% of salary of the month preceeding the suspensiion. *When the temporary suspension expires, the employee must be taken back to work.* *3. The employee must not pay bak the advance salary payment even if (s)he is found guilty and disciplined.* *4. **If the employee is not found guilty the employer has to pay him/ her the remaining salary**, for the suspension time'*		
Article 40 Part7	*'Cases of labor contract termination* *The labor contract can be terminated in the following cases:* *...* *7. The employee is qualified for retirement in terms of age in compliance with the Social Insurance Laws...'*	Amend as follows: ***'7. The employee is qualified for retirement in terms of age on the monthly basis in compliance with the Social Insurance Laws...'***	Reasons: - Easier to apply in reality since Article 50 of the Social Insurance Laws is very clear about the age requirement (60 years old for men, 55 for women); - Helpful to clear the problems in case the employee is old enough to retire as counting on the monthly basis, but has not paid social insurance for a sufficient number of years. In such cases the employer has no legal basis to terminate the labor contract even when such employee is no

			longer able to work.
Article 41 Part1	*'The right to unilaterally terminate the labor contract of the employee* *1. The employee working on a* ***definite-term, seasonal or assignment-based less-than-12-month labor contract*** *has the right to terminate the labor contract before it expires in the following cases:* *a) The employee is not given the right job, the right place of work or the right working conditions as agreed upon in the labor contract;* *b) The employee is not paid in full or at the right time as agreed upon in the labor contract;* *c) The employee is mistreated or forced to work;* *d) The employee or his/her family is in a real difficult situation that makes him/her unable to continue implementing the contract;* *đ) The employee is elected to take a full-time assignment in an people-elected entity or appointed to hold office in the government system;* *e) The woman employee is pregnant*	Amend as follows: ***'1. The employee working on an indefinite-term, definite-term, seasonal or assignment-based less-than-12-month labor contract has the right to terminate the labor contract before it expires in the following cases:*** **.......'**	Reasons: - To mitigate the risk of unilateral termination of the indefinite-term labor contract by the employee (without giving a reason); - To ensure the legitimate rights of the employer to retain high-skilled employees (with whom the employer often sign the indefinite-term labor contract); - The employer is more willing to sign the indefinite-term labor contract instead of 'abusing the flaws in laws' because they are worried that they cannot keep the employees even with the indefinite-term labor contract; - To minimize the problems arising because of the unreasonable nature of the existing Article 37 Part 3 of the current Labor Code.

	and prescribed by the doctor to stop working; *g) The employee has been sick or wounded in an accident and under medical treatment for three consecutive months under a definite-term labor contract which lasts for 12-36 months or for one-fourth of the contract time under a seasonal or definite-term assignment based labor contract which last for less than 12 months and his/ her ability to work has not been recovered.'*		
Part3 Article 41	*'The employee working on an indefinite-term labor contract has the right to unilaterally terminate it after giving the employer a notice at least 45 days in advance; or at least 3 days in advance in case (s)he has been sick or wounded in an accident and under medical treatment for six consecutive months.'*	Dismiss Article 41 Part 3	Reasons: - To mitigate the risk of unilateral termination of the indefinite-term labor contract by the employee (without giving a reason); - To ensure the legitimate rights of the employer to retain high-skilled employees (with whom the employer often sign the indefinite-term labor contract); - The employer is more willing to sign the indefinite-term labor contract instead of 'abusing the flaws in laws' because they are

			worried that they cannot keep the employees even with the indefinite-term labor contract; - To minimize the problems arising because of the unreasonable nature of the existing Article 37 Part 3 of the current Labor Code.
Article 42	*'The right to unilaterally terminate the labor contract of the employer* *The employer has the right to unilaterally terminate the definite-term, seasonal or assignment-based less-than-12-month labor contract with the employee in the following cases:* *...'*	Add to Article 42 as follows: ***'Cases of unilateral labor contract termination by the employer*** ***The employer has the right to unilaterally terminate the <u>indefinite-term</u>, definite-term, seasonal or assignment-based less-than-12-month labor contract with the employee in the following cases:...'***	Reasons: - To expand the legitimate rights of the employer in unilateral labor contract termination; - There are not any regulations about the unilateral termination of the indefinite-term labor contract by the employer in the Draft.
Part1 Article 46	*'4. If <u>the position or job agreed upon in the labor contract</u> no longer exists, on top of the compensation paid by the employer in compliance with Part 1 of this Article, the two parties must negotiate to amend or add to the labor contract.'*	Explain what ***'the position or job agreed upon in the labor contract no longer exists'*** really means? For example: the position or job agreed upon in the labor contract no longer exists because - the organizational structure has changed; - the technology has changed; - the requirements of the business demand so...	Reasons: - There are many reasons leading to the situation when '*the position or job agreed upon in the labor contract no longer exists*' so they should be stated clearly to avoid problems during implementation; - An ambiguous statement will result in different interpretations, which may trigger disputes in application of the

			labor laws; - A clear statement is needed to distinguish between the case in which '*the position or job agreed upon in the labor contract no longer exists*' with the case in which '*the emloyer places another employee in the job or the position which is used to be taken by the employee'*.
Article 47 Part 3	*'Responsibilities of the employee when terminating the labor contract* ... *3. To pay the employer a compensation for the training coss if agreed upon by the two parties in the training contract.'*	Explain clearly what '***agreements on competition***' means in this Article.	Reasons: - To mitigate the risks of labor disputes during application of this clause in reality.
Article 47	*Responsibilities of the employee when terminating the labor contract*	Add: ***'4. The employee has to come back to work under the signed labor contract if his/her unilateral termination does not follows the laws'***	- To ensure equality between the parties over unilateral termination of the labor contract (Article 46 and Article 47 of the Draft); - To mitigate the risk of unhealthy competition for labor among employers; - To improve the responsibility of the employee for agreement on and fulfilment of the time clause in the labor contract.
Article 51 Part 2	*'Within 7 (seven) working days from*	- Add what ***'special case'*** means in Article	Reasons: - To mitigate the

	the termination of the labor contract, the two parties have to make every payment the other party is entitled to; in the special case the time of payment can be extended but not more than 30 days.'	51 Part 2. - Amend: '......***not more than 60 days***'	risks of labor disputes over interpretation of *'the special case'* during application; - In reality where a lot of finance, property and high-ranked positions are involved, the procedures to liquidate the labor contract cannot be completed within 30 days because the employees do not have enough time to hand back the properties or documents to the enterprise.
CHAPTER VI: SALARY **3 recommended amendments to:** **Article 99 Part2, Article 100 Part2, Article 105.**			
Article 99 Part2	*'When preparing the salary table and scales, work targets, the employer must consult the grassroot-level union or the employee collective representative committee in an non-unionized enterprise and publicly announced in the enterprise before application, and at the same time send to the government administration in charge of labor in the district where the enterprise is located.'*	Amend as follows: ***'When preparing the salary table and scales, work targets, the employer must send to the government administration in charge of labor in the district where the enterprise is located.'***	Reasons: To prevent conflicts and jealousy among employees American enterprises think that it should not require - To announce the salary tables and scales - To consult the union
Article 100	*'1. Salary payment in*	Amend as follows:	Reasons explained

Part2	*cash for the employee.* ***<u>If the salary is paid to the bank account, the employer has to agree with the employee on the fees (if applied) involved in mainatining and withdrawing cash from the account</u>.*** *Partly payment in check issued by the Government can be agreed by both parties but it has to be convenient and may not cause any damage or discomfort for the employee.'*	*'1. Salary payment in cash for the employee.* ***If the salary is paid to the bank account, the employee is responsible for paying fees (if any) involved in mainatining and withdrawing cash from the account.'***	by Japanese companies: - Too much protectionizm for employee would result in inequality in industrial relations; - The employee can use the account for various purposes, not only for receiving the salary payment from the employer.
Article 105	*Article 105:* *'In case a contractor or a middle man with a similar role is used, if the contractor or middle man pays a smaller amount of salary or does not pay at all and does not provide other benefits to the employee,* ***the employer is responsible for paying the employee full salary and other benefits.'***	**Skip this article**	Reasons: The employee is employed by the contractor (the middle man), not the enterprise, therefore it is not reasonable to hold the enterprise accountable. The employee can claim compensation from the contractor or middle man .
CHAPTER V: COLLECTIVE BARGAINING AND CBA **2 recommended amendments to: Article 79, Article 90**			
Article 79	*Amend Article 79 about CBA amendment: The parties can only seek an amendment after* ***3***	**Skip Article 79**	There should not be any article about CBA amendment because it takes a lot of time to complete

	months *if the CBA is signed for 1 year and after* ***6 months*** *if the CBA is signed for 1 - 3 years.*		CBA negotiation, if Article 79 is kept as it is in the Draft, to allow re-negotiation in just 3 or 6 months, too much delay to the business will happen.
Article 90	***Whom does the industry-wide CBA covers:*** *'The people who follow the industry-wide CBA include corporate employers and employees in the enterprises or their units who participate in such CBA.'*	Amend as follows: '… who **voluntarily** follow *industry-wide CBA…*'	'Voluntary' should be added, otherwise CBA may understood to be compulsory, which is against the principle of freedom of CBA negotiation and conclusion sited in Part1 Article 75 of the Labor Code "CBA is the document of **agreement …'**
CHAPTER VII: WORKING TIME AND REST TIME **4 recommended amendments to: Article 114 Par t2, Article 119, Article 124, Article 75**			
Article 114 Part 2	*'Overtime* *The employer has the right to ask the employee to work overtime providing that:* *…* *2.* *Option 1 (as in the current Labor Code):* *Ensure that the total overtime worked by the employee does not exceed four hours*	Choose Option 2: ***'Ensure that the total overtime worked by the employee does not exceed a maximum of 50% of the formal daily working hours nor a maximum of 36 hours per month.'*** It is recommended to make it possible to work overtime even '**more than 36 hours**' *In certain jobs such as*	- It fits the current business operation pratice in many enterprises. - To allow the employer more dynamics in workforce and production management when he has to meet urgent orders; - 100% of the surveyed employers prefer this option.

	per day, 200 hours per year, except in some special cases the overtime does not exceed 300 hours per year if permitted by the Goverment, after consulting VGCL and the employers' representative.' <u>*Option 2:*</u> *Ensure that the total overtime worked by the employee does not exceed a maximum of 50% of the formal daily working hours nor a maximum of 36 hours per month.*	*white collar staff working in an well-equiped environment, jobs with special features in terms of delivery deadline and limited availability of equipment it is possible to work overtime more than 36 hours if agreed by the union and employees and approved by DOLISA and the higher-level trade union.*	
Article 119	*'Annual leave* *1. The employee who has worked for at least 12 consecutive months for the same employer is entitled to annual leave with full payment as follows:* *...'*	Add to Article 119: - **Should working *'for at least 12 consecutive months for the same employer'* be a pre-condition to take annual leave?** - *If the employee has not taken all the annual leave days (s)he is entitled to before the end of the calendar year, is (s)he entitled to payment for the unused leave days?*	Reasons: - These clauses remain ambiguous or missing in the Draft and are likely to trigger disputes during implementation; - These problems used to happen before in the application of the current Labor Code (because the specific clauses are missing), and should be corrected in the Draft.
Article 124	***'Working time and rest time in special jobs*** *For jobs with special nature such as road, rail, waterway or air transport, offshore oil exploration and rigging, artistic jobs, use of radiation and*	*Recommendation: the government bodies should issue the **specific explanaroty instructions under Article 124** as soon as possible so that the employers can apply in reality.*	- In fact a lot of employers are very confused when following the laws (*Decree 109/2002/NĐ-CP dated 27 Dec. 2002*) since there has not been any written instruction from the

	nuclear technologies, use of high-frequency wave techniques, diving or mining jobs, seasonal jobs and order-based export-processing jobs, 24-hour-per-day jobs, the related ministries and industries determine the working time and rest time after consulting MOLISA.'		related ministries; - Enquiries from employers to MOLISA has been replied that there has not been any instructing document. Therefore, the employers have to act in uncertainty and are worried that they have no 'legal basis' for the application/ rules of the companies in this area if disputes arise.
Article 75	***Null and void CBA***	Add: ***'The mandate to judge null and void CBAs'.***	- To prevent disputes over the mandate to judge the validity of the CBA; - To be clear for the employers so that they can avoid problems in implementation.
CHAPTER VIII. **WORKING DISCIPLINE AND MATERIAL RESPONSIBILITIES** **6 recommended amendments to: Article 126 Part 2 Point b, Article 130 Part 1 Point c, Article 126 Part 1, Article 126 Part 3, Article 136 Part 1, Article 129 Part 2**			
Article 126 Part 2 Point b	***'Internal working rules*** *...* *2. The contents of the internal working rules must not be against the labor laws, other laws and must include the following:* *...;* ***b) The order in the enterprise;*** *...'*	Explain clearly what '***the order in the enterprise'*** means	- To mitigate the risk of labor dispute during application of this article; - To have a solid base for the enteprises to elaborate more in their internal working rules; - To mitigate the risks of confusing between '*the order in the enterprise*' and similar wording of the existing administrative laws and the Civil Code

			about ensuring the ‘general order and stability of the society’
Article 130 Part 1 Point c	*‘**The principles to handle working rule violations*** *c. The employee has to physically present, has the right to defend him/herself or to have a lawyer <u>or another person to defend him/her</u>; if the employee is below 15 years old a parent or a legal care-giver has to be at presence.’*	Add about ‘**qualifications of the person defending the employee**’	- To prevent problems during implementation. - To help the employee make a better choice when (s)he needs a person to defend him/her in the meeting to handle the case.
Article 126 Part1	*‘**Application of fire penalty*** *The fire penalty can be applied in the following cases:* *1. The employee committs the action of stealing, embezzlement, gambling, attacking to wounded, drug abuse at the enterprise, leaking the technological or business confidential issues or violation of intellectual property rights of the enteprise or other actions that cause substantial material damage or **<u>threathen</u>** to cause **<u>extremely</u>** substantial damage to the properties or **<u>interests</u>** of the eneterprise.* *...’*	Explain clearly: - What ***‘threaten to lead to damage...’*** means? - What ***‘extremely substantial damage to the properties’*** means? - What ***‘extremely substantial damage to the interests’*** means?	- To prevent problems during implementation. - The employers has the firm legal basis to further elaborate the clause in the internal working rules of the enterprises.

Article 126 Part 3	*'3. The employee who stops working without a good reason for 5 (five) cummulative working days per month or 20 (twenty) cummulative working days per quarter, starting from the first day (s)he stops working.* *Good reasons include: natural disasters, fire, sickness of the employee or a family member which is certified by a legally established health care institution; and other cases in compliance with the internal working rules.'*	Amend: **'... 3 days...'** *The employee who stops working without a good reason for 3 (three) cummulative working days per month or 12 (twelve) cummulative working days per quarter, starting from the first day (s)he stops working.'*	Reasons given by Japanese employers: - To ensure smooth operation of the assembly-line-based enterprises; - To protect the interests of the employers
Article 136 Part 1	*'**Temporary suspension of employment*** *1. The employer has the right to temporarily suspend the employment after consulting the grassroot-level union or the employee collective representative committee in a non-unionized enteprise if the violation by the employee contains a certain level of complexity that if (s)he continues to work it will make it **more difficult** to investigate the case.'*	Explain specificly what ***'more difficult to investigate the case'*** means?	- To prevent the problems arising during application; - To mitigate the risks of disputes arising from ambiguous wording.
Article 129 Part 2	*'2. The temporary*	Explain clearly what ***'special case'*** means?	- To prevent the problems arising

	suspension must not exceed 15 working days, or 3 months in a ***special case****. During that time the employee receives in advance 50% of salary of the month preceeding the suspension.* *When the temporary suspension expires, the employee must be taken back to work.'*		during application; - To mitigate the risks of disputes arising from ambiguous wording.
CHAPTER XIV: LABOR DISPUTE RESOLUTION **3 recommended amendments to : Article 233, Article 244, Article 245**			
Article 233	***'Illegal strikes*** *If a strike occures in one of the cases described below, it is considered illegal:* *1. It does not arise from a collective interest-based labor dispute.* *2. It does not involve the employees working in the same enteprise* *3. The collective labor dispute has not been or is being settled by the relevant bodies/ organizations in compliance with this Code.* *4. It occures in an enterprise where strikes are not allowed as per the list issued by the Government* *5. A decision has been made to suspend or stop the*	Add to the list of illegal strikes the following cases: ***- It occures without consulting the employees about going on strike in compliance with Article 235 of this Code, or the procedurse to go on strike have not been completed in compliance with Article 236 of this Code;*** ***- It is not organized and led in compliance wih Article 232 of this Code;***	- To mitigate the risks of wildcat strikes which is becoming more common recently; - To ensure a certain level of stability for business operation; - To improve the actractiveness of the Vietnamese labor market in attracting more FDI.

	strike.'		
Article 244	***Article 244: Decision to suspend or stop a strike*** *If a strike is considered to create the risk of substantial damages to the national economy or public interests, the PPC*[11] *chairperson can make a decision to suspend or stop it and ask relevant government bodies/ organizations to settle it.* *The Government stipulates how to suspend or stop strikes and address the interests of the employee collective after consulting VGCL.'*	Add: ***Article 244: Decision to suspend or stop the strike*** *'...* *When the decision to suspend or stop the strike has been made by the PPC chairperson,* ***the employer has the right to fire*** *the employees who stay on strike.'*	A sanction should be added in case the employees stay on strike when a decision to suspend/ stop it has been made by the PPC chairperson: the employer has the right to fire them
Article 245	***Article 245: Decision to declare a strike non-conforming with the right procedures*** *If a strike is considered not to comply with the procedures described below, the PPC chairperson can make a decision to declare it non-conforming with the procedures and formalities stipulated by the laws...'*	Amend as follows: *Article 245: Decision to declare a strike non-conforming with the right procedures* *If a strike is considered not to comply with the procedures described below, the PPC chairperson can make a decision to declare it non-conforming with the procedures and formalities stipulated by the laws and demand that relevant bodies/ organisations to settle it* ***within 1 (one) day****...'*	

[11] PPC: Provincial People's Committee

OTHER ISSUES **6 recommended amendments to: Part 3 Article 66, Article 66 Part 2, Article 163, Article 182 Part 2, Part 4 Article 209, Article 210**			
Part 3 Article 66 (**CHAPTER IV**: *Training, vocational skill building and improvement for employees working for enterprises)*	*Article 66: Vocational training contract and costs:* *' 3.... The parties discuss the training costs and recorded their agreement in a written document signed by both parties and attached to the vocational training contract'*	Skip: *'The parties discuss the training costs and recorded their agreement in a written minute signed by both parties and attached to the vocational training contract'*	Contents of the training contract and the minute overlap so this procedure is too complicated, an amendment to keep only 'the vocational training contract' is sufficient.
Article 66 Part 2 (**CHAPTER IV**)	*'...2. The vocational training contract must include: objectives, place, time,* ***costs****, the time period the employee commits him/herself to work for the employer after being trained and the responsibility to* ***reimburse*** *the training costs in case (s)he breaks the contract.'*	Amend as follows: ***'The vocational training contract must include: objective place, time, costs, the time period the employee commits him/herself to work for the employer after being trained and the responsibility to reimburse the training costs in case (s)he breaks the vocational traning contract. Cost reimbursement applies in any case if the employee terminates the labor contract before the time deadline (s)he is committed to under the vocational training contract."***	- To protect the legitimate interests of the employers after incurring the costs of training for the employee in expection of future use; - To mitigate the risk of the employee intentionally terminating the labor contract and misusing a case permitted by the laws to 'get rid' of the responsibility to compensate the training costs, even when (s)he has not worked long enough for the employer as agreed (in the training contract).
Article 163: Maternity leave (**CHAPTER. X**: Specific regulations for	***Article 163: Maternity leave*** ***- Option 1:*** *Women can take leave before and after child birth for a total of 6*	***Choose Option 2: keep it as it is in the current Labor Code***	- 6-month maternity leave is too long, 4-month is the longest now in the region. - Option 1 will result in serious shortage of workers and a

women employees)	*cummulative months and is entitled to a maternity allowance in compliance with the Social Insurance laws. If she has a twin or more she receives 30 days more per every extra child.* ***- Option 2:*** *(as in the current Labor Code)* *Women can take leave before and after child birth for a total of 4-6 cummulative months as stipulated by the Government, depending on the working conditions, the level of hardship, poisoning and remoteness. If she has a twin or more she receives 30 days more per every extra child.*		burden to the social insurance system.
Article 182 Part2 (Thuộc Ch. **XI**: Những quy định đối với lao động chưa thành niên và một số lao động khác)	*"Article kiện tuyển dụng Người lao động nước ngoài.* *...* *2. Doanh nghiệp, tổ chức, cá nhân, nhà thầu nước ngoài cần sử dụng Người lao động nước ngoài vào làm việc trên lãnh thổ Việt Nam phải giải trình nhu cầu sử dụng Người lao động nước ngoài và được sự chấp thuận bằng văn bản của* ***cơ quan có thẩm quyền****."*	Bổ sung quy định: "***Cơ quan có thẩm quyền***" là cơ quan nào?	Ý kiến của doanh nghiệp Nhật Bản: - Mục đích: tránh vướng mắc trong việc thực hiện

Part 4 Article 209 (CHAPTER XIII: Trade union – employee collective representative at the enterprise)	*Article 209.* ***Rights of the union staff, employee collective representative*** *'... 4. Is retained to work for the employer, including the union staff, employee collective representatives from the previous terms, if the contracts have not expired, in case the enteprise winds down its business and cuts down the workforce'*	***Dismiss Part 4 Article 209***	Reasons: - Retaining the union/ employee representatives is not good for the employers who have to deal with redundancies. - In SMEs, annual election of union representatives results in a large number of 'previous term' union staff who can never be terminated.
Article 210 (**CHAPTER. XIII**)	*Article 210:* ***Terminate the labor contracts with the union staff, employee collective representative*** *1...* *2. When the employer decides to fire or unilaterally terminate the labor contract with an employee who is the member of the Exercutive Committee of the grassroot-level trade union, he should seek agreement from the Committee, or from the union at one level higher in case the employee is the union chairperson, or from the district-level labor administration in case the employee is the employee collective representative.*	***Dismiss this article***	Reason: - There is laws to protect union staff against discrimination resulting from their legalistic activities and to prohibit illegal interventions by the employers. - There is no limit for the higher-level trade union to reply to the employers' request for termination. This can be unusual in the decision making process of the higher-level union and may create some difficulty for the grassroot-level union's activities.

PART FOUR:

CONCLUSION

Willing to forward to Labor Code Drafting Team the employers' comments about the Draft, VCCI has made great efforts to collect and summarize the oppinions, information and make this report.

We hope that this Labor Code Draft will become the most complete legal framework to regulate labor management practices at the enteprises as well as to facilitate the development of harmonized industrial relations in the fast-growing market economy and international integration of Vietnam today.