

The ABCs of ILRs and Disciplinary Hearings and the New Draft Labor Code

Presented to AmCham

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Common Issues in Drafting Internal Labor Rules (ILRs)

1. What are ILRs?
2. Do I need ILRs?
3. What should my ILRs contain?
4. The discipline section of the ILRs

What are ILRs?

- ❑ Document that sets out a company's work rules and the grounds and procedures for labor discipline
- ❑ Consultation with employees, trade union, and labor authority is required
- ❑ Registration with the labor authority is required

Why do I need ILRs?

- ❑ More than 10 employees – required
- ❑ Fewer than 10 employees – recommended
- ❑ The Labor Code implies that disciplinary action, including dismissal, might not be possible without registered ILRs.

It is prohibited to deal with an employee for conduct in breach of labor discipline when such conduct is not stipulated in the internal labor rules

(Labor Code, Article 128.3)

Why do I need ILRs? (cont.)

Being able to dismiss or discipline your employees in Vietnam is very important because:

- ❑ There are no “at will” labor contracts in Vietnam – only term or indefinite-term
- ❑ Termination must be for cause, based on law and what is set out in the in the ILRs
- ❑ Damages for unlawful termination are significant
- ❑ Issues with forums for dispute resolution

What should my ILRs contain?

- ❑ **Part I:** Required contents – work rules
 - ❑ Working hours and rest breaks
 - ❑ Order in the workplace
 - ❑ Occupational safety and hygiene
 - ❑ Protection of employer property
- ❑ **Part II:** Required contents – labor discipline
 - ❑ Conduct by employees constituting a breach of labor discipline and penalties imposed for those breaches
 - ❑ Liability for damages

What should my ILRs contain? (cont.)

- ❑ Optional contents:
 - ❑ Grounds for performance-based termination
 - “Performance requirements”

An employer must specify the criteria for assessing the level of completion of work in the [company] rules of the enterprise, providing the basis for assessing whether or not an employee has repeatedly failed to complete her/her work in accordance with the terms of the labor contract
(Decree 05, Article 12.1)
 - Trade union consultation required
 - ❑ Other internal company policies?

The discipline section of ILRs

- ❑ Forms of labor discipline:
 - ❑ Reprimand
 - Verbal “warnings”
 - Written “warnings”
 - ❑ Deferral of wage increase for less than 6 months or demotion
 - Can set the stage for a dismissal
 - ❑ Dismissal

Drafting ILRs

- ❑ “Performance requirements” are allowed but difficult to set out and implement in practice for white-collar work
- ❑ The law does not set out which acts deserve reprimands or deferral of wage increase or dismissal; companies need to decide in their ILRs
- ❑ **Written reprimand** examples:
 - ❑ Insubordination, failure to obey orders
 - ❑ Failure to perform duties
 - ❑ Failure to comply with security requirements
 - ❑ Breaches that cause damages of less than 3 months’ relevant minimum wage

Drafting ILRs (cont.)

- ❑ **Deferral/demotion** examples:
 - ❑ Non-compliance with company's work ethics, honesty, sexual harassment, and work safety policies
 - ❑ Two written reprimands for the same breach within a span of 3 months
 - ❑ Breaches that cause damages of more than 3 months' but less than 10 months' relevant minimum wage

Drafting ILRs – Dismissal

- ❑ The employee:
 - ❑ Steals or embezzles
 - ❑ Gambles
 - ❑ Uses deliberate violence causing injury
 - ❑ Uses drugs at the workplace
 - ❑ Discloses employer's technology or business secrets
 - ❑ Infringes employer's intellectual property
 - ❑ Is guilty of conduct causing “serious loss or damage” or which threatens to cause “particularly serious loss or damage” to property or interests of the employer (the catch-all provision)
- ❑ Recurrent offender – commits same offense
- ❑ Absence from work

Drafting ILRs – Catch-all

- ❑ Can use the catch-all provision to add dismissal offenses
 - ❑ “Serious loss or damage” – 10 to 20 months of applicable minimum wage in Hanoi/HCMC
 - ❑ “Particularly serious loss or damage” – more than 20 months of applicable minimum wage in Hanoi/HCMC
 - ❑ “Interest of the employer” – material and non-material (reputation, goodwill, etc.)

Drafting ILRs – Catch-all (cont.)

- ❑ Additional grounds for dismissal are possible under catch-all
- ❑ Examples:
 - Violation of non-competition
 - Falsifying documents
 - Unauthorized computer system usage, copying, corruption, hacking, data transfer, or deletion
 - Soliciting or paying commercial or government bribes
 - Lying about or falsifying work qualifications

Registering ILRs

- ❑ Expect the registration to take time as the ILRs will often be submitted several times to the trade union and labor authority for review and comments
- ❑ The consent from the trade union must clearly state that it agrees with all contents of the ILRs
- ❑ Frequent changes of the laws which require revision/amendment of the ILRs and the same procedures for registration apply

Practical Notes for Labor Disciplinary Process

1. Role of trade union
2. Temporary suspension
3. Disciplinary process

Trade unions

- ❑ Should establish a trade union (TU) within the employer
- ❑ Each district trade union (DTU) in HCMC has its own interpretation and experience
- ❑ DTUs are supposed to protect employees, not employers

Temporary suspension

- ❑ Employer sends request for opinions of the DTU which briefly describes what has happened and asks the DTU for opinions about the suspension
- ❑ DTU may come to employer's office, hold a meeting between the two parties, and make recommendations
- ❑ Employer may not agree with the DTU's recommendations. It will take responsibility for its decisions

Disciplinary process

- ❑ Employer should prepare the minutes of the violation with signatures of violating employee and witnesses
- ❑ Employer sends invitation to TU which describes background information on employee's violation
- ❑ Opinions of the TU are not decisive the employer is not bound by them

Proposed Changes in New Labor Code

1. Representative units for employees
2. Labor contracts
3. Overtime work
4. Expatriate employees
5. Retirement age

Draft new Labor Code

- ❑ MOLISA is drafting a new Labor Code (“Draft”)
- ❑ The Draft is designed to meet the following targets:
 - 1) To meet the ILO’s standards on the rights of employees
 - 2) To harmonize with other laws
 - 3) To address the issues which are unresolved under the 2012 Labor Code

Representative units for employees

❑ Private trade unions

- ❑ The Draft allows employees to set up a [private] trade union
- ❑ Private trade union may accede to the Vietnam General Confederation of Labor (VGCL) or may stand alone by registering its establishment and operation with state authorities (not defined yet)
- ❑ Private trade unions have similar functions as [government] trade unions (e.g., representing the employees in negotiating with employers, holding strikes, etc.)

Representative units for employees

- ❑ **Employer-Employee Cooperation Board (Ban hop tac hai ben)**
 - ❑ An employer who has more than 50 employees must establish the board
 - ❑ The board has duties to carry out dialogues between the employer and the employees, and play role of/replace the trade union when the employer works out a labor usage plan (in business restructuring), and draws up the salary scales and the ILRs
 - ❑ Composed of representatives of the employer (3-10 persons) and representatives of the employees (3-20 persons)
 - ❑ Has a chairperson and a secretary who are elected by the board members

Labor contracts

❑ Automatic conversion of short-term labor contracts

The Draft provides that if a definite-term contract or seasonal contract expires, but the parties fail to enter into a new contract and the employee continues working, the contract will automatically convert into an indefinite-term contract

Labor contracts (cont.)

❑ Early termination by employees

The Draft provides two options for the early termination by employees:

- (i) As currently provided under the 2012 Labor Code; or
- (ii) An employee may terminate without cause by giving a prior notice (5 days, 30 days, or 45 days). In some cases, the prior notice is statutorily waived.

Labor contracts (cont.)

- ❑ Draft removes requirement for reimbursement of training fees if employee illegally terminates labor contract
- ❑ Draft provides new ground for employer to terminate labor contract early, i.e., employee's provision of false information affecting employment decision of employer
- ❑ Draft abolishes ground for layoff due to economic needs
- ❑ Draft no longer requires a layoff due to changes in business structure or technology to involve multiple employees; theoretically, the employer may lay off one employee on this ground

Overtime work

- ❑ Changes to overtime hours:
 - (i) Abolishment of threshold of 30 hours/month; and
 - (ii) Raising the maximum annual overtime to 400 hours
- ❑ Article 35 of the Draft provides two options for overtime payment:
 - (i) As currently provided under the 2012 Labor Code; or
 - (ii) On working days, at least 150% for the first overtime working hour, at least 200% for the following hours; on weekends, at least 200% for the first two overtime working hours, at least 300% for the following hours; on holidays, at least 300% for the first two overtime working hours, at least 400% for the following hours.

Expatriate employees

- ❑ The requirement on the explanations for the need to employ expatriates under the 2012 Labor Code has been revoked

Retirement age

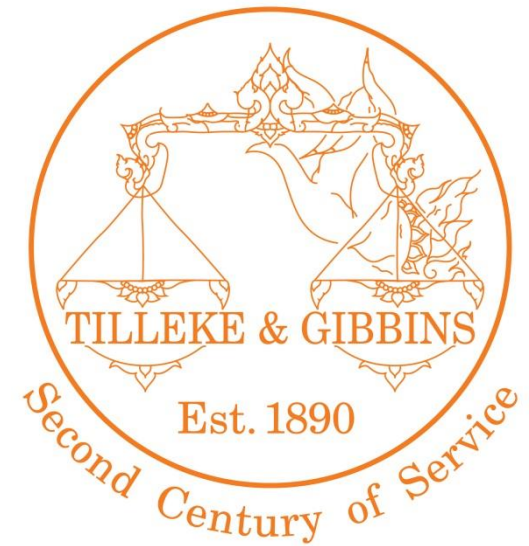
- ❑ The Draft provides two options for the retirement age:
 - (i) As currently provided under the 2012 Labor Code (60 for men and 55 for women); or
 - (ii) 60 for men and 55 for women, but from 1 January 2021, each year the retirement age will be advanced by six months until the retirement age reaches 62 for men and 60 for women, respectively

Q&A

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