Risks in Terminating Problem Employees

American Chamber of Commerce
HR Committee Morning Briefing – 31 October 2017

Sarah Galeski – Special Counsel
Trung Khuat – Associate
Who?

• Employees committing acts of misconduct;
• Underperforming employees.
Why this matters…

• No “at will” employment in Vietnam.
• Limited termination bases with complicated procedures and documentation.
• Many employers are not aware of the termination processes and documentation.
• Employees often bring wrongful termination lawsuits and win.
• Reinstatement is a mandatory remedy.
Example: Worst Case Scenarios – Dismissal and Poor Performance
Worst Case Scenario – Act of Misconduct

**Minh**
- Minh has disclosed your company’s confidential information
- Problems with:
  - Minh’s labor contract: no provision on confidentiality obligation
  - The Internal Labor Regulations: not properly registered
- You lose your temper, and fire Minh on-the-spot in front of the whole office.
Worst Case Scenario – Poor Performance

Nam

- Indefinite term contract
- Nam’s work is riddled with errors and he cannot improve
- Problems with having no:
  - No written description of Nam’s job duties;
  - No performance appraisals;
  - No performance management policy;
- You lose your patience with Nam, and terminate him on-the-spot for the poor quality of his work.
Consequences.....

- Employees initiate lawsuits for wrongful unilateral termination.
- The employees win.
- The termination is illegal.
- The judge orders the following:
  - Reinstatement
  - Pay the employees their full salaries and benefits for the period they did not work
  - At least 2 months’ salary for emotional distress
More consequences…

- Must negotiate with employees and pay extra so they don’t come back
- They don’t want to leave….
- The employees also tell their sob stories to the world
- Dangerous example set for other employees
What went wrong? – Minh (Misconduct)

- To lawfully dismiss an employee for cause, a company must have **Internal Labor Regulations (ILRs)** which are properly registered with the labor authority.
- **Labor contracts/ILRs** should address the duty to keep information confidential.
- The company did not follow any of the **set legal procedures for dismissal**.
- While ignoring the legal procedures for dismissal, the employee was humiliated.
What went wrong? – Nam (Poor Performance)

- The employee should be subject to a probation period and then a fixed term (1-3 years) contract before an indefinite term contract.
- An employee’s job description, including the expected performance level, should be specified in the employee’s labor contract.
- Employer must have a Performance Management Policy formulated in consultation with the trade union.
- Performance appraisals and warnings should be documented in writing.
- **Termination Notice** (30 or 45 days) is required for this type of termination, depending on contract term.
DISMISsAL
Legal Bases for Dismissal for Cause
Legal Bases for Dismissal for Cause

• Committing the following breaches regardless of the damage:
  • Stealing/embezzling company assets;
  • Gambling;
  • Deliberately causing injury;
  • Disclosing trade or technological secrets;
  • Using drugs at the workplace;
  • Infringing employer intellectual property rights.

• Committing other breaches causing serious damage or threatening to cause particularly serious damage to employer interests or assets ("Other Breaches");
Legal Bases for Dismissal for Cause, ctd.

- An employee who has previously been disciplined by an extension of wage increase timing, recommits the same offense during the trial period; or recommits the offense after being demoted; and,
- An employee takes five accumulative days off in one month or 20 accumulative days off in one year without proper reasons.
But, not so simple…

- Even if misconduct is listed in the Labor Code, it must still be included in the registered Internal Labor Regulations (“ILRs”).
- For Other Breaches, damages to the employer caused by the misconduct must be quantifiable and meet a certain monetary threshold
  - ILRs should specify threshold
  - The threshold for material damage is defined by the employer, but it may be challenged by the labor authority if it is too low.
Other considerations

• Cannot dismiss employees in the following circumstances:
  • On sick leave or on leave with employer’s consent;
  • Detained or in prison;
  • Investigation of misconduct by competent agency is ongoing;
  • Pregnant, on maternity leave (female employees)
  • Employees (both male and female) raising a child under 12 months old.

• Limitation periods apply
  • 6 months from the date the breach occurred - (not from the time the breach is discovered)
  • 12 months for a breach relating to finance, assets, or the disclosure of technological or business secrets
  • If employee has protected status (as above) and limitation period expires, only get 60 more days
  • Dismissal decision must be issued within the limitation period
The Importance of Internal Labor Regulations
Internal Labor Regulations

- Internal Labor Regulations ("ILRs") are a company’s written rules setting out working conditions, rest times, and labor discipline
- ILRs must specifically state which acts of misconduct are subject to dismissal
  - Acts listed in the Labor Code
  - “Other Breaches” specified by Company which caused a specific monetary threshold damage (i.e., serious damage) to the Company’s assets/interests
Internal Labor Regulations (Cont’d)

• ILRs should indicate a monetary threshold of damage caused by Other Breaches which will qualify an act for dismissal
  • Should be somewhat significant
  • In practice, often very hard to show quantifiable damage for many acts of misconduct
• Labor authority reviews and confirms the registration of ILRs.
Recommended Action Plan

- Make sure the ILRs are up-to-date
- Register the updated ILRs with the labor authority
- Strictly follow the disciplinary procedures
- Improve your relationship with the trade union (company trade union or immediate upper level trade union).
POOR PERFORMANCE TERMINATION
Legal Bases

An employer may terminate an employee due to poor performance if the employee frequently fails to perform his assigned tasks (Labor Code 1994, and Labor Code 2012)

The definition of “frequently failing to perform Employee’s assigned tasks”

<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>- Employee is served with two written warnings within a months; and - Repeats his shortcomings</td>
<td>- Determined under the employer’s performance management policy; and - The performance management policy is issued in consultation with trade union</td>
</tr>
</tbody>
</table>
Notice Obligations

– Notice requirements:
  - Indefinite term contract: at least 45 days
  - Definite term contract (12-36 months): at least 30 days
  - Seasonal contract (<12 months): at least 03 working days

– Question: advance notice as agreed in the labor contract (e.g., 3 months)?
Protected Employees

Termination by Employer is not allowed if:

• Employee suffers sickness, labor accident, occupational disease

• Employee is taking annual leave, private leave or other approved leave

• Employee is pregnant, taking maternity leave, raising children under 12 months old
**Recommended Action Plan**

- Employee’s labor contract should include a written job description, listing expected performance level.
- Conduct frequent performance reviews with written minutes.
- A performance management policy should be issued in consultation with the trade union.
- Probation period (60 days maximum): important so employer can judge employee’s performance.
- First contract should be a fixed-term for 1-3 years. Also provides the employer with further opportunities to end employment relationship.
Practical Alternatives to Dismissal & Poor Performance Termination
Mutual Termination Agreement

Pros

• Avoids proving legal bases for termination (Registered ILRs/ Performance Management Policy)
• Avoids onerous termination procedures
• Avoids the risk of a wrongful termination lawsuit
• Employee is terminated quickly
• No risk of employee coming back

Cons

• Almost always requires a settlement payment as consideration – very distasteful where employee has committed serious acts of misconduct
• Severance is payable for mutual termination, but not dismissal
• Usually must keep full facts confidential - cannot use employee as an example
Quiz: Subject to Dismissal?
Would these acts of misconduct be subject to dismissal?

1. Taking kickbacks from suppliers in exchange for agreeing to contract with them on behalf of the company.
2. Smoking in a prohibited area.
3. Disclosing confidential information to a competitor.
4. Skipping work for three consecutive days without calling in.
5. Bribing a government official.
6. Misusing the company taxi card for personal purposes.
What to remember….

- If you fail to follow required legal procedures and lack required documentation, you may not be able to legally terminate an employee for misconduct or poor performance.
- It is essential to consider these issues in advance, before a problem arises.
- Ensure your HR team understands the required legal procedures and has put into place ILRs and a Performance Management Policy.
- Please reach out to us for assistance if you need help.
Any Questions?
This presentation has been prepared for clients and professional associates of Baker & McKenzie. Whilst every effort has been made to ensure accuracy, this presentation is not an exhaustive treatment of the area of law discussed and no responsibility for any loss occasioned to any person acting or refraining from action as a result of material in this presentation is accepted by Baker & McKenzie.

Baker & McKenzie (Vietnam) Ltd., a limited liability company, is a member firm of Baker & McKenzie International, a Swiss Verein with member law firms around the world. In accordance with the common terminology used in professional service organisations, reference to a "partner" means a person who is a partner, or equivalent, in such a law firm. Similarly, reference to an "office" means an office of any such law firm. This may qualify as "Attorney Advertising" requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.