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Employment Reorganisation Roadmap

Vietnam

1 April 2021

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Contents

1. Employee representation

1.1. What are the main forms of employee representation involved in restructurings?

The main forms of employee representation involved in restructurings are:

– **Trade union representatives:** A grassroots trade union should be established within a company within a six-month period after it is set up and begins operations. It is the obligation of the district level trade union or industry trade union (not the employer) to do this although the employer must facilitate the establishment of the trade union. If a grassroots trade union has not been set up by the end of the six-month period, the district level trade union must appoint a temporary executive committee of the grassroots trade union to represent or protect the lawful rights and benefits of employees until the grassroots trade union is officially established.

– **Workers' representative organisations (WROs):** The Labour Code (a new version of which took effect from 1 January 2021) allows employees to join or form an independent WRO which does not have to be affiliated with the Vietnam General Confederation of Labour. WROs are permitted to be formed within one enterprise and are registered with relevant State agencies. They have their own constitutions which set out their mandates and purposes. WROs may be consulted on major labour management steps which previously required consultation with trade unions only, including on the development of labour usage plans (see answers to **2.4** and **5.2**).

1.2. Is there a system of employee participation rights?

Employees have no right to management or board-level representation, unless a collective agreement and the company's charter provide otherwise.

2. Process on business sales

2.1. Are employees automatically transferred to a buyer by operation of law on a business sale?

The position relating to the automatic transfer of employees is not expressly clear under Vietnamese law.

Special provisions apply under the Labour Code where an employer undergoes certain changes, including: (i) a merger, consolidation, division or separation of the entity (Reorganisation); or (ii) a transfer of ownership of an entity's assets, or of rights to use its assets (Transfer of Assets). In these circumstances, the buyer is encouraged to continue employing employees and to amend the terms and conditions of their employment contracts as necessary. Where such changes affect the employment of "many employees" (which is not defined), the seller and/or buyer must prepare a labour usage plan prior to implementing such changes, and the seller and buyer must comply with the labour usage plan (see answers to **2.4** and **5.2** for further information).

For employees to be transferred to the buyer, their employment contracts should be amended to reflect the new employer. It is not entirely clear whether, if an employee refuses to sign an amendment to their employment contract, they will be considered as having been transferred to the buyer.

2.2. If so, in broad terms, what is the legal test for identifying which employees transfer?

The employees to be transferred to the buyer will be identified in the labour usage plan, and the seller would need to reach agreement with the relevant employees on the transfer of their employment to the buyer.

2.3. Can employees object to the automatic transfer of their employment and what are the consequences of an objection?

If the employees refuse to reach an agreement on the transfer of their employment, the law is unclear on whether such employees will be transferred to the buyer or not (see answer to **2.1**).

Additionally, employees are allowed by law to resign without prior notice if the business or asset sale leads to a change in their work or workplace, or to them not being afforded the working conditions agreed in their employment contract. Employees with at least 12 full months' service may be entitled to a job-loss allowance if they resign in the context of the business or asset sale (see **section 6 – Process on individual dismissals** for further information).

2.4. Are employees automatically transferred to a buyer by operation of law on a business sale?

The seller and/or buyer must prepare a labour usage plan before the business or asset sale. The seller's employee representatives must be involved in the development of the plan. There is no requirement for a labour usage plan to be approved by the seller's board of directors before the seller enters into any binding agreement relating to the transaction. However, to ensure that the plan is not challenged as non-binding on the seller because it has not been approved by the highest authority body of the seller entity, the plan should be approved by the board of directors or general shareholders (depending on the company's charter).

The labour usage plan must be made available to employees within 15 days from the day on which it is adopted. A consultation process must also be conducted with employee representatives while the labour usage plan is being prepared.

2.5. What are the penalties for non-compliance with information and consultation obligations on a business sale?

No fines or penalties are provided for under current law. However, if the labour usage plan is not properly established, it could be challenged as invalid. If it is found to be invalid, any dismissals arising on the business or asset sale will be considered unlawful.

3. Process on share sales

3.1. Do obligations to inform and consult employee representatives arise on a direct share sale (ie on the sale of the company itself)?

There is no obligation to inform/consult employee representatives in relation to a direct share sale, provided that employees' terms and conditions of employment remain unchanged.

However, under the Labour Code provisions, if a share sale qualifies as a merger, consolidation, division or separation of the company and affects the employment of "many employees", the seller and/or buyer must prepare a labour usage plan and involve employee representatives in this process (see answer to **2.4**).

3.2. Do obligations to inform and consult employee representatives arise on an indirect share sale (on the sale of a company's direct or indirect holding company)?

There is no obligation to inform/consult employee representatives in relation to an indirect share sale, provided employees' terms and conditions of employment remain unchanged.

However, under the Labour Code provisions, if a share sale qualifies as a merger, consolidation, division or separation of the company and affects the employment of "many employees", the seller and/or buyer must prepare a labour usage plan and involve employee representatives in this process (see answer to **2.4**).

4. Process on outsourcings

4.1. Are employees transferred by operation of law in the following scenarios: (i) on an initial outsourcing of processes/services; (ii) on a change of supplier; or (iii) on an insourcing of processes/services?

Where such a scenario qualifies as a technological, organisational structure change or business change under the Labour Code and it affects the employment of "many employees", the outgoing supplier/service provider must prepare a labour usage plan which identifies which employees transfer to the new supplier/service provider and reach agreement with employees on the transfer of their employment (see answers to **2.1** and **2.2**).

4.2. Do obligations to inform and consult employees or employee representatives apply in any of these scenarios?

Where a scenario qualifies as a technological, organisational structure change or business change under the Labour Code and it affects the employment of "many employees", the outgoing supplier/service provider must prepare a labour usage plan and involve employee representatives in this process (see answer to **2.4**).

5. Process on collective dismissals

5.1. Is a "collective dismissal" (or "mass layoff") defined by law?

There is no definition of a "collective dismissal". However, specific procedural requirements apply where "many employees" are being dismissed: (i) by reason of technological or organisational structure changes or for economic reasons; (ii) by reason of Reorganisation; or (iii) by reason of a Transfer of Assets.

5.2. Do obligations to inform and consult employee representatives arise on a collective dismissal?

The employer must establish and implement a labour usage plan, which must be reviewed by employee representatives. This plan must identify: (i) the names and number of employees to be retained, employees to be retrained for further employment, and employees to be working on a part-time basis; (ii) the names and number of retiring employees; (iii) the names and number of employees who will be dismissed; (iv) the rights and obligations of the employer, employee and relevant parties regarding implementation of the labour usage plan; and (v) the method and financial resources required to implement the plan.

Employee representatives must be consulted over the labour usage plan, and this must also be made available to their employees within 15 days from the day on which it is adopted.

If the employer cannot continue to employ the employees on grounds of technological or organisational structure changes, or for economic reasons, it can proceed with the dismissals only after consulting employee representatives (there is no fixed timescale for this process) and after giving the provincial labour authority 30 days' prior notice.

5.3. Do obligations to inform and consult the competent authorities arise on a collective dismissal?

In the case of dismissals due to technological, organisational structure changes, or for economic reasons, the employer must submit a file to the provincial labour authority containing both a notice of retrenchment (which must contain certain information required by law) and the labour usage plan. The file must be submitted to the labour authority at least 30 days in advance of any dismissals.

5.4. When are these obligations triggered?

These obligations are triggered prior to the employer proceeding with the dismissals.

5.5. What are the penalties for non-compliance with information and consultation obligations on a collective dismissal?

Failure to establish a labour usage plan, consult with the employee about the labour usage plan or notify the labour authority will result in a monetary fine ranging from VND10 million to VND20 million (approximately USD434 to USD869) for each violation. If the labour usage plan is not properly established, the validity of the termination of relevant employment contracts may also be challenged.

5.6. Does an employer have options/alternatives when it has been unable to reach agreement with employee representatives during the negotiation period?

Please refer to **section 7 – Process when implementing alternatives to redundancy** as to alternative measures supported by local law.

6. Process on individual dismissals

6.1. Are employees entitled to a minimum period of notice on dismissal on redundancy or economic grounds?

The minimum notice entitlement is:

– 45 days' notice for an indefinite term contract

– 30 days' notice in the case of an employment contract with a fixed term of 12 – 36 months, and

– at least three working days in the case of an employment contract with a fixed term of less than 12 months.

6.2. Does any special procedure apply when proposing to implement an individual dismissal on redundancy or economic grounds?

A dismissal must be justifiable on grounds of technological or organisational structure changes, for economic reasons or on grounds of a business change under the Labour Code. Before proceeding with such a dismissal, the employer must establish and implement a labour usage plan. If there is a new vacancy, redundant employees have priority to be re-trained and re-hired for this.

In case of a dismissal on these grounds, the employer would need to:

– establish a labour usage plan

– consult with the employee represenatives about the dismissal of affected employees, and

– notify the relevant authority about the dismissal at least 30 days in advance.

The law is not expressly clear whether the above procedures would be required if only one employee is affected. From a practical perspective, the employer should reach agreement with the affected employee on the termination of their employment in this situation.

6.3. Does special dismissal protection apply where dismissals are to be implemented following or in connection with a business transfer?

A business sale or transfer cannot be grounds for dismissal. Please see **section 2 – Process on business sales** for further information.

6.4. Are employees entitled to a minimum severance payment on dismissal for redundancy or economic grounds?

Depending on the labour usage plan, employees with at least 12 full months' service are entitled to a job-loss allowance of one month's salary per year of service, subject to a minimum of two months' salary. Salary for the purpose of the calculation is the average salary over the six-month period preceding termination. Length of service excludes any period during which the employee has made unemployment insurance contributions. The job loss allowance for such period is paid by the Social Insurance Fund.

The employer must normally make the severance payment within 14 days of the termination, though this period can be extended.

6.5. What are the penalties for non-compliance with individual dismissal procedure?

If an employee challenges their dismissal before a Labour Court, it could declare a non-compliant individual dismissal illegal and unenforceable. The employer must then reinstate the employee and pay them compensation consisting of salary, social insurance, health insurance for the period not worked, and two months' salary (plus any allowances) representing compensation for psychological damage. If the employee does not want to be reinstated, the employer must pay them compensation on the same basis plus any allowances, except for the period covered by unemployment insurance. If the employer does not want to re-employ the employee, it must still pay this compensation, plus severance and an extra amount of not less than two months' salary to be mutually agreed by the parties.

Furthermore, the Criminal Code makes it a criminal offence for someone to unlawfully dismiss an employee, or to use force or threats to cause an employee to resign, over private interests or for personal reasons, that causes serious consequences. In this case, the offender could be subject to a fine of between VND 10 million and VND 100 million or to a suspended sentence of up to one year, or a term of imprisonment of between three months and one year. Any cases of unlawful dismissal which involve the dismissal of two or more people, a pregnant woman, those raising children under 12 months of age or those who later commit suicide as a result of the dismissal could attract a fine of between VND 100 million and VND 200 million or a term of imprisonment of between one year and three years: the offender may also be prohibited from holding certain positions in organisations for a period of between one and five years. However, these sanctions are rarely imposed in practice.

6.6. Is there any special legal protection or does any special treatment apply for particular groups of workers?

An employer must suspend the dismissal of certain protected groups of employees, including pregnant employees, those on maternity leave or those with a child aged under one year, or those on sick leave, annual leave or on any type of leave that is permitted by the employer. Additional requirements apply prior to the dismissal of a trade union representative.

Criminal liability could also arise for the unlawful dismissal or forced resignation of pregnant employees, those with a child aged under one year, or trade union representatives (see answer to **6.5** for further information).

7. Process when implementing alternatives to redundancy

7.1. Can changes to employment terms be made with or without express employee consent?

Changes to contractual employment terms require employee consent. An employer that wishes to amend an employment contract must notify the employee at least three working days before the term is amended and obtain the employee's consent to the amendment. Where the parties agree on the amendment(s), it or they must be made by signing an annex to the employment contract or signing a new employment contract. If the parties fail to agree on the amendment(s), the signed employment contract must continue to be performed.

7.2. Must an employer consult individually or collectively with affected employees or their representatives (if any) before making changes to employment terms?

There is no requirement under the law about this matter. The employer can either consult individually with the affected employees or collectively with their representatives about the proposed changes.

7.3. Do additional restrictions apply if changes are proposed in connection with or following a business transfer?

There are no additional restrictions where changes are proposed in connection with or following a business transfer. As a matter of practice, the employees and the buyer/new employer can choose to enter into new employment contracts with new terms and conditions, or amend the existing employment contracts with the relevant changes as agreed by the parties.

7.4. What are the penalties for non-compliance with these procedures?

Where these procedures are not followed (ie. the employee's consent to an amendment is not obtained), the changes cannot be made and/or they will be ineffective.

Furthermore, if the employer changes the employment terms without obtaining employee consent of employees, this will be regarded as a breach of the agreed employment terms.

Various monetary fines may apply if the employer does not comply with the agreed employment terms which negatively affects the interests of the employee such as deductions from their salary, transferring them to a different job possition or changing their work location. There are no potential offences under the Criminal Code in this context.

7.5. Do national laws promote or permit any alternatives to redundancy (eg layoff or short-time working)?

The Labour Code permits employers to temporarily reassign employees to perform work which is different to that provided for in their employment contract for a period of up to 60 working days in a one-year period (or for such longer period as may be agreed) in response to business and production demands. Employers must specify the cases in which they may temporarily reassign employees in their internal labour rules. They must inform employees at least three working days in advance, specify the reassignment period and only assign work that is suitable for the employee's health and gender. The employee's salary for the new work must be at least 85% of their previous salary and no less than the minimum wage announced by the government (ie. approximately USD190 per month in central areas). If the employee is paid less for the new work, the employee's previous salary will be maintained for 30 working days. If the employee refuses to be reassigned for a period of longer than six months, the employer can suspend the employee and the employee will be entitled to suspension pay (the amount of which must be negotiated but which cannot be less than the minimum wage).

The Labour Code also permits employers to temporarily suspend employees in the event of certain emergencies, including a pandemic, or for economic reasons.

8. Process on insolvency

8.1. Do obligations to inform and consult employee representatives arise on the sale of an insolvent business (whether share sale or business sale)?

The same rules apply as in the case of the sale of a solvent business (please see **section 2 – Process on business sales** for further information).

8.2. Does the buyer of an insolvent business inherit employees and/or employee liabilities by operation of law?

The same rules apply as on the transfer of ownership of a solvent business (please see **section 2 – Process on business sales** for further information).

8.3. Do obligations to inform and consult employee representatives arise where collective dismissals are to be implemented in an insolvent business?

In the event of the insolvency of the company, the company must send the decision on insolvency to all employees within seven working days from the date of such decision. The company would then need to settle all outstanding payments to employees and require employees to sign agreements to terminate their employment contracts. There is no express requirement for the company to consult employee representatives in this scenario.

9. Contacts

Duc Tran
Partner
Tel +84 28 6288 4949
duc.tran@allenovery.com

Hoang Minh Nguyen
Associate
Tel +84 24 6270 5318
hoangminh.nguyen@allenovery.com

Phat Pham
Paralegal
Tel +84 24 6270 5321
phat.pham@allenovery.com

For more information, please contact:

Hanoi

Allen & Overy Legal (Vietnam) LLC

Level 5, Leadvisors Place Building,
41A Ly Thai To Street, Ly Thai To
Ward, Hoan Kiem District,
Hanoi

Tel +84 24 6270 5388

Ho Chi Minh City

Allen & Overy Legal (Vietnam) LLC

39th Floor, Bitexco Financial
Tower, 2 Hai Trieu,
District 1
Ho Chi Minh City

Tel +84 28 6288 4888

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