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Work permit – the key point in resolving labor disputes with foreign employees

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One of the requirements for foreigners to work in Vietnam is to be granted a work permit by the competent Vietnamese authorities (Article 169.1.(d) of the 2012 Labor Code). However, due to the practical, day-to-day demands of business, many companies do not comply with this regulation and often sign labor contracts with foreign employees without work permits, before the work permits are obtained, or after the work permits expire without renewal. In the event of a dispute, the issues become: "Is the labor contract with a foreign employee without a work permit valid?" and "What role does a work permit play in a labor dispute with foreign employees?"

From both legal and practical perspectives, a work permit is the basis for determining not only the validity of a labor contract and its duration but also the related compensation which a company might incur when a dispute arises. Specifically:

1. A labor contract becomes invalid when the foreign employee does not have a valid work permit, and results in significant legal consequences

1.1. Article 50 of the 2012 Labor Code specifies cases where labor contracts become invalid (e.g. the entire contents of the labor contract are illegal; the signer is unauthorized; the job as agreed in the labor contract is prohibited by law; etc.). However, there is no regulation which specifically states that the labor contract becomes invalid if it is signed with a foreign employee having no work permit, and if this is the case, how it would be categorized under Article 50 of the 2012 Labor Code. Nevertheless, Article 171.2 of the 2012 Labor Code declares that if there is no work permit, the foreign employee shall be expelled from the territory of Vietnam. Therefore, it is unreasonable to conclude that even when the foreign employee is expelled from Vietnam, his/her labor contract will still be enforceable.

The Court System of Vietnam has previously issued rulings regarding this subject. For instance, Cassation Decision No.12/2006/LD-GDT dated July 04th, 2006 of the Council of Judges of the Supreme People's Court concerning a dispute between Mr. Tae Man Song and Hyundai Vinashin Shipyard Company Limited ("***Hyundai Vinashin Company***") is a typical precedent. In this case, the Court determined that a labor contract was invalid because the foreign employee did not have a work permit. Specifically, Mr. Tae Man Song (a Korean) was recruited for a shipping captain position at Hyundai Vinashin Company from March 11th, 1999 to March 10th, 2005, signing several one-year labor contracts. However, Mr. Tae Man Song only had a work permit which was valid between March 11th, 2001 and March 10th, 2002. When a dispute arose, Mr. Tae Man Song was performing his 6th labor contract for the working period of March 11th, 2004 to March 10th, 2005. All three courts (the first instance, appellate and cassation courts) unanimously agreed that the labor contract for the working period from March 11th, 2004 to March 10th, 2005 was entirely invalid due to the violation of the work permit regulations. (Click HERE for more details of Cassation Decision No.12/2006/ LD-GDT)

1.2. In theory, when a contract is wholly invalid, such contract does not create, change or terminate the rights and obligations of the parties from the time of signing. Further, the parties shall revert to the status quo before signing and return to each other what they have received. However, as the nature of a labor relationship is the "trading" of labor power (labor capacity), it is difficult or even impossible to apply such theories to the case of a wholly invalid labor contract (i.e. it is difficult or impossible to "*restore the status quo before signing*").

Returning to the case mentioned above, because Mr. Tae Man Song did not perform the assignment and left the workplace, Hyundai Vinashin Company considered that Mr. Tae Man Song quit his job without authorization. Subsequently, Hyundai Vinashin Company issued a notice of cancellation of the labor contract as he was in violation of his commitments (as agreed in the labor contract, Hyundai Vinashin Company could terminate the labor contract if he "did not perform the assignment"). Following this, Mr. Tae Man Song filed a lawsuit against Hyundai Vinashin Company for illegal unilateral termination. The Council of Judges of the Supreme People's Court stated that: "*[...] the Courts of both the first instance and appellate court had sufficient legal grounds to determine that the labor contract for the working period from March 11th, 2004 to March 10th, 2005 signed between Hyundai Vinashin Company and Mr. Tae Man Song was invalid. However, it was a mistake of law when both the court of first instance and appellate court concluded that Hyundai Vinashin Company unilaterally terminated the labor contract with Mr. Tae Man Song and ordered them to compensate Mr. Tae Man Song's salary for the period during which he was not allowed to work beginning from the termination date until the expiry date of the labor contract, plus two months' salary under Clause 1, Article 41 of the Labor Code. Because the labor contract was invalid, [...] Mr. Tae Man Song was entitled to benefits as agreed in the labor contract only until the day he quit his job, not until the expiry date of the labor contract*." Thus, the fact that a labor contract was declared invalid due to the lack of a work permit does not mean that the employer is exempt from payment for the work the employee performed. However, if there is any claim concerning the illegal unilateral termination of the labor contract, such claim will not be accepted and the said dispute will not be settled under the same principles as illegal unilateral termination of the labor contract.

Article 11, Decree No.44/2013/ND-CP stipulates the legal consequences of invalid labor contracts as follows:

- A labor contract, having its entire contents prohibited by law, is cancelled when there is a decision by the competent authority announcing that the entire labor contract is invalid.

- Within 03 working days from the date of receiving the decision by the competent authority announcing that the labor contract is wholly invalid, as the job agreed to by the parties in the labor contract is prohibited by law, the employer and the employee are required to **enter into a new labor contract** in accordance with the labor law.

  In case of **failure to enter into a new labor contract**, the employer is responsible for **paying the employee an amount** as agreed upon by the parties **provided that for each year of service, the employee is entitled to at least one month's regional minimum salary** promulgated by the Government **at the time of the decision by the competent authority announcing that the labor contract is wholly invalid**.

So, in accordance with the principle of protecting employees' benefits and encouraging agreements which grant more favorable benefits to employees than those provided by the law, the labor law resolves to correct the violations and maintain the job and salary for employees or at least the benefits of the employee are protected until the labor contract is determined invalid. It is noteworthy that the compensation incurred by the employer if the labor contract is determined to be invalid would be much lower than if a valid labor contract is

illegally unilaterally terminated (i.e. the foreign employee has a work permit). Nevertheless, business owners should be aware that government penalties for employing foreign workers without a work permit include a fine from between VND60,000,000 to VND150,000,000 and a suspension of the business from between 01 month to 03 months (Article 22, Decree No.95/2013/ND-CP amended by Decree No.88/2015/ND-CP).

2. Determining the term of the labor contract and setting a limit on employer's liability in case of illegal unilateral termination of the labor contract

Even if a foreign employee is granted a work permit, companies usually misunderstand regulations regarding the term of the labor contract signed with the foreign employee. Most companies apply Article 22.2 of the 2012 Labor Code which provides a transformation of the term of the labor contract for both Vietnamese and foreign employees, specifically: Upon the expiration of the definite-term labor contract, if the employee continues working, within 30 days from the expiry date of the labor contract, the parties must sign a new labor contract. Otherwise, according to this law, the said definite-term labor contract will become an indefinite-term one. Alternatively, if a new labor contract is signed, this new labor contract can be a definite-term one, which is applied for a set time period. If the employee continues working after the second definite-term labor contract expires, both parties must sign an indefinite-term labor contract. As a result, there are many cases in which companies and the foreign employees may sign a labor contract believing it contains an indefinite-term. However, the regulations for transforming the term of a labor contract aforesaid cannot be applied to foreign employees as signing an indefinite-term labor contract with foreign employees is illegal. This is because the term of the labor contract with the foreign employee is always limited by the term of the work permit (Article 11.1, Decree 11/2016/ND-CP). Thus, under any circumstance, the labor contract with the foreign employees is always a definite-term one. Determining the correct term of the labor contract will affect the compensation incurred by the employer in case of any illegal unilateral termination. For example, the compensation for violation of the advance-notice obligation is calculated up to 30 days instead of 45 days, and compensation for the period during which the foreign employee is not allowed to work is calculated as not to exceed the term of the labor contract.

A precedent for this result can be found in Appellate Judgment No.640/2018/LD-PT dated June 28th, 2018 of the People's Court of Ho Chi Minh City ("***Judgment 640***") regarding a dispute over the illegal unilateral termination of the labor contract between the plaintiff – Mr. H (the employee) and the defendant – School Q (the employer). According to Judgment 640, Mr. H signed a definite-term labor contract from May 15th, 2013 to July 31st, 2015 (the 1st work permit was granted on October 10th, 2013). After the definite-term labor contract expired, both parties did not sign any new labor contract but Mr. H continued working until the end of March 30th, 2016 (the work permit was renewed with a term from October 22nd, 2015 to October 21st, 2017). On March 31st, 2016, School Q sent a notice of terminating the labor contract with Mr. H effective from April 30th, 2016 (i.e. a 30-day advance notice). Mr. H claimed that School Q illegally unilaterally terminated the labor contract with him. Additionally, by arguing that his labor contract became an indefinite-term one under Article 22.2 of the 2012 Labor Code, he requested School Q to provide compensation for the following amounts:

- An amount equivalent to 15 days' salary because School Q violated the 45-day advance notice obligation when unilaterally terminating the labor contract (School Q only notified him for 30 days in advance);

- His salary for the period during which he was not allowed to work beginning from April 01st, 2016 up until the date of the appellate hearing, which was on June 28th, 2018;

- His salary for untaken annual leave up until the date of the appellate hearing, which was on June 28th, 2018.

(Click HERE for more details of Judgment 640)

However, the People's Court of Ho Chi Minh City determined that the term of Mr. H's labor contract can only be valid until October 21st, 2017, which was in accordance with the term of his work permit. Specifically, the People's Court of Ho Chi Minh City stated that: "*[…] foreign employees working in Vietnam must comply with the Vietnam labor law (Clause 2 of Article 170 of the Labor Code) and are subjected to certain restrictions on jobs and working periods in Vietnam such as: Only doing jobs that Vietnamese employees are still unable to fill in order to meet production and business demands (Clause 1 of Article 170 of the Labor Code); foreign employees must have the work permit to work in Vietnam (Article 171 of the Labor Code); the maximum term of the work permit is 02 years (Article 173 of the Labor Code). At the time Mr. H's labor contract was unilaterally terminated, Decree No.11/2016/ND-CP providing Labor Code guidance regarding foreign workers in Vietnam came into effect. Under Article 15 of this Decree, foreign employees working in Vietnam under the term of a work permit and before the expiry date of the work permit from 5 to 45 days must follow specific procedures if the company is still in need of employing foreign employees. Specifically, businesses must execute procedures to renew the work permit, sign a new labor contract and submit a copy of such new labor contract to the Department of Labor - Invalids and Social Affairs which grants the renewed work permit. Pursuant to the above-mentioned provisions, the term of the labor contract signed with foreign employees working in Vietnam is 02 years and the parties must sign a new labor contract if they still have employment needs when the work permit expires*". According to these provisions, the People's Court of Ho Chi Minh City did not accept the argument that Mr. H's labor contract was an indefinite-term one comparable with that of a Vietnamese citizen working in Vietnam. Therefore, the People's Court of Ho Chi Minh City only required School Q to compensate Mr. H amounts, including his salary and payment for untaken annual leaves, up until the end of October 21st, 2017 which was the expiry date of his work permit instead of June 28th, 2018 which was the date of the appellate hearing. The People's Court of Ho Chi Minh City further rejected the claim by Mr. H for compensation equal to 15 days' salary for a violation of the period of sending advance notice, because Mr. H's labor contract was defined as definite-term which only required a 30-day advance notice.

Conclusion

The work permit plays a key role in resolving labor disputes with foreign employees since it not only is the basis for determining the validity of labor relations but also sets limits to the liability incurred by employers in case of disputes. It should be noted that the responsibility of applying for a work permit for foreign employees belongs to the employers. If an employer employs a foreign employee without a work permit or with an expired work permit, the employer shall be subjected to a fine from between VND60,000,000 to VND150,000,000 and a suspension of the business from between 01 month to 03 months (Article 22, Decree No.95/2013/ND-CP amended by Decree No.88/2015/ND-CP).

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