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## Vietnam

### Legal Impact of COVID-19 on Businesses - Q&A (As of March 23, 2020)

Kazuhide Ohya, Ha Hoang Loc, Tomomi Murata

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*\*This article is based on the information as of March 23, 2020.*

We discuss below several legal matters and issues that enterprises in Vietnam have encountered, and may encounter in the future, in connection with the COVID-19 pandemic.

**Q1:** *If an employee is found positive for COVID-19, how broad is the scope of employees that will be required to stay at home (isolated from others)?*

Under the laws, the persons who have been in contact with the COVID-19 positive person shall be isolated. There is no explicit definition of “contact”, therefore, the scope of employees to be held in isolation will depend on the severity of the preventive measures enforced by the State authority. Considering that Vietnam’s Governmental authorities have implemented preventive measures at the highest level, there is possibility that workplace of such employee may be entirely closed in case this event occurs.

**Q2:** *Does the employer have any obligation to pay salary to the employee who is instructed to stay at home for isolation reason?*

The employer’s payment obligation would depend on the particular situation of the employee that stays at home:

- if an employee suffers from COVID-19 due to reasons not relating to his/her work/job, such employee will not get paid from the company but from the social insurance agency under compulsory social insurance;
- if an employee suffers COVID-19 due to work-related reasons (such as: the employee is assigned to have a business trip to affected areas, or due to employer’s negligence in ensuring a safe and hygienic workplace), subject to the investigation and

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conclusion of the labour authority as to whether such employee is deemed as suffering a labour accident, the company is obligated, among others, to fully pay the employee's salary during his/her absence for treatment and health rehabilitation;

- if the company closes its office or operations in compliance with the State authority's order, the company will pay its employees as per mutual agreement, but not less than the statutory regional minimum wage; and
- if the company voluntarily closes in order to prevent the spread of COVID-19, it is likely that the company will be obligated to fully pay its employees during such period of closure. (*See also Q3 to Q5 for treatment during such voluntary closure period.*)

On 13 February 2020, the social insurance agency submitted a proposal to Ministry of Labour, Invalids, and Social Insurance ("MOLISA") to approve the special treatment of employees who have been kept under medical quarantine pursuant to the State authority's order but have tested negative for COVID-19, so that they can be covered by compulsory social insurance (i.e., receiving paid sick leave insurance from the social insurance agency). Currently, they are not qualified for such payments under the laws. If this proposal is approved by MOLISA, it will be very likely that the employer will not have to pay such employee during their medical quarantine.

***Q3: Can the employer voluntarily order the employee to cease to work (i.e., to stay at home and wait for further work to be assigned) for several days/weeks/months due to COVID-19? Does the employer have obligation to pay salary to the employee during such period?***

It is possible for the employer, at its discretion, to order its employees to stay at home for a certain period of time under the cease-to-work scheme, provided that the employees are paid either full salary or salary at the rate agreed by employer and the employees (but not less than the statutory regional minimum wage) for such period (regardless of the length of the cease-to-work period).

***Q4: How long could the employer order the employee to cease work?***

The laws on labour do not give any further guidance on the statutory limit for the period that an employer can order the employee to cease work. However, upon our verbal consultation with competent authorities, this period shall only extend until the element triggering such cease-to-work order still occurs. As such, in case of a pandemic, it is likely that the cease-to-work period shall end upon the announcement of competent authority in Vietnam on the end of the pandemic (e.g., in case of COVID-19, announcement of the Prime Minister).<sup>1</sup>

***Q5: Can the employer decide the specific day or period for work (e.g., Mon, Wed, Fri are work days, the remaining days are non-work days) at its discretion due to COVID-19? Is it permissible for the employer to reduce the amount of salary of employee for such period/days at home?***

Under the current legislation, the working time and salary of the employees shall be in accordance with the labour contract. As such, unless the labour contracts expressly provide flexibility of the working hours subject to the work allocation of the employer and salary fluctuation based on actual working hours, the employer cannot reduce the working time and salary of the employees at its sole discretion.<sup>2</sup>

However, the employer can mutually agree with the employee on the amendment of the working time and salary (*See also Q7 below*) or unilaterally order the employee to stay at home provided that the employer pay a certain amount of salary (*as discussed in Q1 to*

<sup>1</sup> Articles 38 and 40 of the Law on Prevention and Control of Infectious Diseases.

<sup>2</sup> Articles 6.2(a), 35.1 and 35.2 of the Labour Code, as amended.

Q4 above).

**Q6: Can the employer unilaterally terminate labour contracts with its employees due to COVID-19 outbreak?**

If the employer has to limit production and reduce the number of jobs due to COVID-19 and can prove that COVID-19 causes reduction in production, operation, and jobs despite of all effort and remedies carried out by the employer, the employer can unilaterally terminate the labour contracts with the concerned employees.<sup>3</sup> However, due to lack of further guidance on how to assess the effort and remedies carried out by the employer to satisfy the condition for termination, there is a risk that the termination may be challenged by the terminated employees.

**Q7: Can an employee request he/she temporarily work on a part-time basis because of the closure of his/her children's schools?**

No, unless agreed by the employer. Working time is one of the main contents of a labour contract and the employee has obligation to comply with the agreed contents in a signed labour contract. Therefore, the employee has no statutory right to request, and the employer has no statutory obligation to accept, the part-time work scheme in this case. Please note that in case difficulties are encountered due to a pandemic despite of all remedies carried out by the employee, the employee has the right to unilaterally terminate his/her labour contract. However, similar to the case of the employer, due to lack of further guidance on how to assess the remedies carried out by the employee to satisfy the condition for such unilateral termination, the employer can challenge such termination.<sup>4</sup>

**Q8: Must the employer fully make social insurance contribution during period of occurrence of COVID-19?**

Certain employers which are impacted by COVID-19 could be allowed to temporarily suspend the payment of contributions to retirement and survivorship allowance funds until the end of June or December 2020.<sup>5</sup>

In particular, enterprises engaged in passenger transportation, tourism, accommodation service, restaurant and other special industries which encounter difficulties caused by epidemics resulting in (i) not being able to arrange jobs for employees, and having a number of employees who are subject to social insurance participation and who must temporarily suspend their work that amounts to 50% or more of the total number of employees registered before the temporary suspension of production or business activities, or (ii) suffering a loss of over 50% of the total asset value (excluding land value), could suspend its contribution of compulsory social insurance payments to the retirement and survivorship allowance funds.<sup>6</sup>

To be entitled to the above temporary suspension, the affected employers must submit an application dossier to the provincial social insurance agency.<sup>7</sup>

**Q9: Can enterprises defer tax payment or be exempted from late payment interest due to COVID-19?**

Yes. The General Department of Taxation (“GDT”) has requested Tax Departments at the provincial level to carry out tax payment

<sup>3</sup> Article 38.1(c) of the Labour Code, as amended, and Article 12 of Decree 05/2015/ND-CP.

<sup>4</sup> Article 11.2(c) of Decree 05/2015/ND-CP.

<sup>5</sup> Section II.1(d), Directive No. 11/CT-TTg; Official Letter No. 860/BHXH-BT.

<sup>6</sup> Article 88.1 of the Law on Social Insurance, as amended; Articles 16.1, 16.2, 16.3 and 16.4 of Decree 115/2105/ND-CP; Article 29 of Circular 59/2015/TT-BLDTBXH.

<sup>7</sup> Section 1(a) and (b) of Official Letter No. 860/BHXH-BT.

extension and late payment interest exemption for enterprises that are adversely affected by COVID-19.<sup>8</sup> In particular:

- Enterprises eligible for tax payment extension shall include enterprises that have property damage caused by natural disasters, blazes, or accidents that directly affects the business operation. “Property damage” means the damage to the taxpayer’s property that can be measured by money, such as: machinery, equipment, supplies, goods, buildings, cash, and valuable papers. “Accidents” are the unexpected incidents due to external causes that affect the taxpayer’s business, and not violations of law. The following events are considered as accidents: traffic accidents, occupational accidents; fatal diseases; infection of epidemic disease during the time and in the area considered an epidemic hotspot by a competent agency; and other force majeure events.<sup>9</sup>
- Enterprises eligible for late payment interest exemption shall include enterprises that encounter a natural disaster, conflagration, accident, epidemic, or fatal disease, or other force majeure circumstances.<sup>10</sup>

***Q10: Can enterprises be supported by banks due to the COVID-19 outbreak?***

Enterprises which are adversely impacted by COVID-19 could be supported by credit institutions and branch of foreign banks through re-structuring of debt payment schedule, exemption, reduction of interest, fee, and maintaining of original debt classification group.<sup>11</sup> The credit institutions will decide on the above, on case-by-case basis.

***Q11: Can the annual General Meeting of Shareholders (“GMS”) be postponed due to COVID-19? If the company postpones such meeting, what is the consequence?***

Yes, the GMS may be postponed. The annual GMS must be held within four months from the end of the last fiscal year, but it can be postponed for a maximum of two months. In case of postponement, the Board of Directors must send a written request to the local Department of Planning and Investment to postpone the annual GMS.<sup>12</sup>

***Q12: Can a party automatically cease its performance of contractual obligations on the basis of force majeure amid the COVID-19 outbreak? What factors need to be proven to claim force majeure in the event of the COVID-19 outbreak?***

Vietnam’s laws allow parties to contractually agree on particular events upon the occurrence of which a party will be exempted from liabilities for the non-performance of contract. Among others, epidemic and government restrictions are commonly included in force majeure clauses. Therefore, the party whose performance has been disrupted by the COVID-19 outbreak should review the force majeure clauses in the relevant contract to identify the factors that are specifically required to establish a force majeure claim.

Even in the absence of force majeure clauses in contracts, a party may claim force majeure on the basis of the laws. In this case, the party needs to prove that the claim satisfies the statutory description of force majeure: it is an event that (i) occurs in an objective manner, (ii) is unforeseeable, and (iii) is irremediable despite all possible necessary measures and capabilities being taken.<sup>13</sup>

<sup>8</sup> Official Letter No. 897/TCT-QLN.

<sup>9</sup> Article 31.1(a) of Circular 156/2013/TT-BTC, as amended.

<sup>10</sup> Article 35.1 of Circular 156/2013/TT-BTC, as amended.

<sup>11</sup> Pursuant to Circular 01/2020/TT-NHNN.

<sup>12</sup> Article 136.2 of the Law on Enterprises, as amended.

<sup>13</sup> Article 156.1 of the Civil Code.

***Q13: Can a party claim material adverse change (“MAC”) in the event of the COVID-19 outbreak?***

As Vietnam’s law is silent in this regard, the possibility to make a MAC claim depends on whether any provisions on MAC is set forth in the relevant contract. For instance, merger and acquisition contracts usually elaborate and govern MAC with respect to the target company and its business conditions. Upon the occurrence of the events as contemplated, a party may opt not to proceed with the transaction. Therefore, the parties should monitor and follow the requirements and procedure as prescribed in the contract for the purpose of claim and notification of a MAC.

On a related note, Article 420 of the Civil Code governs the performance of a contract upon a ‘substantial change in circumstance’. The legal consequences arising from a substantial change in circumstance could be different from those of a MAC. When there is a substantial change in circumstance, the party whose benefits are affected may request the other party to re-negotiate the contract within a reasonable period of time. If the parties cannot agree on amendments to the contract, any party may request a court to either terminate or amend the contract (and the court may only amend the contract if the termination of the contract will cause more damage than the performance of the amended contract).

***Q14: Has the Vietnam Government restricted entry into Vietnam?***

On 17 March 2020, the government announced that it would temporarily suspend the issuance new visas for all foreigners for 30 days, starting from 18 March 2020. In addition, the government also suspended the visa exemption policy for Japanese nationals from 21 March 2020.

Further, on 21 March 2020, the government temporarily suspended entry of all foreigners who already have a visa to the country from 22 March 2020.

Foreigners who are deemed experts, business managers or highly skilled workers will still be allowed to enter Vietnam but they must have certificates showing that they have tested negative for the novel coronavirus and must fill out health declarations, but they will be ordered to quarantine upon arrival.

The entry suspension does not apply to those who visit Vietnam for diplomatic or official purposes.



[Kazuhide Ohya](#)

Partner, HCMC Office Representative  
E-mail: [k\\_ohya@jurists.co.jp](mailto:k_ohya@jurists.co.jp)



[Ha Hoang Loc](#)

Vietnam Partner\*, Ho Chi Minh City Office  
E-mail: [ha.hoang.loc@jurists.jp](mailto:ha.hoang.loc@jurists.jp)



[Tomomi Murata](#)

Attorney-at-Law, Singapore Office  
E-mail: [t\\_murata@jurists.co.jp](mailto:t_murata@jurists.co.jp)

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