

LEGAL & TAX UPDATES

PAYMENT OF WAGES AND BENEFITS FOR EMPLOYEES DURING WORK SUSPENSION DUE TO COVID-19 PANDEMIC

OVERVIEW

On 25 March 2020, the Ministry of Labor, War Invalids and Social Affairs issued **Official Letter No. 1064 / LDTBXH-QHLĐTL** giving guidance on **Payment of wages and benefits for employees during work suspension due to Covid-19 pandemic.**

The Official Letter gives guidance on the payment of wages and offers solutions for the employers who are facing supply shortage or market reduction and have to scale down, **based on the provisions of the Labor Code and the Instruction documents** for implementation.

We hereby analyze the personnel policy options that businesses could possibly consider coping with due to the Covid -19 epidemic.

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❖ Option 1: For employees who are suspended due to direct impacts of Covid-19 pandemic

Including:

- **Employees who are not allowed to return to work** as requested by competent authorities;
- **Employees who are suspended from work during quarantine as requested** by competent authorities;
- **Employees who are suspended from work because their employer is being quarantined** or other employees in the same enterprise or department **are being quarantined or not allowed to return to work.**

The suspension pay shall be provided in accordance with Clause 3 Article 98 of the Labor Code (**the pay shall be agreed upon by both parties but must not be smaller than the region-based minimum wages**).

The region-based minimum wages in 2020 is stipulated in Decree No. 90/2019 / ND-CP as follows:

Region I: VND 4,420,000/month.

Region II: VND 3,920,000/month.

Region III: VND 3,430,000/month.

Region IV: VND 3,070,000/month.

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Option 2: The employer might temporarily reassign the employees against their employment contracts

*However, the employer may temporarily assign an employee to perform another job **no more than 60 accumulated workdays within one year.***

*After 60 working days, if the employee must continue to perform another job, **the written consent of the employee must be obtained.***

*When an employer temporarily assigns an employee to perform another job, the employer shall inform the employee **at least 3 working days in advance, clearly stating the duration of temporary work and the assigned work which must be suitable to the health and gender of the employee.***

Clause 1, Article 31 of the 2012 Labor Code:

*When meeting with sudden difficulties such as natural disaster, fire or **epidemic**, etc. the employer might temporarily assign an employee to perform a job which is not stated in the labor contract.*

Clause 3, Article 31 of the 2012 Labor Code:

The employee is entitled to a wage for the new job; if the wage for the new job is lower than the previous wage, he/she is entitled to the previous wage for 30 working days.

The wage for the new job must be at least 85% of the previous wage but not lower than the regional minimum wage stipulated by the Government.

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Option 3: If the prolonged suspension of employment poses negative effects on the affordability of the business, the employer and the employee might make an agreement on **the suspension of a labor contract as prescribed.**

Clause 5, Article 32 of the 2012 Labor Code:

*Cases of suspension of a labor contract
5. Other cases as agreed upon by the two parties.*

The duration of the temporary suspension of the labor contract is agreed upon by the two parties. In principle, the enterprise might make an agreement on not paying salaries for the employee during work suspension, so the enterprise might not have to pay insurance for the employee during this time.

Reinstatement of employees upon expiry of the period of temporary suspension of employment contracts

- Within 15 days after the date of expiration of the employment contract suspension, the employee must be present at the workplace and the employer must reinstate the employee . If the employee can not be present at the workplace in accordance with the regulated time, the employee shall agree with the employer on the time of their presence.*
- The employer shall be responsible for arranging the employee to perform the job defined in the employment contract ; in case the employer fails to arrange the job defined in the employment contract, both parties shall be agreed on a new job and amend, supplement the existing employment contract or conclude a new one.*

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If enterprises that cannot provide adequate employment due to production deduction, **the labor arrangement shall be carried out as follows:**

Option 4: The right of employers to unilaterally terminate labor contracts (Article 38 of Labor Code).

However, when unilaterally terminating a labor contract, the employer shall notify the employee in advance:

- ***At least 45 days, for indefinite-term labor contracts;***
- ***At least 30 days, for definite-term labor contracts;***
- ***At least 3 working days, for seasonal or work-specific labor contracts of under 12 months.***

[Clause 1.c Article No. 38 of the 2012 Labor Code](#) on the right of employers to unilaterally terminate labor contracts:

- c) If, as a result of natural disaster, fire or another force majeure event as prescribed by law, the employer, though having applied every remedial measure, has to scale down production and cut jobs;

[Clause 2, Article 12 of Decree No. 05/2015 / ND-CP](#) lists other force majeure in one of the following cases:

- Enemy-inflicates destruction, **epidemics;**
- Relocation or narrowing of the production and business sites, at the request of competent State agencies.

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Option 4: The right of employers to unilaterally terminate labor contracts (Article 38 of Labor Code).

The employer needs to prove that he have sought all remedies, however, he have to reduced production and workplaces if necessary to explain to the State Agency or the Court in case the employees disagree with unilateral termination of a labor contract of the employer.

Factors that could be considered such as the decline in revenue and cash sources to continue to pay wages for employees; difficulties in purchasing input materials and narrowing output markets; as well as restricting business development areas under decisions of State Agency such as not going into pandemic areas, not making/ restricting business activities of some fields, etc.

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Option 5: Developing and implementing a plan to use **employees** in case more than one employee face the risk of unemployment **for economic reasons** (Article 44 of the Labor Code)

A labor utilization plan shall have the following contents: The names and number of employees to be retained, employees to be retrained for further employment; That of employees to retire; to be working on part-time basis; That of employees whose employment contracts have to be terminated; and The measure and financial sources to implement the plan.

During development of the labor utilization plan, the employer shall discuss with the representative organization of employees.

[Clause 2, Article 44 of the 2012 Labor Code](#) on Obligations of an employer in case of changing structure, technology or economic reasons:

2. In case more than one employee face the risk of unemployment for economic reasons, the employer shall elaborate and implement a labor utilization plan in accordance with Article 46 of this Code.

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Option 5: Developing and implementing a plan to use employees (Article 44 of the Labor Code)

*In case the employer cannot create new jobs and have to dismiss employees, **the employer shall pay job-loss allowances to the employees.***

*The dismissal of more than one employee in accordance with this Article may be implemented only **after discussion with the representative organization of the grassroots-level employees' collective and notification 30 days in advance to the provincial-level state management agency of labor.***

[Article 49 of 2012 Labor Code](#) on Job-loss allowance:

1. An employer shall pay a job-loss allowance to an employee who loses his/her job under Article 44 or 45 of this Code and has worked regularly for the employer for 12 months or longer. The job-loss allowance is equal to 1 month's wage for each working year, but must not be lower than 2 months' wage.
2. The working period used for the calculation of job-loss allowance is the total time during which the employee actually works for the employer minus the time during which the employee benefits from unemployment insurance in accordance with the Law of Social Insurance and the working period for which the employer has paid a severance allowance to the employee.
3. The wage used for the calculation of job-loss allowance is the average wage in accordance with the labor contract during 6 months preceding the time the employee loses his/her job.

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❖ In addition, businesses could choose the following two options

Option 6: Agreement to terminate the labor contract based on a voluntary agreement of both parties (Clause 3, Article 36 of the Labor Code). The employer might agree on financial support depend on the company's ability for the employee could agree to terminate the labor contract and seek another job.

Option 7: Agreement to reduce working time and salaries. In case the two parties could reach an agreement, the modification or supplementation of the labor contract must be carried out by signing an annex to the labor contract or signing a new labor contract to change the working time and salaries (Article 35 of the Labor Code).

NOTICEABLE ISSUES ABOUT LABOR POLICY DUE TO COVID-19 PANDEMIC

Facing the current situation, many businesses have made plans to cut back on their costs to continue business activities. In which the plan to reduce employees is one of the issues that businesses are most concerned about because this might face risks of labor legislation, the shortage of human resources after the pandemic ends, as well as the reputation of the business and the employees' beliefs. Hence, businesses need to find a viable solution to both exist in the market and retain human resources.

The issuance of Official Letter No. 1064 / LDTBXH-QHLĐTL has created a legal corridor as well as guidance from the State agency on labor policies for issues such as performing a temporary job, suspending/terminating labor contracts as well as formulating and implementing employment plans. However, the agreement between employers and employees to find appropriate solutions as well as share difficulties between the two parties is considered the key value to solving problems based on the serious effects on the business operations and the understanding of employees.

In cases where the employer is unable to reach an agreement with employees, labor legal issues should be consulted carefully before making a decision, especially with respect to unilateral termination of a labor contract and implement the employment plan that might lead to the dismissal of more than one employee, to avoid posing effects on the business operations.

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