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PART I – CONCERNS

RIGHT OF LOCKOUT

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For the first time, the right of lockout is stated in Article 239 of the Labour Code as amended in the term “enterprise closure”. This article is to contribute some more opinions regarding the regulation on the right of lockout

Lockout – a new right of employers



Lockout is a right of employers, being often compared with strike, a right of employees. Lockout has not been stated in current Labour Code. For the first time, the right of lockout is introduced in Article 239 of the Labour Code (as amended) in the term “enterprise close”. According to the draft, closing an enterprise means “the employer decides to temporarily close the enterprise during the strike to protect the assets of the enterprise, preventing abuse of the strike to sabotage of extremist elements and because the enterprise does not have enough manpower to maintain the normal operation of the enterprise”.

As defined by the International Labour Organization (ILO) in 1993, lockout is “a total or partial temporary closure of one or more places of employment, or the hindering of the

normal work activities of employees, by one or more employers with a view to enforcing or resisting demands of or expressing grievances, or supporting other employers in their demands or grievances”.

When comparing the two definitions, we see that the draft regulations have significant differences compared to that in ILO definition. According to ILO, lockout first of all is a total or partial temporary closure of one or more places of employment rather than temporary closure of an enterprise. ILO's regulations are reasonable because an enterprise may have different factories/manufacturing places and in case of labour dispute or strike, the employer may temporarily close the factory(ies)/manufacturing place(s) where occur the dispute, strike, rather than and are not necessarily to close the operation of other factory(ies)/manufacturing place(s) having no dispute or strike or close the entire enterprise.

Next, according to ILO definition, lockout is the active action of the employer in order to enforcing or resisting demands of or expressing grievances, or supporting other employers in their demands or grievances - such as other enterprises in the same association. Meanwhile, Article 239 of the draft recognizes the lockout right as a passive and defensive protest measure of the employer when the employees go on strike, with the purpose of protection of enterprise’s assets and avoidance of destructive actions of extremists and/or due to the employer has not sufficient manpower to operate the enterprise.

Furthermore, according to the draft, the lockout right of enterprises exists only during the employee's strike, since the draft prohibits the employer of closing his enterprise before the commencement of the employee's strike to threaten the strikers, or after the end of the strike to take revenge of the strikers (Article 241 of the draft), while this content is not found in the ILO definition.

As a result, in general, ILO definition reflected the nature of the lockout right as a right of the employer, being enforced actively rather than a passive self-defense measure against the strike of the employee. Therefore, in principle, lockout does not necessarily take place during the employee strike only.

Since it is the right of the employer, when the employer enforces this right, even damages caused to the employee, laws shall not force the employer to compensate the employee for those damages, unless the employer breaches the laws. Article 243 of the draft only forces the employer to pay salaries, allowances and other benefits to the employee when the employer breaches legal provisions (with regard to the notice period about lockout, lockout before the strike or after the strike ended.) However, if the lockout leads the employees who did not involve in the strike to their stoppage, the employer has to pay the stoppage salaries and other benefits for these employees.



Some suggestions

Firstly, the term "enterprise close" itself easily leads to misunderstanding, since in reality the term "enterprise close" is often understood as the liquidation or dissolution of an enterprise. The identification of the concept of "enterprise" with "factory/place of production" in the draft made the scope of application of lockout right too broad. As analyzed above, the employer may close one or more factories/ places of employment having dispute or strike, but not necessarily to close down his entire enterprise. According to my personal opinion, compared with the term "enterprise close", the term "lockout" demonstrates most clearly and concisely the nature of the issue. If no more accurate terms can be found, we should use the term "lockout" as the world's practices.

Secondly, once defined the lockout right as a right of the employer, we should not specify in detail the purpose of lockout as in the draft. The employer carries out the lockout for various reasons but not necessarily because of having not enough work forces to maintain normal operation. So, the more we try list purposes of the lockout, the more actual shortcomings we make. Furthermore, we should consider using the concept of "extremist elements" in the draft because this is a sensible concept and it is difficult for a determination. Furthermore, strike is the right of the employee and when the employee executes his right to strike, on what criteria can we base to classify them into the "extremist elements"?

According to the draft, the closure of an enterprise must be decided by the employer. However, for joint stock companies, the draft forces the closure of the enterprise shall be

decided by the Board of Management by ballot with an approval of more than 50% members (Article 240 of the draft). We reckon that the lockout decision is an internal matter of the enterprise, according to the law and the Charter of an enterprise; therefore, labour law should not have specific regulations on competence of making decision on lockout for joint stock companies. The solution may be the enterprise - as the employer - through his legal representative issuing the lockout decision is legally sufficient.



Furthermore, it should consider the lockout notice period of the employer. According to Article 240 of the draft, the lockout decision shall be notified to the collective employees, state management authority on labor and labor union at province level at least three working days before implementation. We agree that lockout needs to be notified to the concerned parties, but if the employer is forced to notice at least three working days, the purpose of lockout may be difficult to achieve. Why? As analyzed above, one of purposes of lockout, according to the draft, is to protect property, prevent the abuse of strike to destroy the enterprise's property. The destruction of enterprise's

property is an act strictly prohibited by labour law and often takes place spontaneously and without notice. To protect his assets, with the meaning of self-defense action, the employer has to carry out the lockout when the risk of sabotage or acts of sabotage is taking place. If the lockout may only be carried out after three days of notice, the destruction of property, if there is, has already taken place, and then the purpose of self-defense of the lockout is not achieved.

One of shortcomings in the regulations on lockout is that the draft does not specify which authority has the right to determine the act of unlawful lockout. If no authority have the right to determine the legality of the lockout, what will be the basis for payments of salaries, allowances and other benefits for the employee in case of unlawful lockout?

Lockout is a very new issue in the legislation on labour of Vietnam, therefore, careful consideration is required in prior to actual application. In acceptance of lockout, not only the employee but also the employer suffers a lot of damages. Therefore, the employer will have to consider very carefully when carry out this right. Although recognized as right of the employer*, but the content of the draft does not expose this sense and there are issues to be considered.

* Clause 3, Article 238 stipulates that employer has right to decide to “close his enterprise during the strike by employees”.

PART II – REMARKABLE REGULATIONS

1. It is possible to be fined up to 30 million VND if failing to report to the Provincial Department of Labour, Invalids and Social Affairs regarding the recruitment and administration of foreigners



It is one of remarkable provisions in Decree No. 47/2010/ND-CP dated 06 May 2010 of the Government on administrative penalties for breaches of Law on Labour. Accordingly, any employer who recruits foreign employee(s) to work in the enterprise without having notified the need to recruit employees; [and/or] fails to report to the Department of Labour regarding recruitment and administration of foreigners shall be fined from 20,000,000 VND to 30,000,000 VND.

Apart from that, the Decree also supplements several penalties and increase the fine levels against breaches related to foreign employee(s) working in Vietnam, such as:

A fine of from 15,000,000 VND up to 20,000,000 VND shall apply to any one of the following breaches:

- (i) Employing a foreigner to work pursuant to a labour contract when one of the following conditions has not been satisfied:

The foreign employee must be aged 18 years or older;

- The foreign employee must be in sufficiently good health as appropriate for the job requirements;

- The foreign employee must be a manager, executive director or expert;
- If the foreign employee practices in the private medical or pharmaceutical professions, directly provides diagnostic or preventive medical treatment in Vietnam, or works in the occupational training sector, he or she must satisfy the stipulated legal requirements for practicing in such professions or sector;
- The foreign employee must not have a criminal conviction in the national defense and security sector; and must not be currently subject to criminal prosecution or a criminal penalty in accordance with the law of Vietnam and foreign law;
- The foreign employee must have a work permit issued by the competent authority of Vietnam, except where the law stipulates a work permit is not required.
 - (ii) Recruiting foreign employees in excess of the ratio stipulated by law;
 - (iii) Employing a foreign employee to work in Vietnam without a work permit issued by the competent authority of Vietnam;
 - (iv) Failing to conduct stipulated procedures for extension of a work permit;
 - (v) Failing to conduct stipulated procedures for re-issuance of a work permit;

- (vi) Failing to have a plan for training Vietnamese workers to replace the foreign employee/s working in Vietnam in the case of work of a high technical nature or managerial work for which Vietnamese workers are not yet able to satisfy the work requirements.

Furthermore, another remarkable provision is that the Decree has removed provisions on administrative penalties for breaches in relation to social insurance (“SI”), such as: the employer

does not pay SI or the employer has not paid SI in full for its employees, etc.

The statutory time-limit for imposing a penalty for an administrative breach of the law on labour pursuant to this Decree shall be one year as from the date on which the offence was committed. An offender may not be dealt with for an administrative breach after expiry of the one year period, but may still be subject to measures to remedy consequences.

This Decree shall be of full force and effect as from 25 June 2010.

2. Adjustment of investment incentives, corporate income tax preferences for administrative units newly established as a result of the change in administrative boundary by the Government



The Government has recently issued Decree No. 53/2010/ND-CP dated 19 May 2010 stipulating areas subject to investment incentives, and corporate income tax (“CIT”) preference with respect to administrative units newly established as a result of the change in administrative boundary by the Government. Namely:

- (i) Administrative unit (“AU”) which is newly established due to implementation of the Government’s regulation on changing administrative boundary (dividing, separating, or upgrading the existing AU belonging to area subject to incentive investment, CIT preference) after the effective date of Decree No.

108/2006/ND-CP dated 22 September 2006 of the Government making detailed provisions and guidelines for implementation of a number of articles of Law on Investment (“Decree 108”) having not been stated in the list of areas entitled to investment incentives (issued together with Decree No. 108) and the list of geographical areas entitled to CIT preferences (issued together with Decree No. 124/2008/ND-CP dated 11 December 2008) shall be entitled to investment incentives, CIT preferences applied to their existing AU.

- (ii) AU which is newly established in accordance with item (i) above and is defined as area with difficult socio-economic conditions, or area with special difficult socio-economic conditions by the Government shall be entitled to investment incentives, CIT preferences in accordance with current regulations for such kind of areas.
- (iii) AU which is newly established in accordance with item (i) above due to the rearrangement, change of boundary of commune-level AU in the area with

difficult socio-economic conditions, and the area with special difficult socio-economic conditions; but provisions on investment incentives, CIT preferences have not been stipulated yet then these AU shall be entitled to investment incentives, CIT preferences based on the majority (more than 50%) of number of commune-level AUs that have been enjoyed. If the number of commune-level AUs in the area with difficult socio-economic conditions is equal to those of commune-level ADs in the area with special difficult socio-economic conditions, then the newly established AU shall be entitled to investment incentives, CIT preferences as applied to the area with special difficult socio-economic conditions.

(iv) If the change of administrative boundary results in the change of commune-level AU belonging to the list of geographical area of investment incentives, CIT preferences from higher level (area with special difficult socio-economic conditions), to an area with lower incentive level (area with difficult socio-economic conditions), and vice versa, then the changed commune-level AU shall be entitled to investment incentives, CIT preferences applicable to the area receiving such AU.

This Decree shall be of full force and effect as from 15 July 2010.

3. To issue invoice only for payment valued at 200,000 VND or more

According to Decree No. 51/2010/ND-CP dated 14 May 2010 of the Government providing on invoice for sales of goods, and provisions of services, the sales of goods and services with total payment value of less than VND200,000 on each occasion shall not compulsorily prepare invoice, unless purchaser requests it (previously less than VND100,000).

A new point of this Decree is that it provides business entities may simultaneously use different forms of invoices, such as: self-printed invoice, electronic invoice, invoices printed pursuant to orders. The State encourages the use of electronic invoice.

Enterprises permitted to self-print their own invoice are the enterprises established in accordance with law in industrial zones, economic zones, export processing zones and high-tech zones; enterprises with the amount of charter capital stipulated in regulations of the Ministry of Finance; and public professional units which conduct production and business activities in accordance with laws.

Any business entity other than the above enterprise shall be permitted to self-print its invoices for use in the sale of goods and services if it satisfies all the following conditions: (i) It has been issued with a tax code number; (ii) It has revenue from the sale of goods and/or services; (iii) It has not been penalized for a breach of the law on tax at the level stipulated by the Ministry of Finance within the period of 365 consecutive days prior to the date of announcement of issuance of its self-printed invoices; (iv) It has a system and equipment which ensures that invoices will be printed and filled in when goods or services are sold; (v) It is an accounting entity in accordance with the Law on Accounting and has software for the sale of goods or services associated with accounting software which ensures that invoices will only be printed and filled in at the same time as accounting entries are made.

Electronic invoices is invoice created, filled in and processed on the computer system of a business entity which has been issued with a tax code number when such entity sells goods or services, and shall be archived on the computers

of the parties in accordance with the Law on Electronic Transactions. Business entity which has been issued with a tax code number, but not qualify the requirements to make its self-printed invoices or electronic invoices, shall place invoice printing orders to use the invoice during its operation of sale of goods and services.

Besides, the Decree provides 07 kinds of administrative breaches regarding invoices with their fine from VND200,000 to

VND100,000,000. In which, purchasers should be noted that administrative breaches regarding invoices may be fined from VND1,000,000 to VND100,000,000 – the highest fine applied to administrative breaches regarding invoices.

This Decree shall be of full force and effect as from 1 January 2011 and shall replace the Government's Decree 89/2002/ND-CP dated 7 November 2002 on printing, issuance, use and management of invoices.

4. Amendment of customs procedures applicable to goods being processed for foreign business entities.

On 14 May 2010, Ministry of Finance has issued Circular No. 74/2010/TT-BTC supplementing and amending some contents of Circular No. 116/2008/TT-BTC dated 04 December 2008 guiding customs procedures applicable to goods being processed for foreign business entities.

Accordingly, the contents of processing contract shall follow Article 30 of the Government's Decree No. 12/2006/ND-CP dated 23 January 2006. In case where the transaction between the principal and the processor is made through the third party, it must be stated in the processing contract, or appendix, or relevant documents for demonstration. The implementation of customs procedures of a particular processing contract (include: receiving the contract, accepting the level of use/consumption of raw materials, clearing customs procedures for each batch of

goods for export and import under the contract, and customs clearance of the processing contract) shall be performed in a Customs Sub-Department belonging to Customs Department of Province or City at the enterprises' selection (in Customs Sup-Department where the production unit performs the processing contract, inclusive of the production unit performs re-processing goods; or in Customs Sup-Department where the head office/branch office of the enterprises locates. If there is not Customs Unit covering the location of production unit, head office/branch office of the enterprises, the enterprise is entitled to choose a Customs Sub-department to perform customs procedures conveniently.

This Circular shall be of full force and effect 45 days after the signing date.



PART III – NEW PROMULGATIONS OF THE MONTH

GOVERNMENT

1. Decree 57/2010/ND-CP dated May 25, 2010 detailing and guiding the implementation of Ordinance on the procedure for arrest of aircraft.
2. Decree 56/2010/ND-CP dated May 24, 2010 on amendment of and supplement to a number of articles of the Decree 107/2007/ND-CP dated May 26 2007 of the Government providing detailed regulations and guidelines for implementation of Law on Residence.
3. Decree 55/2010/ND-CP dated May 24, 2010 on amendment of and supplement to a number of articles of the Decree 142/2004/ND-CP dated July 8 2004 of the Government providing on penalty for administrative offenses in relation to posts, telecommunications and electrical radio frequency.
4. Decree 54/2010/ND-CP dated May 21, 2010 detailing the implementation of a number of articles of Law No.62/2006/QH11 on Cinematography and the Law No.31/2009/QH12 amending and supplementing a number of articles of Law on Cinematography.
5. Decree 53/2010/ND-CP dated May 19, 2010 providing on investment incentives, preferential enterprise income tax for the administrative units newly established as a result of a change of administrative boundaries by the Government.
6. Decree 52/2010/ND-CP dated May 19, 2010 on import of fishing boat.
7. Decree 51/2010/ND-CP dated May 14, 2010 on invoice for goods and services.
8. Decree 50/2010/ND-CP dated May 14, 2010 making detailed provisions and guiding the implementation of a number of articles of Law on natural resources royalties.
9. Decree 48/2010/ND-CP dated May 7, 2010 on contracts in construction activities.
10. Decree 47/2010/ND-CP dated May 6, 2010 on administrative penalties for breaches of Law on Labour.

THE PRIME MINISTER

1. Decision 712/QD-TTg dated May 21, 2010 on approval of the National Program “Enhancing productivity and quality of products and commodities of Vietnam enterprises until 2020”.
2. Decision 40/2010/QD-TTg dated May 12, 2010 on promulgation of the sample regulation on the management, use of the land development fund.

Decision 39/2010/QD-TTg dated May 11, 2010 promulgating the System of products of Vietnam.

MINISTRY OF PLANNING AND INVESTMENT

1. Decision 678/QD-BKH dated May 13, 2010 on approval of the list of encouraged investment activities in the Program on national investment promotion in 2010.
2. Circular 10/2010/TT-BKH dated May 13, 2010 on training, improving professional competence in tendering.

MINISTRY OF FINANCE

1. Circular 76/2010/TT-BTC dated May 17, 2010 providing the collection rate, policies for collection, payment, management and use of fees in atomic energy sector.
2. Circular 74/2010/TT-BTC dated May 14, 2010 on amendment of and supplement to a number of contents of Circular 116/2008/TT-BTC dated Dec 4, 2008 of Minister of Finance guiding the customs procedures applicable to goods being processed for foreign business entities.
3. Circular 71/2010/TT-BTC dated May 7, 2010 guiding the imposition of tax for entities trading automobiles, motorcycles which indicate selling price of automobiles, motorcycles in the invoices delivered to consumer lower than the normal price in transaction on the market.
4. Circular 68/2010/TT-BTC dated April 26, 2010 guiding the registration fee.

MINISTRY OF INDUSTRY AND TRADE

1. Circular 23/2010/TT-BCT dated May 20, 2010 on import of salt.
2. Circular 22/2010/TT-BCT dated May 20, 2010 on the application of automatic import license for a number of steel products.
3. Circular 21/2010/TT-BCT dated May 17, 2010 on implementation of the Rules of origin in the ASEAN Trade in Goods Agreement.
4. Circular 20/2010/TT-BCT dated May 17, 2010 on promulgating the list of consumer goods to determine time-limit for import duty payment.
5. Circular 19/2010/TT-BCT dated May 17, 2010 issuing the list of goods and products may cause unsafe falling to the management of the Ministry of Industry and Trade.
6. Circular 18/2010/TT-BCT dated May 10, 2010 providing the operation of the competitive electricity market.
7. Circular 17/2010/TT-BCT dated May 5, 2010 providing contents, order, procedures for establishment, assessment, approval of the plan for development of commercial industries.

STATE BANK OF VIETNAM

1. Circular 13/2010/TT-NHNN dated May 20, 2010 providing for the secured rates for operation of credit institutions.

MINISTRY OF INFORMATION AND COMMUNICATIONS

1. Circular 11/2010/TT-BTTTT dated May 14, 2010 providing for the sale promotion activities applicable to mobile information services.



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