GLOBAL VIETNAM LAWYERS

WHO IS THE EMPLOYER OF THOSE WORKING FOR A REPRESENTATIVE OFFICE?

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In reality, there are trivial matters that often cause confusion through the application of law, but if due care is not given to them, they can totally erupt into the cause of disputes which may even lead to legal actions.

Eighteen years ago, a Singapore-based company set up its representative office in Vietnam to carry out market research and trade promotion. At the end of 2020, the role of this representative office was deemed to be completed and the company decided to terminate the office's operations. As a matter of law, the company would notify the Department of Industry and Trade thereof; the office would cease all activities, terminate all contracts, including those signed with suppliers, office lease contracts and labour contracts. The liquidation of those contracts was normally carried out until some of the liquidated employees complained that it went against the law to terminate labour contracts with them. They initiated a legal action to request the company to reinstate them to work and pay compensations.

The representative office believes that the termination of labour contracts in this situation falls under the case "The employer who is not an individual terminates its operations" as specified in Article 36.7 of the Labour Code 2012 (the "**LC 2012**"). The employees, on the contrary, believed that because their labour contracts were signed by the manager of the representative office on behalf of its foreign company, so this company was their employer. These employees contended that when their labour contracts were terminated due to the company terminating the representative office's operations, it was the case where "The employer retrenches employees due to a structural change", which is specified in Article 36.10 of the LC 2012, and also argued that the foreign company retrenched many employees as a result of not developing a labour usage plan as regulated in Article 44 of the LC 2012. Thus, it was illegal for the foreign company to terminate their labour contracts.

This argument of the employees is pushed forward by some advocates upon commenting that that the representative office cannot be the employer because it is not a legal entity, but just an affiliated unit which the foreign company must take responsibility for.

However, some opine that the drafter may have made a mistake when writing in the labour contracts that the manager of the representative office signed on behalf of the foreign company, since the foreign company cannot sign labour contracts to recruit employees for its representative office in Vietnam. According to the Civil Code 2005 and the Civil Code 2015 alike, when foreign legal entities establish and perform civil transactions in Vietnam, their civil legal capacity is governed by the Vietnamese law. Since the Commercial Law only stipulates that a Vietnam-based representative office of a foreign company may hire employees, but does not stipulate that a foreign company may hire employees for its representative office in Vietnam. Thus, the

Vietname-based representative office of a foreign company can sign labour contracts to hire employees for that office, but this is not the case with the foreign company.

This opinion also refers to some provisions of Decree 75/2014/ND-CP of the Government on recruitment and management of Vietnamese employees working for foreign organisations and individuals in Vietnam (Decree 75). Accordingly, "foreign organisations in Vietnam" as defined in Article 2 of Decree 75 include a number of organisations licensed for establishment by Vietnamese competent authorities, e.g. Vietnam-based representative offices of foreign companies, but excluding such foreign companies.

The author is among some advocates of the view that "representative offices are employers" since all relevant provisions of the commercial and labour laws are in favour of and consistent with the view. As the Vietnamese law does not stipulate that a foreign company is a “foreign organisation in Vietnam” which can sign a labour contract, it is inconsistent with the Vietnamese law for the employees to argue that the foreign company signs labour contracts to recruit them for its Vietnam-based representative office.

Furthermore, acceptance of this view will leave the court confined to a "dilemma" as it has to consider how the foreign company will reinstate the employees to work under the labour contracts when its Vietname-based representative office has closed. Will the court force the company to restore the operation of the representative office and reinstate the employees? Or will the court force the company to accept the employees back to work at the company's office abroad? The author contends that there is no legal basis for the court to make such a decision. Even with the issuance of such a decision, there is no legal ground to enforce the decision.

Therefore, the labour contracts of the employees working at the representative office will be consistent with law if they are signed between the representative office and those employees. But it is inconsistent with the Vietnamese law to write in the labour contracts of the employees working at the representative office that they are signed with the representative of the foreign company.

This type of dispute arises from a trivial matter. Some trivial matters are likely to cause confusion when they are applied in practice, but little attention is paid to them for correction. The trivial matter referred to in this article seemed not to cause any obstruction in the daily operations of the representative office, but likely raged into a cause of dispute when the office ceased to operate. Therefore, to avoid future disputes, the Vietnam-based representative offices of foreign companies should review the labour contracts signed with their employees and, if necessary, re-sign them to be consistent with the Vietnamese law.