

NOVEMBER 2018 NEWSLETTER

In this edition of our newsletter we report on the following:

- (i) Draft Law on **Securities**;
- (ii) New Decree on compulsory **social insurance applicable to foreign employees** working in Vietnam;
- (iii) New Decree implementing the **Labour Code**;
- (iv) New Decree on the **confidentiality of information of credit institutions** and branches of foreign banks;
- (v) New Decree on the use of **electronic invoices** (e-invoices) for the sale of goods and services; and
- (vi) Vietnam's ratification of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CP-TPP**).

1 Draft Law on Securities

In early October 2018, the Ministry of Finance issued the second draft of the new Law on Securities, introducing various changes to the current legislation on the securities market of Vietnam (***the Draft Law on Securities***). The Draft Law shall replace the existing legislation, including Law No. 70/2006/QH11, entitled the Law on Securities dated 29 June 2006 and Law No. 62/2010/QH12 dated 24 November 2010 amending, supplementing a number of articles of the Law on Securities (***Current Laws on Securities***) as from the date it becomes effective.

Below are some notable changes under the Draft Law on Securities as compared to the Current Laws on Securities:

- **New definition of public companies**

Under the Current Laws on Securities, a "public company" is defined as a joint-stock company which (i) has made a public offer of shares; (ii) has shares listed on the Stock Exchange or a Securities Trading Centre; or (iii) has shares owned by at least 100 investors excluding professional securities investors, and which has paid-up charter capital of

at least VND10 billion.

Under Article 30.1 of the Draft Law on Securities, the definition of “public company” is modified to be either (i) a company having made a public offer of shares via the registration with the State Security Commission of Vietnam (**SSC**); or (ii) a company having paid charter capital of VND30 billion or more and at least 20% of its paid charter capital owned by at least 100 investors who are not shareholders owning one per cent or more of the voting shares in such company.

- **Removal of foreign ownership caps for public companies**

The “foreign ownership ratio” under the Draft Law on Securities is calculated based on the ownership of voting shares, consistently with the provisions under the Law on Enterprises. The Draft Law on Securities contemplates that there will be no foreign ownership limitation imposed on public companies, unless otherwise provided by Vietnamese legislation or by an international treaty of which Vietnam is a member.

Also, there will be no restriction on the maximum number of investment fund certificates, shares of securities investment funds, non-voting shares of public companies, derivative securities, custody certificates and warranty certificates which foreign investors are able to invest in, unless otherwise provided by the charters of the relevant issuing organisations.

- **New conditions for private placement**

Currently, the private placement of public companies is arranged for less than 100 investors apart from professional investors, without using the mass media or the Internet. However, the Draft Law on Securities now only allows strategic investors and professional investors to participate in a private placement of a public company. The definition of “strategic investors” has not been provided by the Draft Law on Securities yet (instead, it is currently provided by Decree No. 126/2017/NĐ-CP dated 16 November 2017 on the equitisation of State enterprises).

According to the Draft Law on Securities, (i) the lock-up period on transfer of the privately placed shares and converted bonds will be at least three year for strategic investors and at least one year for professional investors as from the date of completion of the offer tranche (excluding in some specific cases regulated under the law), and (ii) the lock-up period on transfer of the privately placed bonds for professional investors will be at least until the due date of such bonds.

2 **New Decree on compulsory social insurance applicable to foreign employees working in Vietnam**

On 15 October 2018, the Government issued Decree No. 143/2018/ND-CP, providing detailed regulations on the Law on Social Insurance and the Law on occupational safety and hygiene regarding compulsory social insurance for foreigners working in Vietnam (**Decree 143**). Decree 143 will take effect from 1 December 2018.

Decree 143 contains a remarkable change in the compulsory social insurance policy as compared to previous legislation. In particular, Article 2.1 of Decree 143 now provides that foreigners working in Vietnam shall be subject to compulsory social insurance when:

- a) they have a (i) work permit, (ii) practising certificate or (iii) practising licence issued by the empowered Vietnamese agency; and
- b) an indefinite term labour contract or definite term labour contract for a full one year or more with an employer in Vietnam (**Qualified Foreign Workers**).

In other words, new Decree 143 makes it mandatory for Qualified Foreign Workers and their employers to participate in compulsory social insurance. However, the aforesaid Qualified Foreign Workers will not be subject to compulsory social insurance if:

- (i) Being internally transferred within an enterprise (in accordance with Article 3.1 of Decree 11/2016/ND-CP of the Government, dated 3 February 2016, implementing the Labour Code on foreigners working in Vietnam); and/or

- (ii) Being workers of retirement age (as prescribed in Article 187.1 of the Labour Code).

The employers of Qualified Foreign Workers shall be obliged to pay their monthly contribution (being 17.5% of their employees' monthly salary) into the social insurance fund as from the effective date of Decree 143; and the Qualified Foreign Workers shall be obliged to pay a monthly contribution (being 8% of their monthly salary) into the retirement and survivorship fund as from 1 January 2022 (Articles 12 and 13 of Decree 143).

Those contributions are based on the Qualified Foreign Worker's actual monthly salary, allowances and other additional payment provided in the employment contract, capped at 20 times the applicable General Minimum Wage (currently VND1,390,000 which is roughly equivalent to USD59). Therefore, with respect to salaries being more than 20 times the General Minimum Wage, the monthly compulsory contributions will not exceed VND2,224,000 for an employee (8% of the General Minimum Wage multiplied by 20), and VND4,865,000 for an employer (17.5% of the General Minimum Wage multiplied by 20).

In addition, pursuant to Article 12.2 of Decree 143, any Qualified Foreign Worker not working and not receiving his or her salary for fourteen (14) or more working days in a month is not required to pay the social insurance contribution for such month. This period of time shall also not be included when calculating entitlement to social insurance benefits, except in the case of maternity leave.

3 New Decree implementing the Labour Code

On 24 October 2018 the Government issued Decree No. 148/2018/ND-CP amending and supplementing the current Decree No. 05/2015/ND-CP detailing and guiding the implementation of the Labour Code dated 12 January 2015 (**Decree 148**). Decree 148 will take effect from 15 December 2018.

Below are some noteworthy developments contained in Decree 148 as compared to the current Decree No. 05:

- **Changes in the calculation of severance/retrenchment allowances**

Under Decree 148, probationary period, apprenticeship and job practicing contracts will not be included in the total actual working time under labour contracts which is used to calculate the severance/retrenchment allowances (**Actual Working Time**).

- **Simplification of the procedure for labour disciplinary proceedings**

In order to implement labour disciplinary proceedings, the employer will now only be required to send one invitation for convening a disciplinary hearing (instead of three invitations as required under previous legislation). In particular, Decree 148 requires the full participation of all invitees to the meeting, but allows the employer to conduct the labour disciplinary meeting in case of absence of some participants provided that such participants did not confirm their attendance or did not provide a sufficient justification for their absence (or confirmed to attend the meeting but did not actually attend), without the requirement for the employer to send any additional invitation to the absent participant(s).

The above mentioned amendment of Decree 148 should be considered as a simplification compared with the previous legislation. However, since Decree 148 is silent on how to deal with the situation where some participants are absent but provide a sufficient justification, the new provision can be interpreted as requiring the employer to call for another meeting as long as the absent participants can provide a sufficient justification for their absence.

4 New Decree on the confidentiality of information of credit institutions and branches of foreign banks

On 11 September 2018 the Government issued Decree No. 117/2018/ND-CP (**Decree 117**) on maintaining confidentiality of and providing information about customers, replacing Decree No. 70/2000/ND-CP dated 21 November 2000 (**Decree 70**). Decree 117 came into effect on 1 November 2018.

According to Decree 117, customers' information of credit institutions and foreign bank branches must be kept confidential and can only be provided to State authorities, other organisations and individuals in accordance with the law.

- **Scope of application**

In comparison with Decree 70, Decree 117 applies to a broader scope of customers' information. In particular, under Decree 70, information which is required to be kept confidential by the credit institutions and branches of foreign banks only included information related to deposits and assets deposited by customers. While, under Decree 117, information which is required to be kept confidential includes (i) personal information of the customers, (ii) information in relation to the customer's accounts, (iii) information in relation to customer's deposits, (iv) information in relation to customer's assets, (v) information in relation to customer's transactions, and (vi) information in relation to the individuals and/or organisations which are guarantors at such credit institutions and branches of foreign banks.

- **Providing information about customers to State authorities, other organisations and individuals**

Unlike Decree 70, Decree 117 provides clear procedures and requirements for the credit institutions and branches of foreign banks to provide information about customers to State authorities and to other organisations and individuals.

In addition:

- (i) As for customers' authentication information, credit institutions shall not provide it to any entity, organisation or individual unless such provision is authorised in writing by that customers.
- (ii) As for other customers' information, State authorities, organisations and individuals shall only request credit institutions to provide customers' information for lawful purposes and in accordance with the law or as authorised by that customers, and must be responsible for such request.
- (iii) State authorities, organisations and individuals must also maintain confidentiality of such information and use it only for the purpose for which they requested such information in the first place and must not provide such information to third parties without the customer's consent unless otherwise prescribed by the law.

5 **New Decree on the use of electronic invoices (*E-Invoices*) for the sale of goods and services**

Decree No. 119/2018/ND-CP (**Decree 119**) was issued by the Government on 12 September 2018, replacing Decree No. 51/2010/ND-CP dated 14 May 2010 regulating invoices for the sale of goods and services (**Decree 51**), and Decree No. 04/2014/ND-CP dated 17 January 2014 amending and supplementing certain articles of Decree 51 (**Decree 04**).

Electronic invoices are defined as invoices represented in electronic data form, created by an organization or individual selling goods or providing services, and showing information about these goods or services as well as digital signatures and electronic signatures by using electronic instruments, even including those invoices created by POS cash registers with network connections for transmission of electronic data to tax authorities.

According to Decree 119, as from 1 November 2020, all (i) enterprises, (ii) economic organisations, (iii) other organisations, and (iv) households or individuals keeping accounting records, regularly hiring at least 10 employees and earning in the preceding year revenue which equals at least from 3 to 10 billion VND subject to their business activities (the entities herein are listed in Article 12 of Decree 119) must use electronic invoices when selling goods or supplying services, irrespectively of the value of such goods or services. With only a few exceptions, an electronic invoice shall be assigned an identification code by the tax authority before an organisation or individual selling goods or providing services sends it to the buyer.

- **Timeline for transition from printed invoices to electronic invoices:**

Among other timelines for transition from printed invoices to electronic invoices, from 1 November 2018 to 31 October 2020:

- (i) Enterprises, economic organisations, other organisations, households or individuals, who have notified the issuance of professionally printed or self-printed invoices, or have purchased invoices issued by tax authorities for use before 1 November 2018, are entitled to continue using those printed invoices until 31 October 2020 (and to follow the invoice-related procedures provided in Decree 51 and Decree 04).
- (ii) With respect to the enterprises and business establishments, who have notified the issuance of electronic invoices without tax authority's identification code, or have registered an application for electronic invoices with tax authority's identification code, they are entitled to issue electronic invoices after 1 November 2018.

From 1 November 2020, the transition into using electronic invoices must be completed. Decree 51 and Decree 04 will be invalid as from that date.

6 Vietnam's ratification of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (*CP-TPP*)

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (*CP-TPP*) is a free trade agreement entered into by and between 11 countries (Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam) on 8 March 2018 in Santiago, Chile.

On 31 October 2018, Australia became the sixth country to ratify the CP-TPP, which means that the CP-TPP shall officially come into force on 30 December 2018. The CP-TPP was ratified by the National Assembly of Vietnam on 12 November 2018, and will enter into force for Vietnam on 14 January 2019. As of today the CP-TPP has been ratified by seven countries, being Australia, Canada, Japan, Mexico, New Zealand, Singapore and Vietnam.

We trust that you find this edition of our newsletter an interesting read and welcome any feedback or comments you may have on any of our topics. Our address for comments is legalenquiries@frasersvn.com.

Whilst we aim to provide a useful update on new legislation, Frasers' Newsletter does not constitute formal legal advice. Should you feel that you require further information on any of the issues in this edition of the Newsletter, please contact us at the address above or via your usual Frasers' legal adviser.

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