**FAQs for labour matters of foreign trader’s Rep Offices in Viet Nam**

1. **Is the Rep Office allowed to open bank account to pay the salary and contribute the social insurance for the employees?**

**ADK Lawyers:** With this question, we advise as follows

Under Law on Commercial (i.e. Article 18.1 ), the Rep Office does not perform the direct profitable activities in Vietnam, it means the Rep Office’s foreign trader shall not arise any legal profits from business activities in Vietnam. However, the Rep Office has the right to open bank account (i.e. Article 17.4 LOC) to execute payment of expenses for following several activities:

1. To carry out a number of trade promotion activities permitted by Vietnamese law.
2. To rent offices, rent and purchase equipment and facilities necessary for their operations.
3. To recruit Vietnamese and expatriate employees to work for them according to the provisions of Vietnamese law.

Therefore, in the operation time, despite not arising any profits the Rep Office has to pay the expenses related to the Rep Office’s activities such as: salary, personal income tax, social insurance for employees (“**SI**”), the rent offices or facilities necessary for the Office and the other related expenses. Hence, the Rep Office is allowed to open bank account to pay salaries for employees.

Please note that, the payment of expenses of the Rep Office in Vietnam must ensure compliance with regulations on foreign exchange. Pursuant to Circular No. 32/2013/TT/NHNN guiding the implementation of regulations on restricting the use of foreign exchange in the territory of Vietnam, all of the transactions, payments of residents and non-residents are not allowed to be conducted in foreign exchange. Thus, in order to implement payment of expenses for the Rep Office’s activities by in Vietnam, the Rep Office must have a separate payment account in Vietnam to receive money (foreign exchange) from foreign trader.

1. **Do Vietnam administration departments do automatic credits of accept automatic debits?**

**ADK Lawyers**: We understand that this question is whether the Government authority of Viet Nam automatically deducts the money from the bank account of Rep Office or the like for Rep Office’s financial obligation payable to Government authorities.

Under the Law on Credit Institutions (i.e. Article 10.3) and other relevant regulations of Viet Nam, a credit institution shall have the right to deduct the money from its client’s bank account if it is so requested by the local competent State authority of Vietnam in accordance with the law of Viet Nam

Scanning the law of Viet Nam, we found that the local State competent authorities of Viet Nam shall have the right to request a credit institution(s) to for automatically deducting amount(s) of the client’s bank account(s) who has the financial obligations payable to the local agencies/State competent authorities for the purpose of coercing the enforcement of: (1) a decision on sanctioning of administrative violations (“**Administrative Fine**”); or (2) a judgment/decision on dispute settlement, specifically as listed in the table below:

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| --- | --- |
| **Items** | **Notes** |
| For the purpose of coercing the enforcement of Administrative Fine | 1. Decision on the Administrative Fine by the State competent authorities of Vietnam may be issued due to failure of paying social insurance premiums (“**SI**”), unemployment insurance premiums (“**UI**”); and Health Insurance premiums (“**HI**”) includes the following payable obligations: 2. the sum of full payment for SI,UI and HI premiums which are not yet paid; 3. an interest for late payment; and 4. monetary penalty.   For your information, a violator of the SI, UI and HI contribution may be subject to the criminal liabilities as described in the Penal Code of Viet Nam.   1. Decision on the Administrative Fine may be issued due to violation of tax obligation.   In case of the Rep Office, the obligation related to the personal income tax (“**PIT**”) such as withholding and payment of payable PIT for its employee(s) to the local competent tax authorities may be arisen. |
| **Coercing the Enforcement of a Judgment/decision** | A judgment/decision in a labour relationship will be issued when a labour dispute by relevant parties is settled by a judgment or decision of a competent court/the local State competent labour authority of Viet Nam. |

Please be advised that the deduction of the money from the bank account(s) shall be only executed on the following main conditions:

1. The bank account owner who has the financial obligation payable fails to voluntarily execute the decision or judgement of State competent authorities/Court of Viet Nam; and
2. There is a decision on coercing the enforcement of (i) decision on the Administrative Fine; or(ii)the judgment or a decision of the labour dispute settlement by the local competent State authority/court of Vietnam which shall be issued in compliance with the statutory procedural steps as indicated in the relevant law of Viet Nam.

(*According to (i) Article 86.1 of the Law on Handling Administrative Violations dated 20 June 2012; (ii) Articles 11 and 2 of Circular 215/2013/TT-BTC; and (iii) Article 46 of the Law on Enforcement of Civil Judgments dated 14 November 2008)*

1. **A Rep Office is not a legal entity; which labour law is the relevant and applicable one for the employees and the foreign trader, the Vietnamese labour law or the foreign labour law?**

**ADK Lawyers**: The matter on the applicable law for the labour relationship between the foreign trader and its employees working for Viet Nam is still an unclear and vague one. From the most conservative view and in common view of the local State competent authorities and courts of Viet Nam, such labour relationship shall be governed by the law of Viet Nam only. Please refer to our details advice as below:

1. As we analysed in Question 4 below, the foreign trader is considered as an actual employer in the labour relationship with the employee(s) working at its Rep Office’s location. Therefore, the labour contract(s) between the foreign trader and the employee(s) working at its Rep Office’s location is defined as the contractual relationship involving foreign element (*under Article 663.2.(a) of the Civil Code of Vietnam (“****CCV****”)*).
2. Under the law of Viet Nam, for the labour relationships between the foreign trader and its employees working for Rep Office, the Vietnamese law shall be the applicable law in both cases below:
3. The contractual parties of the labour contract choose to apply the law of Viet Nam under Article 683.1 of the CCV; or
4. The contractual parties do not mention or agree on the applicable law. Specifically, pursuant to Article 683.2.(d) of the CCV, the law of the country where the employee usually work will be the applicable law. In this case, of course, the employees of the foreign trader usually work in Viet Nam. Therefore, the laws of Viet Nam shall be the applicable one to govern such labour relationship.
5. The question is as to whether the foreign trader and its employee(s) working at the Rep Office’s location in Viet Nam may choose the foreign law as the applicable one and the answer is “NO”.

* We reviewed and further found that pursuant to Article 664.2 of the CCV, the foreign law as agreed by the parties for the civil relation involving foreign elements may be applied only in case the law of Viet Nam has a provision allowing the parties to select the governing law. Given this regulation, it is understood that if the law of Viet Nam does not have regulation allowing the employer and its employees to choose the governing law for the labour contract, the parties could not do so. As per our experience, the local State competent authorities and courts of Viet Nam have common views that the labour relationship is a specialized relationship and should be governed and construed in accordance with the Labour Code of Viet Nam (“**LCV**”). As there has no provision in the LCV allowing the overseas employer and its employees to do so, the foreign trader and the employee(s) may not be able to choose to apply the foreign law for the labour contract(s) in Viet Nam.
* Articles 683.1 and 683.5 of the CCV indicates that the contractual parties may choose governing law for a contract based on the condition that the law that the parties choose to apply in the labour contract do not adversely affect the minimum interests of the employees in accordance with the labour law of Viet Nam.Therefore, the local State competent authorities and courts of Viet Nam have common views that the labour relationship is a specialized relationship with several minimum requirements which employer must ensure for employees, such as minimum salaries, working hours, SI, UI and HI contribution, and good causes and period of giving an advance notice to unilaterally terminate the labour contracts should be governed and construed in accordance with the LCV.

Accordingly, in our opinion, the labour relationship between the foreign trader and the employees working at its Rep Office’s location in Viet Nam shall be governed by the law of Viet Nam only.

1. **Does the labour contract be in the name of the Rep Office as the employer?**

**ADK Lawyers:** The matter is as to whether the foreign trader or its Rep Office is considered as the employer of the employees working at the Rep Office’s location in Viet Nam has already been the subject of controversy because of absence of clear provision of the law of Viet Nam.

The common point of view is that the foreign trader is the real employer of the employees working at its Rep Office’s location in Viet Nam. such view is based on the following legal basis:

1. The LCV does not list a Rep Office as an employer in the definition of the employer (according to Article 3.2 of the LCV). In addition, pursuant to Article 18.3 of LCV, amongst other circumstances, the person signing labour contract(s) on behalf of the organizational employer side shall be the legal entity’s head
2. Under Article 3.6 of the LOC, Rep Office is only a dependent unit of a foreign business entity which means Rep Office does not have legal entity; and the foreign traders shall be legally responsible for the Rep Office’s entire operation in Vietnam;
3. Even the LOC (*pursuant to Article 17.3 of the LOC*) provides the Rep Office to recruit employees for their working for the Rep Office. However, as mentioned above, the labour relationship is a specialized relationship and should be governed and construed in accordance with the LCV only.

In practice, we have already dealt with a few similar cases where the local competent courts of Vietnam have the same view that the foreign trader is the real employer and a party of the labour contract(s) with the Vietnamese employee(s) since the Rep Office(s) is just dependent unit(s) of the foreign trader pursuant to the LOC.

In brief, it means the foreign trader, but not the Rep Office, is the actual employer in the labour relationship with the employee(s) working at its Rep Office’s location. Regarding the legal compliance matters which the foreign trader, as an employer, must comply in accordance with the law of Vietnam, the Rep Office as being the foreign trader’s commercial presence in Vietnam shall act on behalf of and for the sake of the foreign trader to (1) register, declare, withhold and then pay SI, UI and HI premiums to the local social agency of Vietnam; and (2) register, declare, withhold PIT payable by the employees to pay to the State tax management authority of Vietnam because the foreign trader itself is unable to do so as its registered office is located overseas.

1. **What would happen if the foreign trader closes the Rep Office, is the labour contract still valid then or does it end as soon as the Rep Office shuts down? Would the foreign trader be obliged to pay any kind of compensation for its employees in case the foreign trader closes its Rep Office?**

**ADK Lawyers**: According to Article 34.7 of the LCV, the employer shall have the right to put the end of the labour relationship with the employees where the employer as an organization terminates its operation. However, as mentioned above, from the most conservative view, the foreign trader but not the Rep Office shall be considered as the actual employer, therefore, the shutdown of Rep Office is not solid basis for the automatic termination of labour contract under Article 34.7 of the LCV.

Instead, the foreign trader shall carry out the statutory legal procedural steps to terminate the labour contract(s) with the employee(s) working at its Rep Office’s location due to the change in organizational restructure - *in this case it is the Rep Office’s closure*, pursuant to Articles 34.10 and 42 of the LCV (“**Retrenchment**”)

Hence, the foreign trader must pay the following payable amounts to the employee(s) working at the Rep Office’s location ( according to Article 47 of the LCV):

1. Outstanding payment such as: unpaid salary, a lump sum of untaken leave, and other outstanding payments (if any); and
2. Retrenchment allowance at the rate of one month of salary for each working year for the employee(s) who he/she is entitled to, but at least 02 months of salary, provided that the employee(s) has been regularly worked for the foreign trader for a full of 12 months or more.
3. **What are usual resignation terms in case the foreign trader might have to dismiss one of its workers?**

**ADK Lawyers**: We understand that the foreign trader wants to know the term of notice in advance to the employee in case the foreign trader/Rep Office wants to terminate a labour contract with its employee.

Please see the notice period which an employer shall comply in case of termination of a labour contract with its employee in some specific case as below.

* 1. **Unilateral termination of labour contract by the employer**

Pursuant to Article 36 of the LCV, the foreign trader as an employer shall have the right to unilaterally terminate the labour contract(s) with the employee(s) only when it has a good cause as indicated in Article 36.1 of the LCV. If so, the foreign trader shall give an advance notice to the employee(s):

1. At least 45 calendar days for an indefinite-term labour contract(s);
2. At least 30 calendar days for a definite-term labour contract(s); or
3. At least 03 working days for a seasonal or a work-specific labour contract(s) of less than 12 months or in case of unilateral termination of labour contract(s) due to the employee’s sickness, accident as mentioned in Article 38.1(b) of the LCV.
   1. **Termination of labour contract due to handling labour discipline under the form of dismissal**

The labour law of Vietnam is silent on the period of notifying in advance of the termination of labour contract when the employee is subject to labour discipline under the form of dismissal. In practice, in this circumstance, the labour contract shall be terminated on the date as mentioned in the decision on labour discipline under the form of dismissal as issued by the employer.

* 1. **Termination of labour contract due to the change of organization (retrenchment)**

The labour law of Vietnam is also silent on the period of notifying in advance in this case. However, per our experience in consulting the similar cases, the local State labour management authority and the court of Vietnam also require employers to comply with the advance notice which are the same as the option of unilateral termination of a labour contract as we advised herein above.

1. **Whether it is allowed by the Vietnam laws to restrict a power of attorney given to the head of the Rep Office in terms of bank transfer or any other restriction the foreign trader might be forced because of its compliance standards?**

**ADK Lawyers**: Yes, it is allowed by the law of Vietnam to restrict the power of attorney given to the head of Rep Office.

Pursuant to Article 33 of Decree No.07/2016/ND-CP, the RO’s Head shall be only responsible for his/her actions and the Rep Office’s operation per the power of attorney as given by the foreign trader to him/her.

Therefore, we opined that the scope of authorization of the Rep Office’s head shall be at the foreign trader’s sole discretion. However, please be advised that the scope of authorization should be broaden enough for his/her management of the Rep Office only since the Rep Office’s head shall be the person managing the Rep Office’s daily operation as stipulated in the law of Vietnam only.

**Note: Legal documents**

In order to provide our legal answers herein, we have reviewed the legal documents as follows:

1. Labour Code of Vietnam No. 45/2019/QH14 passed by the National Assembly of Vietnam dated 20 November 2019 and effective from 01 January 2021 (“**CCV**”);
2. Civil Code of Vietnam No. 91/2015/QH13 passed by the National Assembly of Vietnam dated 24 November 2015 and effective from 01 January 2017 (“**LCV**”);
3. Law on Commerce No. 36/2005/QH11 passed by the National Assembly of Vietnam dated 14 June 2005 and effective from 01 January 2006 (“**LOC**”);
4. Law on Enforcement of Civil judgment No. 26/2008/QH13 passed by the National Assembly of Vietnam dated 14 November 2005 amended by the Law amending and supplementing a number of articles of the Law on Enforcement of Civil judgments and effective from 01 July 2015 (“**Law on Enforcement of Civil judgment**”);
5. Law on Credit Institutions No. 47/2010/QH12 passed by the National Assembly of Vietnam dated 16 June 2010 amended by Law amendments to some articles of the Law on Credit Institutions and effective from 15 January 2018 (“**Law on Credit Institutions**”);
6. Law on Handling administrative violation No. 15/2012/QH13 passed by the National Assembly of Vietnam dated 20 June 2012 and effective from 01 July 2013 (“**Law on Handling administrative violation**”);
7. Decree No. 07/2016/ND-CP promulgated by the Government of Vietnam dated 25 January 2016 detailing regulations on establishment of representative offices or branches of foreign traders in Vietnam under LOC and effective date from 10 March 2016 (“**Decree 07/2016/ND-CP**”);
8. Circular No. 215/2013/TT-BTC promulgated by the Ministry of Finance dated 31 December 2013 guiding enforcement of tax decisions and effective date from 01 March 2017 (“**Circular 215/2013/TT-BTC**”);
9. Circular No. 16/2014/TT-NHNN promulgated by the State Bank of Vietnam dated 01 August 2014 instructing the use of foreign currency and Vietnamese dong accounts for residents and non-residents at authorized banks and effective date from 15 September 2014 (“**Circular 16/2014/TT-NHNN**”).
10. Circular No. 32/2013/TT-NHNN promulgated by the State Bank of Vietnam dated 06 December 2013 guiding the implement of regulation on restricting the use of foreign exchange in the territory of Vietnam and effective date from 02 October 2014 (“**Circular No. 32/2013/TT-NHNN**”)
11. Decision 888/QD-BHXH dated 16 July 2018 amending and supplementing certain articles of the decisions No. 595/QD-BHXH dated 14 April 2017 of the direction general on procedures for collection of social insurance, health insurance, unemployment insurance, occupational accident and disease insurance; management of social security booklets and health insurance cards (“**Decision 888/QD-BHXH**”)

We hope above satisfactory and clear. Should you have any inquiries please do not hesitate to contact us.

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