**Requesting Employees To Reimburse For Training Costs And Keeping Employees’ Certificates Or Diplomas When Termining The Labour Relation Before The Binding Duration – From The Legal Perspective To Real Practice (Part 1)**

Nowadays, Businesses appreciate improving their Employees' skills and qualifications. They are willing to spend a vast amount of money and time to invest in labor resources and organize intensive training and fostering activities for their Employees.  Along with this benefit, the Employees have to commit to work for their enterprise in the long run and/or assign Business to manage necessary diplomas and certificates if the Employees violate the commitment. The commitment period can last five years, ten years or several decades. However, regardless of the long-term commitment, breach of duty is possible, which is increasingly common when people's needs to change jobs, accommodation and other conditions are diverse. Moreover, many competitive enterprises are always ready to "hunt" for qualified and specialized employees, especially those with available training backgrounds. Therefore, to protect themselves, many enterprises having employees violating their commitments have made a considerable compensation claim for training costs, and at the same time, have kept the original diplomas and certificates of the Employees. So, what is the legal issue for the above actions of the enterprises? And, facing these actions, how should Employees or Businesses "hunting" for Employees behave? In this article, the author will analyze and clarify the above issues.

1. **Regarding the form of the training agreement:**

In principle, when arising the need for training, professional and occupational training for the current Employees or trainees, apprentices (collectively referred to as "**Trainees**") to work for the enterprises after training, the enterprises and Employees, Trainees must sign a Training Agreement (“**TA**”). TAs signed between enterprises and Employees must directly comply with the regulations of the Labor Code. Meanwhile, TAs signed by enterprises and Trainees are further regulated by the Law on Vocational Education. In many cases, enterprises invest and sponsor training costs or grant scholarships to "expected" employees even when they are still students at vocational education institutions, universities; or recruit refreshers into their enterprises to provide guidance on occupational practice, vocational training, which is also considered as one of the forms of vocational training and apprenticeship regulated by both the labor law and the vocational education law. Therefore, the parties must sign TAs, except in the case of being funded from the Government's budget which will not be the subject mentioned here.

In general, a TA must include the following main contents: (i) training occupation, (ii) training time and location, (iii) training costs and responsibility to reimburse training costs, compensation for damage caused by the breach of agreement, (iv) committed duration to work after training, and (v) other rights and obligations of each party. Despite the above regulations, in reality, not all enterprises have properly signed TAs with Employees and Trainees (collectively referred to as "**Trained People**"). And, it may be that the TA was not signed by the parties at all, or if it was signed by the parties, it did not contain the above contents as prescribed by law, including the important content such as the responsibility to reimburse training costs when terminating the labor relation before the commitment period. Without doubt, this leads to disputes when one of the parties violates the agreement, especially when the violating party is a Trained Person.

 In fact, the parties usually agree on vocational training and directly stipulate it in the Labor Contract (“**LC**”), accompanied by a commitment to an independent working term signed later. Or, in many cases, enterprises recruit/send Employees and Trainees to participate in training courses only according to general regulations issued internally at each given time. In other cases, the training agreement may exist under another name, not "Training Agreement", such as civil contract, employment agreement,... Although the above training agreement does not meet the requirements about the form, when disputes arise, it is still possible to be accepted by the competent authority. So that, the training agreement is valid and is a basis for determining the responsibilities of each party.

1. **Legal issues of the enterprises' claims for compensation for training costs with Employees or Trainees violating the committed working duration:**

It can be said that the purpose of the training activities, intensive and professional training for the Trained People is not for commercial purposes and the ultimate purpose is certainly not to recover training costs. However, when the Trained People violate the committed working duration, enterprises are willing to ask them to reimburse and compensate for training costs with an amount many times higher than the initial costs incurred by the enterprises. This also aims to "deter" the remaining employees. The costs that the enterprises require the Trained People to compensate will normally include: (i) actual training costs that the enterprises have spent, (ii) Training costs for replacement personnel, and (iii) a compensation cost many times higher than the training cost or a fixed amount of compensation predetermined by the parties. A claim for training costs can be set by the enterprise at any stage in the committed working duration whenever the Trained People breach the TAs.

* 1. **Claim for reimbursement for the actual training costs**

Currently, some enterprises often use the term "compensation" when asking the Trainees to pay back the training costs that the enterprises have spent because of the breach of commitment. However, the correct term used in this case should be “reimbursement” of training costs.

First, to determine whether the Trained People have any responsibility for reimbursing the training costs to Businesses, it is necessary to determine whether TAs were signed by and between the Trained People and the enterprises and whether the contents of such TAs have a clause on reimbursing the training costs or not. In particular:

* In case the parties have signed the training agreement and the content of the training agreement contains a clause on the reimbursement of training costs, the Trained People must automatically reimburse the training costs as the commitment when the breach of the agreement leads to reimbursement responsibility.
* In case the parties have signed the training agreement, but the content of the training agreement does not stipulate the responsibility of reimbursement of the training costs:
* According to Clause 3, Article 40 of the Labor Code 2019, one of the obligations of the Employee when unilaterally terminating the labor contract illegally is "Reimburse to the Employer training costs as prescribed in Article 62 of this Labor Code”. Thus, regardless of whether an agreement is formed on responsibility for reimbursement of training costs or not, in the event that the Trained People terminate the labor contract illegally, the Trained People must reimburse the training costs for the enterprises.
* So, in case the Employee terminates the labor contract legally but violates the committed working duration, do they have to reimburse the training costs?

The labor laws do not have a specific answer to this question. However, Clause 2, Article 61 of the Law on Vocational Education 2014 stipulates:

*“2.* ***The learners graduated from training courses as scholarship or training costs given by the Employers must work for the Employer according to the period as agreed*** *in the training agreement;* ***in case they fail to fulfill their commitment, they must make a reimbursement for the scholarship or training costs.****”*

According to the above regulations, it can be seen that, in all cases where the Trained People violate the commitment of working duration for the enterprises, they must reimburse the training costs, regardless of whether they terminated the labor contract illegally or legally. However, this regulation only applies in case the TA signed by the Employee and the enterprise is regulated by the Law on Vocational Education.

* In case the parties do not sign any training agreement, do not agree on the responsibility of reimbursing the training costs:

In this case, even if the Trained People and the enterprise do not sign a TA, but the enterprise has grounds to prove the fact that training activities have been held when a dispute arises, the Trained People still have to be responsible for reimbursing training costs when violating the commitment working duration in one of the above cases.

1. **Claim for compensation for the training costs for replacement personnel and the compensation cost many times higher than the training cost or a fixed amount of compensation predetermined by the parties**

According to Clause 3, Article 62 of the Labor Code 2019 and Clause 2, Article 29 of the Law on Vocational Education 2014, the training costs do not include the training costs for replacement personnel and the compensation cost many times higher than the training cost or a fixed amount of compensation predetermined by the parties. Hence, these types of costs are not considered as training costs according to relevant laws. Therefore, the enterprise’s claim that the Trained People must pay these costs is considered a claim for damages and is governed by civil law. As a result, some cases may occur as follows:

* In case the Trained People and the enterprise have an agreement to compensate for the training costs for replacement personnel, and the compensation higher than the training cost or a fixed amount of compensation predetermined by the parties if the Trained People violate the committed working duration, it is considered a predetermined compensation agreement and is a civil agreement of the parties. Currently, Vietnamese laws do not obviously stipulate predetermined compensation, but the trial practice at the Courts shows that this amount can be accepted depending on the adjudication norm of each Court. Therefore, in principle, enterprises can still have grounds to request Trained People who violate their commitments to make these predetermined compensations according to the agreement of the parties.

* If the Trained People and the enterprises do not form any agreement on any predetermined damages in formal writing, the enterprises’ claim for damages will be settled according to the actual damage mechanism, namely the actual damage is equal to the compensation. In this case, the burden of proving the damage of the enterprises is heavier and more challenging.