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Trends for 2020 and Beyond
Overview: Compliance and Risk Management
European Chamber of Commerce Vietnam
21 November 2019

AGENDA

- About ACSV Legal
- Overview
- General Data Protection Regulation (GDPR) Matters
- Labour Matters
- Anti-Corruption Matters
- Conclusion
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ABOUT ACSV LEGAL

ACSV Legal is a Ho Chi Minh City, Vietnam-based law firm. The firm is led by Managing Partner, Mark Oakley who has been living and working in Vietnam since 2007.

Established in 2014 and most recently, at the end of March 2018, it was rebranded to ACSV Legal, with a new logo and new website: www.acsvlegal.com.

ACSV Legal has a premier corporate/M&A practice in Vietnam and its approach is to understand the legal, commercial and political dynamics of every matter. We have extensive experience in private equity transactions with a focus on a strong commercial approach.

ACSV Legal currently has a team of lawyers who are qualified in Vietnam and abroad in civil and common law jurisdictions. Our lawyers are bi-lingual in Vietnamese, German, English, Italian, Dutch, French and Malay.

Our clients are active in a wide range of sectors and industries: manufacturing, food & beverage, hospitality and leisure, education, pharma, health, beauty & fitness, IT, apparel and fashion, retail and public relations.



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OVERVIEW

OVERVIEW: WHAT IS COMPLIANCE AND RISK MANAGEMENT?

- **Governance** is the combination of processes established and executed by the directors (or the board of directors) that are reflected in the organisation's structure and how it is managed and led toward achieving goals
- **Risk Management** is predicting and managing risks that could hinder the organisation from reliably achieving its objectives under uncertainty
- **Compliance** refers to adhering with the mandated boundaries (laws and regulations) and voluntary.

Governance, Risk Management, and Compliance (GRC) are 3 related facets that help assure an organisation reliably achieves objectives, addresses uncertainty and acts with integrity. GRC is a discipline that aims to synchronise information and activity across governance, risk management and compliance in order to operate more efficiently, enable effective information sharing, more effectively report activities and avoid wasteful overlaps.

Source: GRC Capability Model 3.0 / Wikipedia



OVERVIEW: IMPORTANT QUESTIONS TO ASK: DO YOU KNOW...

- ...What your Chief Accountant does exactly and what documents you sign?
Potential tax evasion and/or social insurance invasion.
- ...How your HR Manager terminates staff?
Potential violation of labour code provisions or forcing staff to resign.
- ...How your Sales Manager obtains such good results?
Potential bribery of anti-competition behaviour.
- ...Why do your products have the same price as those of your competitors?
Potential anti-competition behaviour.



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GDPR MATTERS

GENERAL DATA PROTECTION REGULATION (GDPR)

- What is the GDPR?
 - The GDPR is a regulation by which the European Parliament, the Council of the European Union and the European Commission intend to strengthen and unify data protection for all individuals within the European Union (EU).

- Effective date of GDPR?
 - 25 May 2018.

- Why important for companies in Vietnam?
 - Because the GDPR covers companies that are not located in the EU.
 - Fines can be high.



TERRITORIAL SCOPE OF THE GDPR

- Where does the GDPR apply?
 - In the EU - It will apply to the processing of personal data by controllers and processors **in the EU**, regardless of whether the processing takes place in the EU or not.
 - Outside the EU - It will also apply to the processing of personal data of data subjects in the EU by a controller or processor **not established in the EU**, where the activities relate to:
 - Offering goods or services to EU citizens (irrespective of whether payment is required); and
 - The monitoring of behaviour that takes place within the EU.



PERSONAL DATA AND CONSENT

- What constitutes personal data?
 - Any information related to a natural person or ‘Data Subject’, that can be used to directly or indirectly identify the person.
- What consent conditions apply?
 - The request for consent must be given in an intelligible and easily accessible form, with the purpose for data processing attached to that consent;
 - Consent must be clear and distinguishable from other matters and provided in an intelligible and easily accessible form, using clear and plain language; and
 - It must be as easy to withdraw consent as it is to give it.



BREACH NOTIFICATION

- When does a company has to notify a data breach?
 - Will become mandatory in all member states where a data breach is likely to “result in a risk for the rights and freedoms of individuals”;
 - Within 72 hours of first having become aware of the breach;

- Who will have to notify a data breach?
 - Each company; and
 - Data processors are required to notify their customers, the controllers “without undue delay” after first becoming aware of a data breach.



RIGHTS OF DATA SUBJECT

- Right to access
 - Controller must confirm as to whether or not personal data concerning data subject is being processed, where and for what purpose; and
 - Controller must provide copy of personal data.

- Right to be forgotten
 - Controller must erase personal data;
 - Controller must cease further dissemination of the data; and
 - Controller potentially must have third parties halt processing of the data.



RIGHTS OF DATA SUBJECT

- Right to data portability
 - Controller must provide the personal data subject provided; and
 - Data subject has the right to transmit that data to another controller.
- Privacy by design
 - Data protection should be included from the design of systems and not be an addition.

Note: Controllers should hold and process only data which are absolutely necessary for the completion of its duties (data minimisation), and limit access to personal data to those needing to act out the processing.



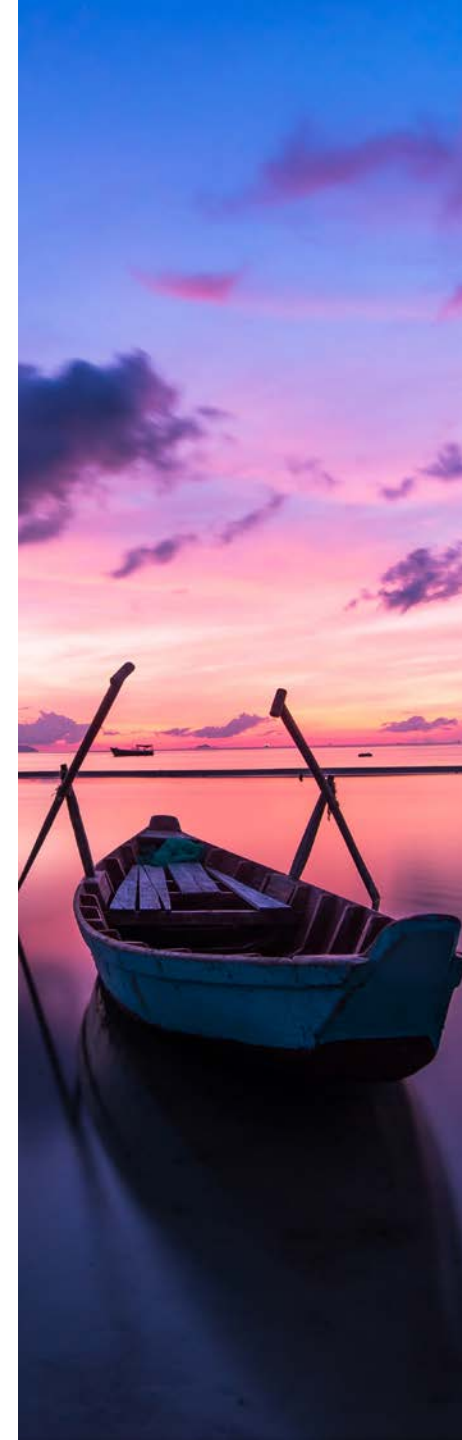
FINES

What fines can be imposed?

- Fine of up to 4% of annual global turnover or €20 Million (whichever is greater)
 - For not having sufficient customer consent to process data; or
 - Violating the core of Privacy by Design concepts.

- Fine of 2% of annual global turnover
 - For not having their records in order;
 - Not notifying the supervising authority and data subject about a breach; or
 - Not conducting impact assessment.

Note: These rules apply to both controllers and processors, meaning 'clouds' will not be exempt from GDPR enforcement.



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LABOUR MATTERS

OVERVIEW: LABOUR MATTERS

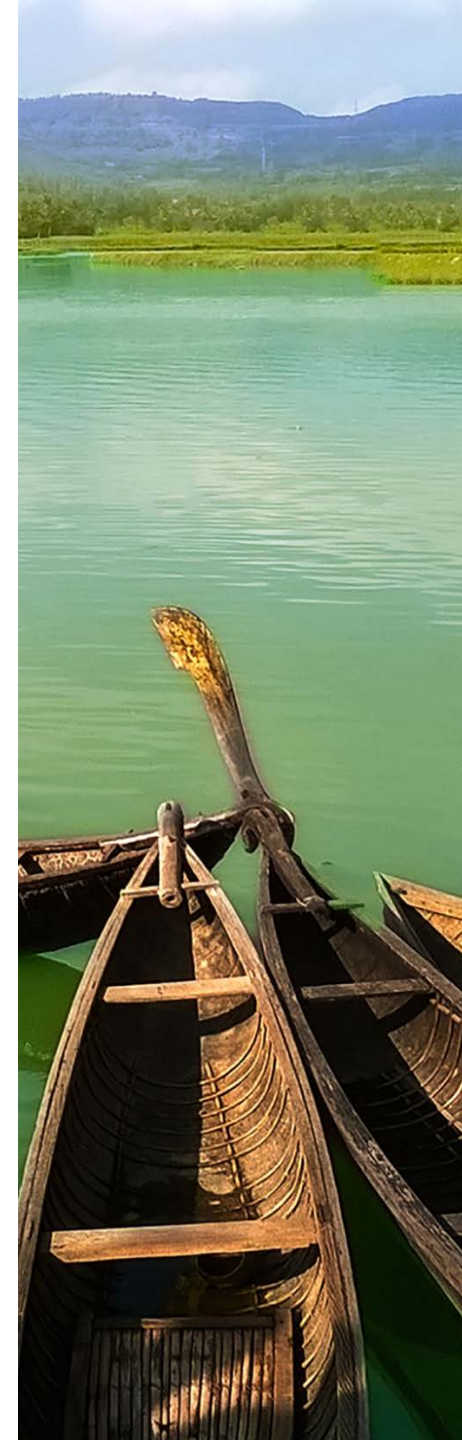
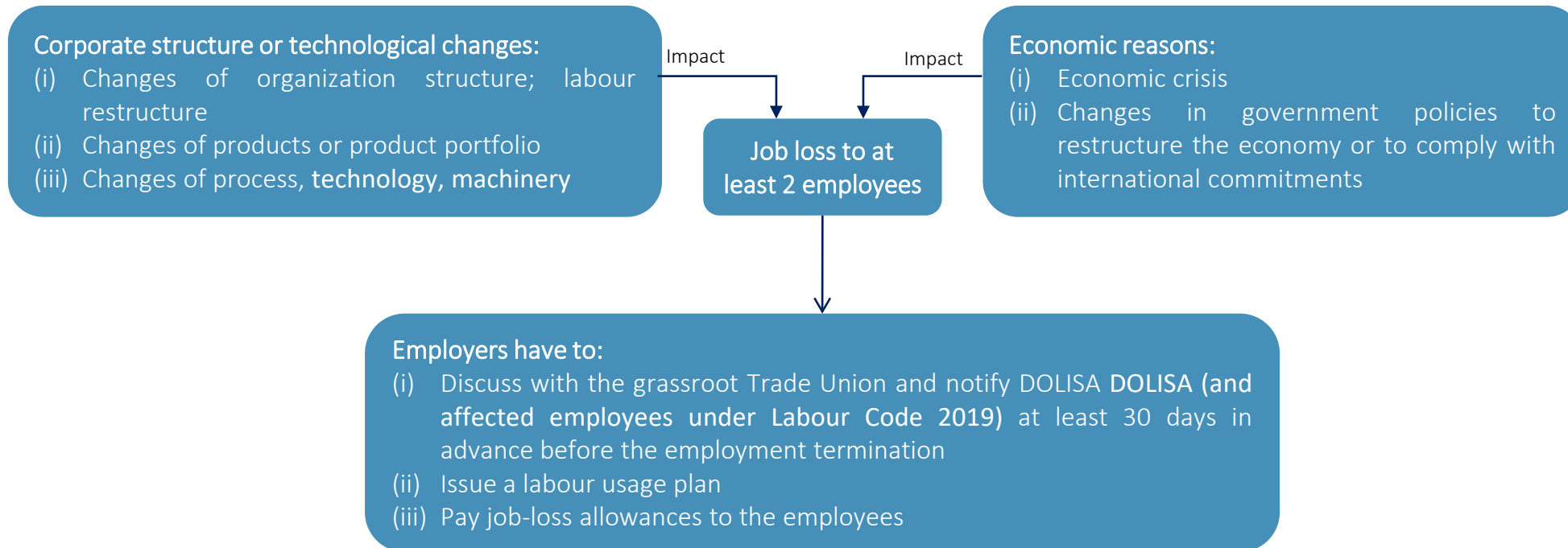
- The main legislation for this is the Labour Code 2012.
- It is generally very beneficial for employees. The biggest issue faced by employers relates to wrongful termination.
- Before a hire, an employer should always ask themselves how well they really know such potential employee. If the business/working relationship doesn't work out, there will be legal ramifications.
- A new amended law was passed yesterday, 20 November 2019, amending certain provisions, which would come into effect on 1 January 2021.



UNILATERAL TERMINATION BY THE EMPLOYER

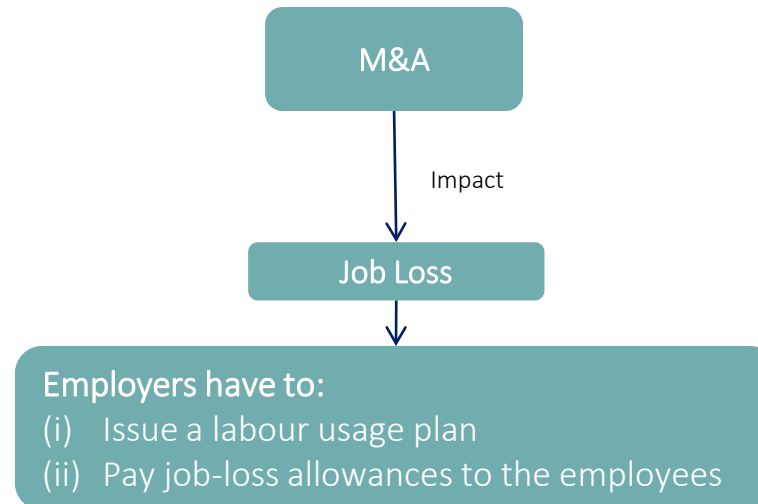
The general rule is termination must be with cause:

Cause No. 1: Unilateral termination due to corporate structure or technological changes, or economic reasons



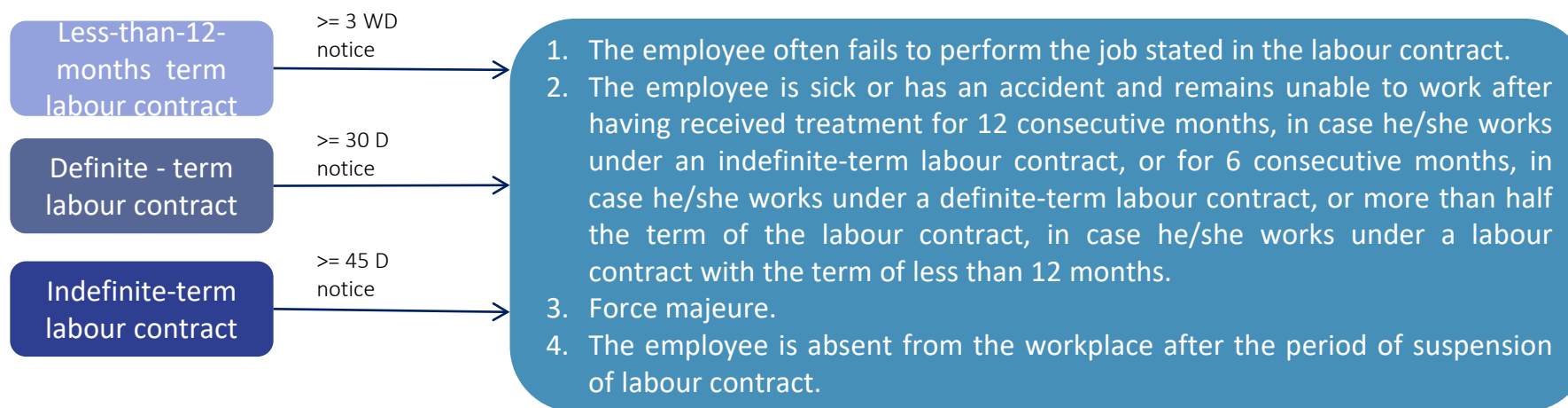
UNILATERAL TERMINATION BY THE EMPLOYER (CONTINUED)

Cause No. 2: Unilateral termination due to corporate restructuring



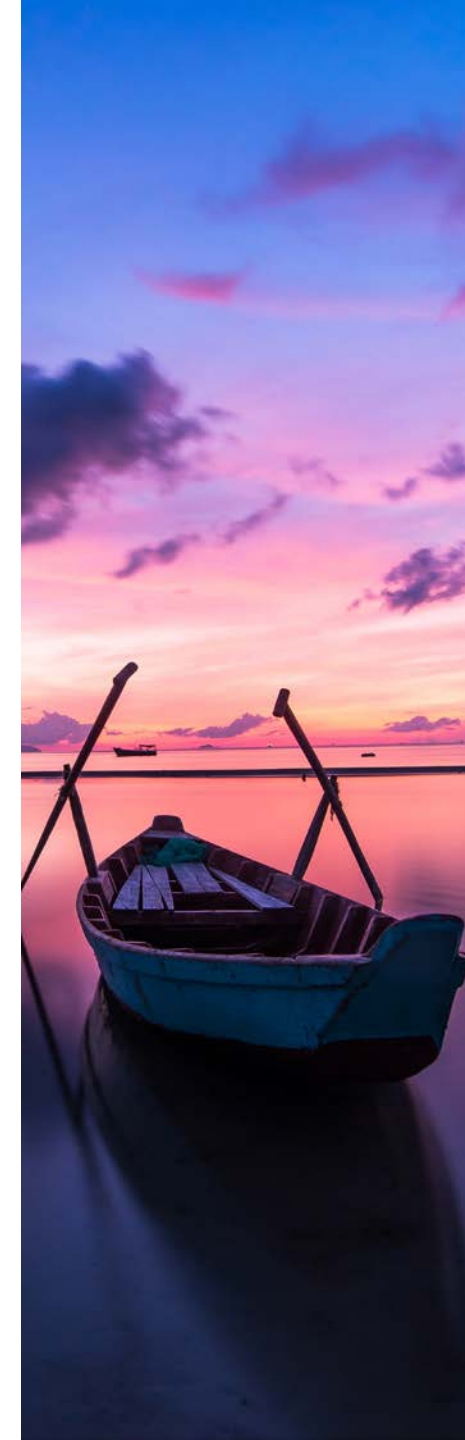
UNILATERAL TERMINATION BY THE EMPLOYER (CONTINUED)

Cause No. 3: Unilateral termination when employers **have reason AND** must comply with the **prior notice** requirement as stipulated in the Labour Code.



Note:

D: Calendar day
WD: Working day

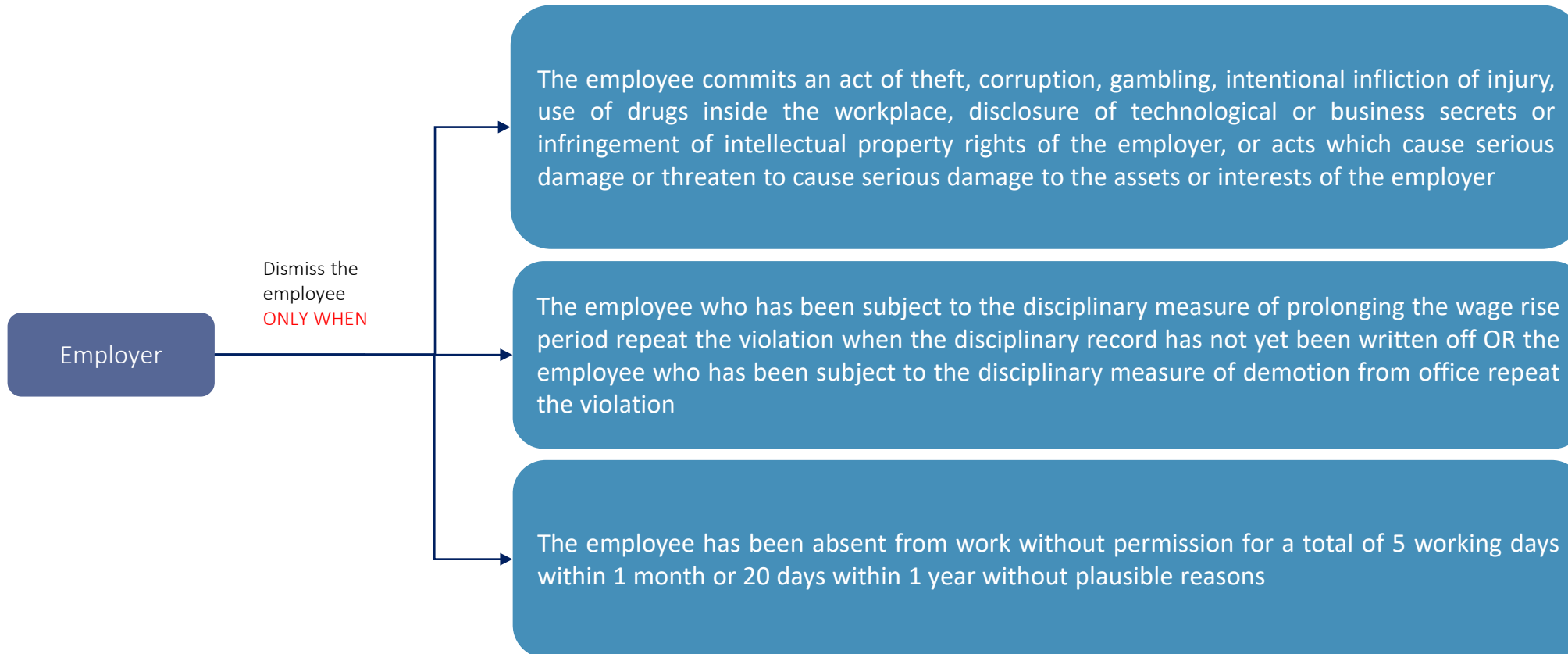


COMPARISON WITH NEW LABOUR CODE 2019 ON UNILATERAL TERMINATION BY THE EMPLOYER

Issue	Labour Code 2012	Labour Code 2019
Reasons to unilaterally terminate the labour contract	See previous slides	Additional reasons: 1. The employee reaches his/her retirement age. 2. The employee is absent from work for 5 consecutive working days without a justified reason. 3. The employee provides false information which interferes with the recruitment decision of the employer.
Prior notice	Required for <u>ALL</u> causes	A prior notice is <u>NOT</u> required for 2 causes: 1. The employee is absent from the workplace after the period of suspension of labour contract. 2. The employee is absent from work for 5 consecutive working days without a justified reason.



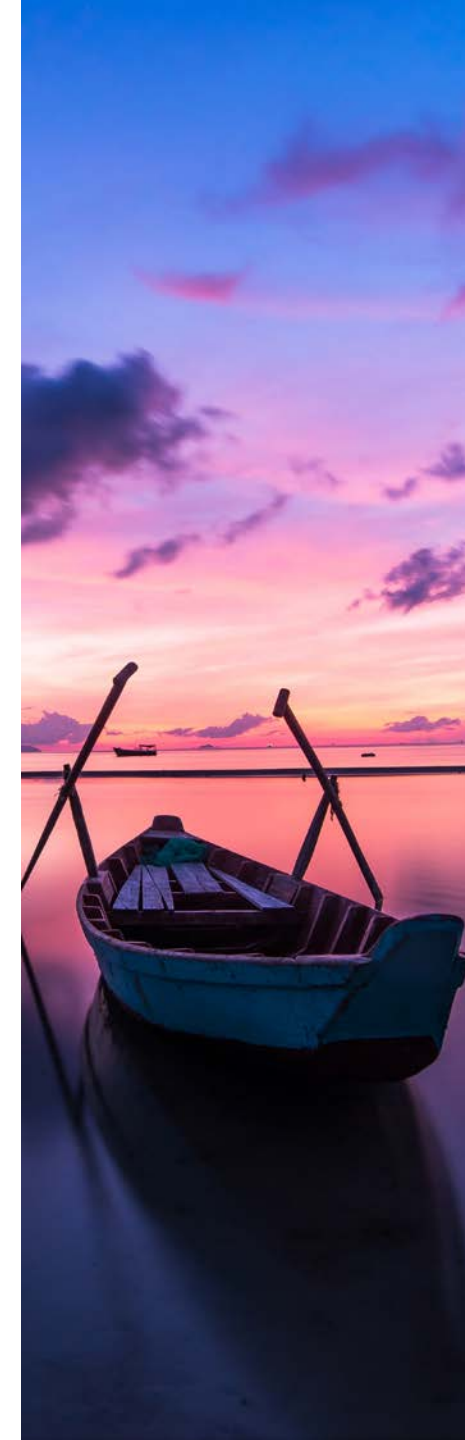
DISMISSAL BY THE EMPLOYER



COMPARISON WITH NEW LABOUR CODE 2019 ON DISMISSAL BY EMPLOYER

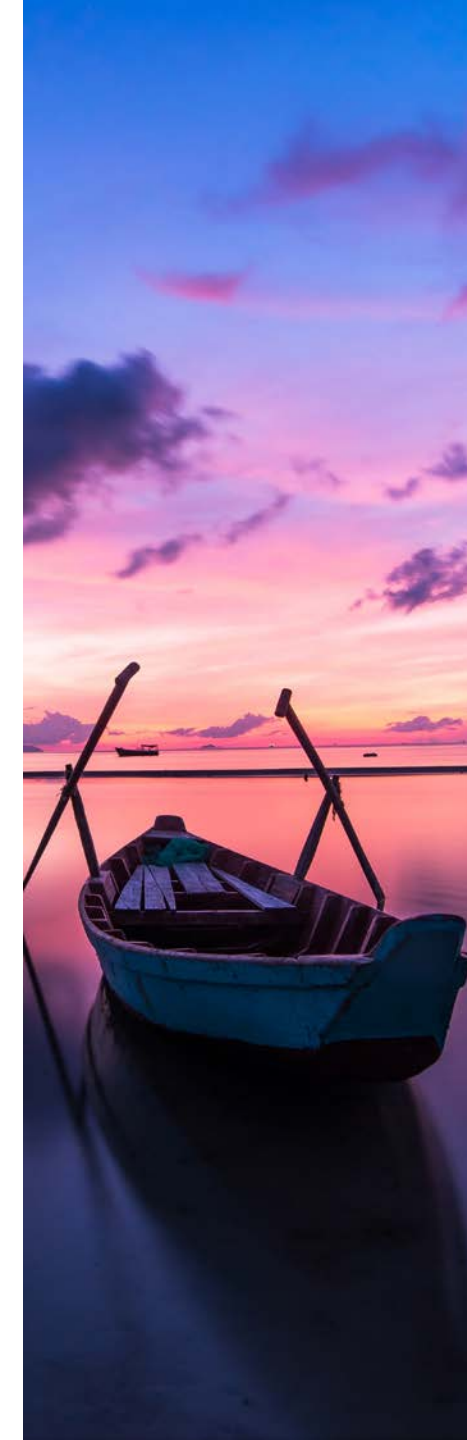
Issue	Labour Code 2012	Labour Code 2019
Reasons to dismiss an employee	N/A	Additional reason: The employee conducts sexual harassment at workplace. This content must be included in the Internal labour regulations.

In Labour Code 2019, sexual harassment at workplace shall mean “any behaviour of a sexual nature of anyone towards other(s) at workplace that is not expected or accepted by the recipient(s)”.



OTHER NOTABLE HIGHLIGHTS TO NEW LABOUR CODE 2019

Issue		Labour Code 2012	Labour Code 2019
Exempted from work permits		Owners of LLCs or BOM members of JSCs (aka. BOD directors)	Minimum contributed capital is required and shall be prescribed in detail in a guiding decree.
		Foreign students studying and working in Vietnam	<u>NO LONGER</u> exempted.
		N/A	One more subject is added: Foreign employees married to a Vietnamese citizen and living in Vietnam.
Licensing procedures	New issuance	Validity term is max. 2 years	Unchanged.
	Renewal	N/A	One time renewal is allowed.
	Re-issuance	Applicable when work permits are lost, damaged, or nearly expired or when its contents are changed	This has been removed/left vague but shall be prescribed in detail in a guiding decree.



OTHER NOTABLE HIGHLIGHTS TO NEW LABOUR CODE 2019 (CONTINUED)

Issue	Labour Code 2012	Labour Code 2019
Internal Labour Regulations (ILRs)	Confused about when a company is obliged to issue ILRs and under which form these need to be made.	<ul style="list-style-type: none"> ALL companies must issue ILRs, regardless of the number of employees. As for the companies having at least 10 employees, the ILRs must be registered with the labour authorities.
Overtime cap	<ul style="list-style-type: none"> 12 hours/day 30 hours/month 200-300 hours/year 	<ul style="list-style-type: none"> 12 hours/day 40 hours/month 200-300 hours/year
Holidays	10 days/year	11 days/year (there will be 2 days off on the Independent holiday)
Retirement age	55 for a female 60 for a male	60 for a female (to be fully applied in 2035) 62 for a male (to be fully applied in 2028)



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ANTI-CORRUPTION MATTERS

OVERVIEW: ANTI-CORRUPTION MATTERS

- Vietnam is currently ranked 117th out of 180 countries and territories on Corruption Perception Index 2018. To fight corruption, Vietnam signed the United Nations Convention Against Corruption (**UNCAC**) in 2003. On 30 June 2009, Vietnam's President signed Decision No. 950/2009/QD-CTN to ratify the UNCAC. Following the President's ratification, on 7 April 2010 the Prime Minister signed Decision No. 445/QD-TTg to approve the Plan on the Implementation of UNCAC in Vietnam, and UNCAC took effect in Vietnam as of 19 August 2009.
- Accordingly, Vietnam revised a number of important laws governing anti-corruption to comply with the UNCAC, which caused the issuance of Criminal Code 2015 and Law on Anti-Corruption 2018.
- On 1 July 2019, Decree No. 59/2019/ND-CP dated 1 July 2019 (**Decree 59**) was issued, providing specific guidance on a number of articles and measures for implementation of the Law on Anti-Corruption Law 2018, which took effect from 15 August 2019.



OVERVIEW: ANTI-CORRUPTION MATTERS (CONTINUED)

- According to Article 3.1 of Law on Anti-Corruption 2018, **“corruption” means an act committed by a person with position and/or power that takes advantage of such position and/or power for personal benefit.**
- The UNCAC governs corruption not only in public sector but also in private sector (non-state sector). This is the main difference between UNCAC and former relevant laws on anti-corruption of Vietnam. Currently, both Criminal Code and Law on Anti-Corruption have been revised to include the private sector under the scope of application of anti-corruption.
- Pursuant to Article 2.2 of Law on Anti-Corruption 2018, acts of corruption in private sector include:
 - Giving bribes or brokerage of bribery to solve the business of the enterprise or organization for personal gain;
 - Embezzlement; and
 - Accepting bribes.



OVERVIEW: ANTI-CORRUPTION MATTERS (CONTINUED)

■ Giving bribes

Definitions: cf. Article 364.1 of Criminal Code 2015

Giving bribes is directly or through an intermediary giving or promising to give any benefit to any individual or organization in order to influence the office-holder to act or not to act in the interests of or at the request of the bribe giver.

■ Embezzlement

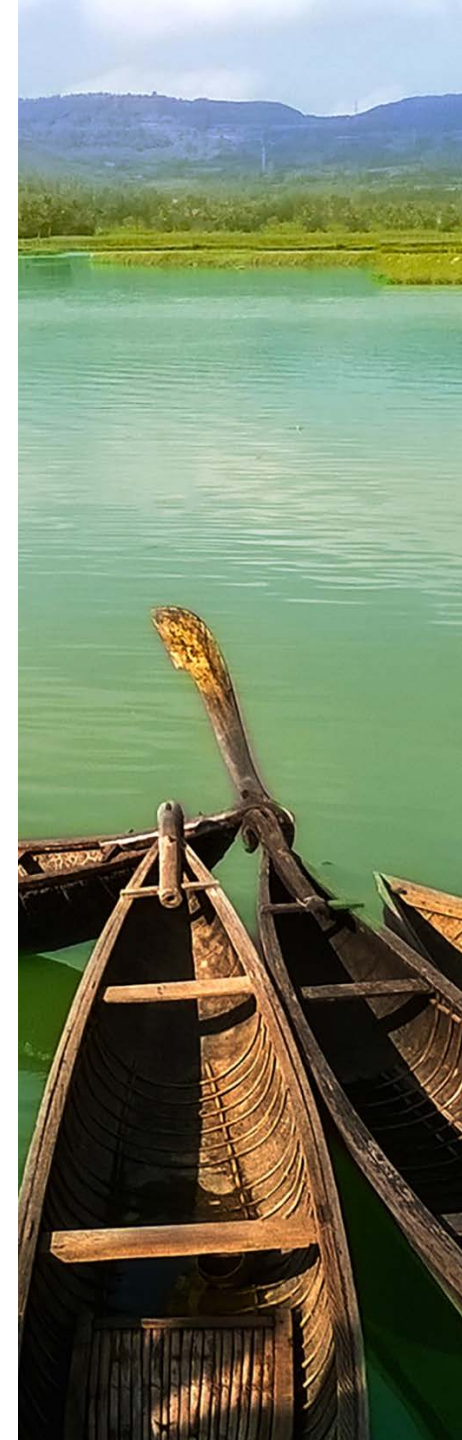
Definitions: cf. Article 353.1 of Criminal Code 2015

Embezzlement is abusing the position or power to embezzle property under the management responsibility.

■ Accepting bribes

Definitions: cf. Article 354.1 of Criminal Code 2015

Accepting bribes is abusing the position or power to directly or through an intermediary receive or promise to receive any benefit for himself/herself or for any other individual or organization to act or not to act in the interests of or at the request of the bribe giver.



NEW DECREE 59

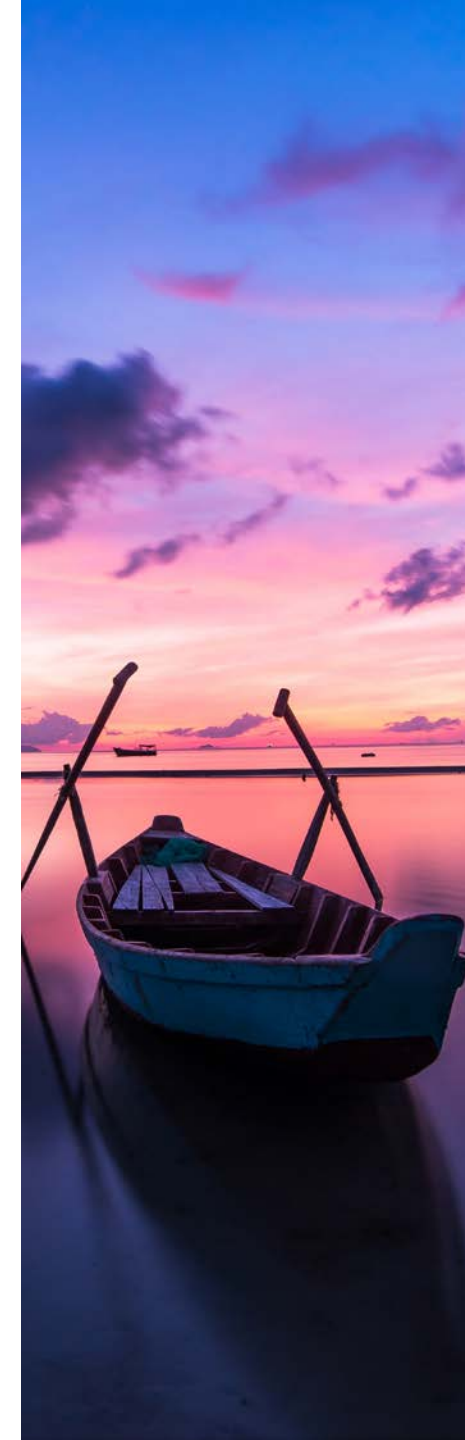
On a whole, this is in line with Vietnamese government's pronouncements to "clean up" corruption. Key highlights on Decree 59:

- Publicly traded companies and credit institutions are required to establish specific policies designed to guard against corruption.
- Publicly traded companies and credit institutions are also subject to investigation by government inspectorates from time to time to ensure compliance with the Anti-Corruption Law 2018.
- Specific prohibitions on former government officials joining certain nonstate enterprises after they resign or retire from office.
- Public Officials must now disclose all gifts received for an improper purpose, regardless of the value of the gift, and also require Public Officials to disclose their relationship with the giver of the gift.



CONSEQUENCES

No.	Violation	Non-Criminal Sanctions	Criminal Sanctions		
1.	Giving bribes	Disciplined of the labour <i>(if the Internal Labour Regulations stipulate giving bribes as a violation of the labour discipline)</i>	Minimum penalty	The material bribes valued <u>from VND 2M to under VND 100M</u>	<ul style="list-style-type: none"> • Fine (as main penalty): <u>From VND 20M to VND 200M</u>; OR • Community sentence: Up to <u>3 years</u>; OR • Imprisonment: From <u>6 months to 3 years</u>
				The immaterial bribes at any value	
			Maximum penalty	An aggravating factor applied: <ul style="list-style-type: none"> • The material bribes valued <u>from VND 1B</u> 	Imprisonment: Up to <u>20 years</u>
			Supplemented penalty		Fine: From VND 10M to VND 50M
			Acquitted of criminal responsibility and have all bribes returned		The person who is forced to give bribes but voluntarily reports the bribery <u>before being discovered</u>
			Possibly exempted from criminal responsibility and have the bribes returned entirely or partly		The person who is <u>NOT</u> forced to give bribes but voluntarily report the bribery <u>before being discovered</u>



CONSEQUENCES (CONTINUED)

No.	Violation	Non-Criminal Sanctions	Criminal Sanctions		
2.	Embezzlement	Disciplined of the labour (if the Internal Labour Regulations stipulate giving bribes as a violation of the labour discipline)	Minimum penalty	<ul style="list-style-type: none"> The embezzled property valued <u>from VND 2M to under VND 100M;</u> OR The embezzled property valued <u>under VND 2M</u> but <u>used to be disciplined</u> of the same act or <u>used to be sentenced</u> for any corruption crime for which the conviction has not been expunged 	Imprisonment: From <u>2 years to 7 years</u>
			Maximum penalty	One of aggravating factors applied: <ul style="list-style-type: none"> The embezzled property valued <u>from VND 1B;</u> Material damages valued <u>from VND 5B</u> 	<ul style="list-style-type: none"> Imprisonment: Up to <u>20 years;</u> OR <u>Life imprisonment;</u> OR <u>Death</u>
			Supplemented penalty	<ul style="list-style-type: none"> Prohibited from holding certain positions from <u>1 to 5 years;</u> OR Fine: From <u>VND 30M to VND 100M;</u> OR Confiscated of a part or whole of property 	



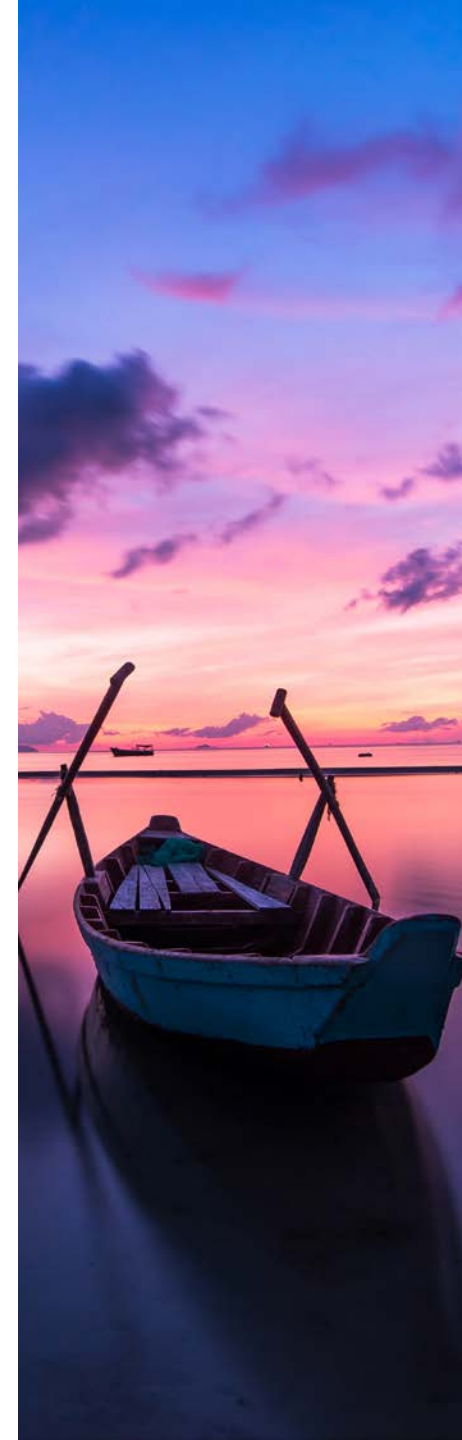
CONSEQUENCES (CONTINUED)

No.	Violation	Non-Criminal Sanctions	Criminal Sanctions		
3.	Accepting bribes	Disciplined of the labour <i>(if the Internal Labour Regulations stipulate giving bribes as a violation of the labour discipline)</i>	Minimum penalty	<ul style="list-style-type: none"> The material bribes valued <i>from VND 2M to under VND 100M;</i> OR The material bribes valued <i>under VND 2M</i> but <i>used to be disciplined</i> of the same act or <i>used to be sentenced</i> for any corruption crime for which the conviction has not been expunged 	Imprisonment: From <i>2 years to 7 years</i>
				The immaterial bribes at any value	
			Maximum penalty	One of aggravating factors applied: <ul style="list-style-type: none"> The material bribes valued <i>from VND 1B;</i> The material damages valued <i>from VND 5B</i> 	<ul style="list-style-type: none"> Imprisonment: Up to <i>20 years;</i> OR <i>Life imprisonment;</i> OR <i>Death</i>
			Supplemented penalty	<ul style="list-style-type: none"> Prohibited from holding certain positions from <i>1 to 5 years;</i> OR Fine: From <i>VND 30M to VND 100M;</i> OR Confiscated of a part or whole of property 	



CONSEQUENCES (CONTINUED)

No.	Violation	Non-Criminal Sanctions	Criminal Sanctions		
4.	Brokerage of bribery	Disciplined of the labour <i>(if the Internal Labour Regulations stipulate giving bribes as a violation of the labour discipline)</i>	Minimum penalty	<ul style="list-style-type: none"> The material bribes valued <u>from VND 2M to under VND 100M</u> <p>The immaterial bribes at any value</p>	<ul style="list-style-type: none"> Fine (as main penalty): <u>From VND 20M to VND 200M</u>; OR Community sentence: Up to <u>3 years</u>; OR Imprisonment: From <u>6 months to 3 years</u>
			Maximum penalty	<p>An aggravating factor applied:</p> <ul style="list-style-type: none"> The material bribes valued <u>from VND 1B</u> 	<ul style="list-style-type: none"> Imprisonment: Up to <u>15 years</u>
			Supplemented penalty		<ul style="list-style-type: none"> Fine: From <u>VND 20M to VND 200M</u>
			Possibly exempted from criminal responsibility		<p>The person voluntarily reports the brokerage of bribery <u>before being discovered</u></p>



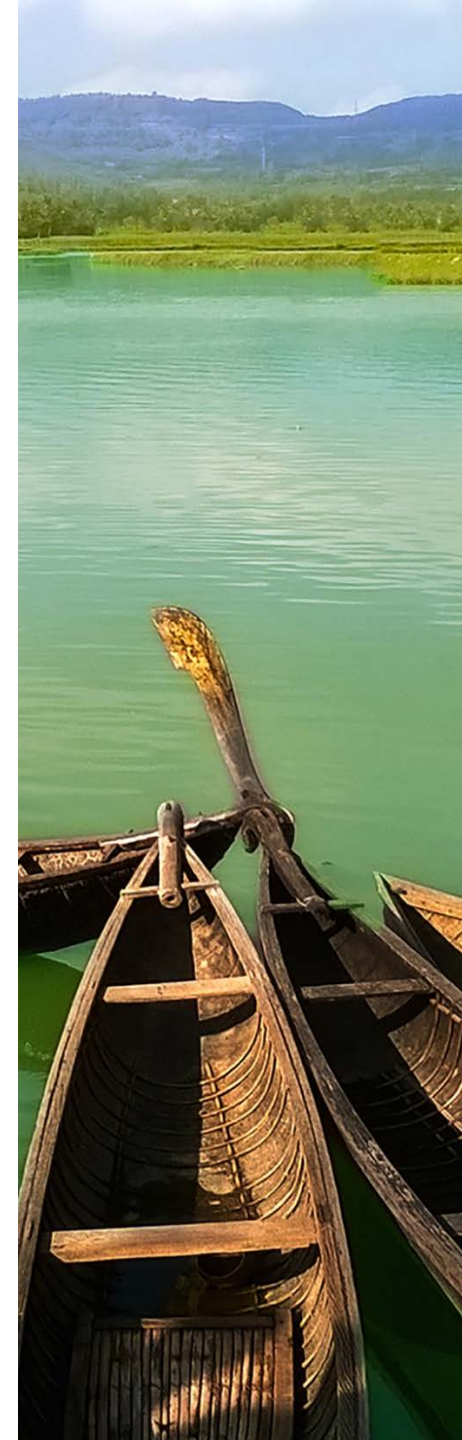
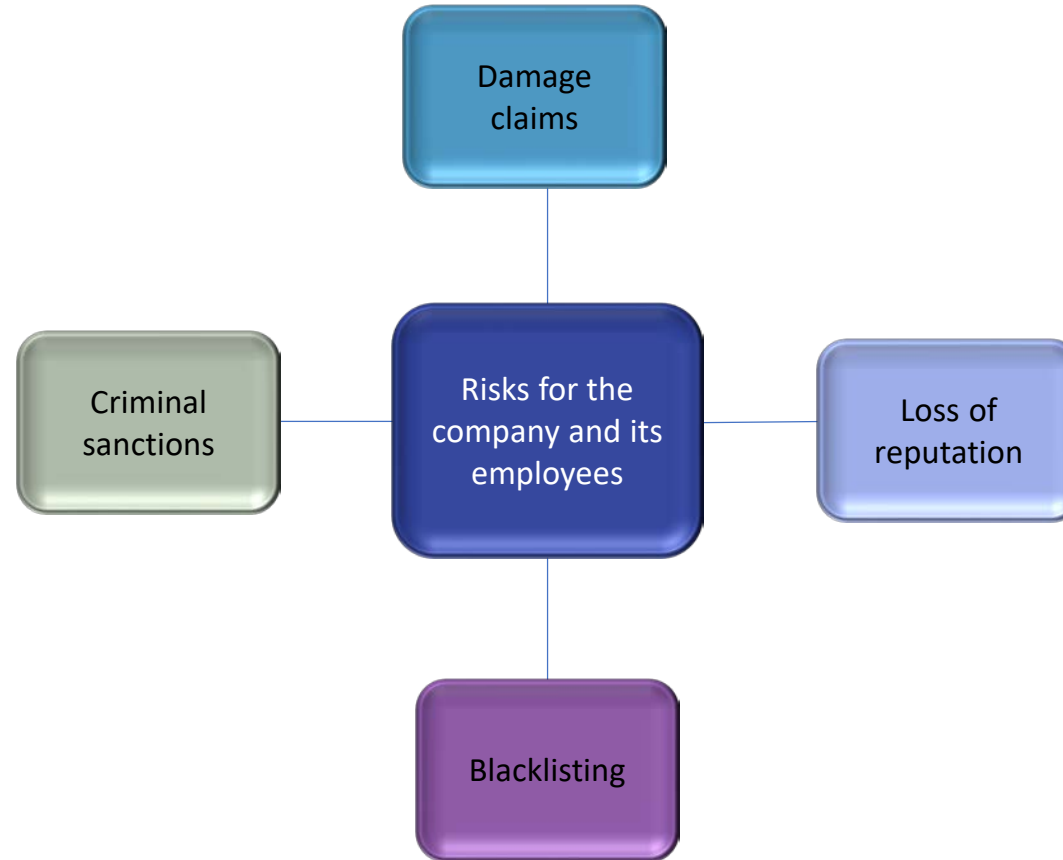
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CONCLUSION

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- Good practice to draft, implement and enforce a compliance policy.
- Appoint compliance officer.
- Include reference to compliance policy in:
 - Internal labour rules;
 - Appendix labour contract; or
 - Have every employee/relevant person in the company sign a document that he/she has read the policy and will comply with it.





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