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Abstract	Due to globalization and integration, the number of migrant workers has increased. The scramble for economic development and the shortage of labor resources are the main drivers of migration. Hence, every country has reformed its legal framework for better the management and protection of migrant workers. Vietnam exports labor and accepts many foreign professionals with high technical skills. Therefore, the management of foreign workers has gained a considerable amount of attention from the government. Visa application, work permits, resident registration, and social insurance are the main topics with regard to the management of foreign workers. Migrant workers are also known to be involved in activities causing certain legal issues, including illegal work, discrimination, and exploitation. Thus, the main question is how to develop an effective legal framework to regulate foreign workers in Vietnam. This paper analyzes the current issues in the legal framework on the management of foreign workers and their implications, particularly in the face of the current COVID-19 pandemic.
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Legal Framework on the Management of the Foreign Workers in Vietnam

Phan Thi Lan HUONG¹⁾

1. Introduction
2. Difficulties and challenges in working in Vietnam
3. Emerging issues
4. Conclusion and recommendation

Abstract

Due to globalization and integration, the number of migrant workers has increased. The scramble for economic development and the shortage of labor resources are the main drivers of migration. Hence, every country has reformed its legal framework for better the management and protection of migrant workers. Vietnam exports labor and accepts many foreign professionals with high technical skills. Therefore, the management of foreign workers has gained a considerable amount of attention from the government. Visa application, work permits, resident registration, and social insurance are the main topics with regard to the management of foreign workers. Migrant workers are also known to be involved in activities causing certain legal issues, including illegal work, discrimination, and exploitation. Thus, the main question is how to develop an effective legal framework to regulate foreign workers in Vietnam. This paper analyzes the current issues in the legal framework on the management of foreign workers and their

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implications, particularly in the face of the current COVID-19 pandemic.

1. Introduction

1.1 Overview of foreign workers in Vietnam

Like other Asian countries, Vietnam is not only a country that exports labor but also a destination for foreign labor migration mostly from China and other Asian countries. In 2005, Vietnam had only 12000 foreign workers; this number increased to 55.4 thousand in 2010, 83.6 in 2015, and 117.8 thousand in 2019.²⁾ Foreigners working in Vietnam are often concentrated in big cities or areas with industrial development zones, such as Binh Duong or Dong Nai and Hai Duong. The number of male workers is around 70,000 and female workers around 13,500. In 2018s, the number of foreign workers was around 80,000; of them, 90% had obtained work permits, and around 10% were exempted or were still applying.³⁾ About 93,425 foreigners had been working in Vietnam as of June 26, 2020. The workers who occupied mid-management to senior management and expert roles accounted for 77.95% of the total of foreign workers, and the technical workers were about 22.05% of the total number of foreign workers.⁴⁾

Due to an increase in the number of free trade agreements, further economic development, globalization, and integration, the number of foreign workers in Vietnam is projected to increase. This projection is further supported by the ASEAN Economic Community initiative to enable the free flow of skilled labor between the member states. Thus, the economic effect of increased trade will have a direct impact on migration be-

2) “Lao động nước ngoài ở Việt Nam qua con số thống kê,” accessed January 25, 2022, <http://conso-sukien.vn/lao-dong-nuoc-ngoai-o-viet-nam-qua-con-so-thong-k.htm>.

3) hội Báo Công Thương, “Tăng cường quản lý lao động nước ngoài làm việc tại Việt Nam | Báo Công Thương,” Báo Công Thương điện tử, kinh tế, chính trị, xã hội, December 26, 2018, <https://congthuong.vn/tang-cuong-quan-ly-lao-dong-nuoc-ngoai-lam-viec-tai-viet-nam-114013.html> (Ministry of Trade and Industry E-Journal, Enhancing management of foreign workers in Vietnam).

4) VietnamPlus, “Over 93,000 Foreigners Working in Vietnam | Society | Vietnam+ (VietnamPlus),” VietnamPlus, August 31, 2020, <https://en.vietnamplus.vn/over-93000-foreigners-working-in-vietnam/182136.vnp>.

tween the member countries.⁵⁾ Moreover, the migrant labor trend aligns with the foreign investment trend in Vietnam. As the number of foreign direct investment projects increases in Vietnam,⁶⁾ the number of skilled foreign workers will also increase since the labor market of Vietnam will require more skilled laborers. For example, in 2015, the percentage of skilled workers in Vietnam was only 40%, and only 30% received vocational training.⁷⁾

In 2019, the Labor Code of Vietnam was amended, and regulations on foreign workers have changed accordingly. Hence, visa applications, work permits, and resident registration have played an important role in the management of foreign workers as they closely relate to the civil rights of workers. Foreign workers may face difficulties in implementing their rights when living in foreign nations, such as illegal overtime, unpaid wages, dangerous working conditions, confiscation of passports, prohibitions on having cellphones, and discrimination, especially during the COVID-19 pandemic. Conversely, an increase in the number of foreign workers also causes many social issues relating to crime or public safety. Therefore, the question of how to manage and protect the foreign workers in Vietnam remains.

1.2 Current procedures to work in Vietnam

Legal frameworks on the management of foreign workers include the 2014 Law on Entry, Exit, Transit, and Residence of foreigners in Vietnam (hereinafter referred to as Law on immigration, amended in 2019), the 2012 Labor Code (amended in 2019), and the 2014 Law on Social Insurance. This section will analyze the current issues related to foreign workers, which are considered as the obstacles in the management and protection of their rights in Vietnam.

5) "From Humanitarian to Economic: The Changing Face of Vietnamese Migration," accessed September 30, 2016, <http://www.migrationpolicy.org/article/humanitarian-economic-changing-face-vietnamese-migration>.

6) "Vietnam's FDI Outlook for 2016: Trends and Opportunities," Vietnam Briefing News, February 16, 2016, <http://www.vietnam-briefing.com/news/vietnamese-fdi-2016-outlook.html/>.

7) "More Skilled Workers Needed," vietnamnews.vn, accessed October 3, 2016, <http://vietnamnews.vn/opinion/254353/more-skilled-workers-needed.html>.

The current procedure for recruiting foreign workers in Vietnam includes the following.

1.2.1 Applying for approval to recruit foreign workers

At least 30 days before the date on which foreign workers are expected to be employed, the employer (except contractor) shall determine the demand for foreign workers for every job position for which Vietnamese workers are underqualified and send a corresponding report to the Ministry of Labour–Invalids and Social Affairs or the People’s Committee of the province or the central-affiliated city (hereinafter referred to as province) where the foreign workers are expected to work (Article 4, Decree No.152/2020).⁸⁾ Notably, online applications are allowed under Circular No. 23/2017/TT-BLĐTBXH, dated August 15, 2017. At least 20 days before the planned date of employment of the foreign workers, the employer (excluding contractors) must submit the declaration and explanation about his/her demand for employment of foreign workers, and within 12 days from the receipt of the declaration and explanation or report on change in demand for the employment of foreign workers, the approving authority must respond by sending an email to the employer (Article 6). However, the employer shall by hand or by post submit the original explanation and/or report to the approving authority for verification and retention as regulated.

1.2.2 Applying for a work permit or exemption of work permit

The employer needs to submit an application to the Department of Labor, War Invalids, and Social Affairs for work permits for the foreigners. Decree No. 152/2020, which replaced Decree No. 16/2016, determines the documents to submit for the work permits. These documents are as follows:

- (1) An application form.
- (2) A health certificate issued by a competent foreign or Vietnamese health facil-

8) Decree No.152/ND-CP on foreign workers working in Vietnam and recruitment and management of Vietnamese workers working for foreign employers in Vietnam, dated 30 December 2020.

- ity issued within 12 months before the submission date of the application, or a certificate as specified by the Minister of Health in the regulations.
- (3) A criminal record certificate or a document certifying that the foreign worker is not serving a sentence has a criminal record expunged or is not facing criminal prosecution issued by a foreign or Vietnamese authority. The certificate or document certifying that the foreign worker is not serving a sentence has a criminal record expunged or is not facing criminal prosecution must be issued within 6 months before the submission date of the application.
 - (4) Proof of being a manager, executive, expert, or technical worker.
 - (5) 02 color photos (4 × 6 cm size, white background, front view, bare head, and no color glasses), taken within 6 months before the submission date of the application.
 - (6) An acceptance of demand for foreign workers, unless it is not required.
 - (7) A valid certified true copy of passport as per the law.
 - (8) Documents relevant to the foreign worker:

According to this provision, foreign workers must submit the proofs of being managers, executives, experts, or technical certificate holders. There are specific requirements for each position (as per Article 3, Decree No. 152/2020) :

- (1) “Expert” means a foreign worker who a) obtains at least a bachelor’s degree or equivalent and at least 03 years of experience in his/her training field corresponding with the job position/job assignment that he/she will be appointed to in Vietnam, b) obtains at least 5 years of experience and a practicing certificate corresponding with the job position that he/she will be appointed to in Vietnam, or c) falls under a special case, subject to the decision of the Prime Minister, following the request of the Ministry of Labour–Invalids and Social Affairs.
- (2) “Manager” means a person in charge of the management of an enterprise as prescribed in clause 24, Article 4 of the Law on Enterprises, or the head or deputy head of an agency or organization.
- (3) “Executive” means the head of a person who directly administers affiliated

entities of an agency, organization, or enterprise.

- (4) “Technical worker” means a foreign worker who a) has been trained in a technical field or another major for at least 1 year and has worked for at least 3 years in his/her training field or b) obtains at least 5 years of experience corresponding with the job position that he/she will be appointed to in Vietnam.

1.2.3 Applying for a visa

To apply for a visa, employers must invite or sponsor foreigners within the functions, tasks, and entitlements prescribed by law or by the operating licenses issued. The inviting entity shall directly apply for the visa in the immigration authority. Notably, the first time an entity is a sponsor, the company must send a written notification to the immigration authority together with a dossier consisting of a) a certified copy of the license or decision of the competent authority on the establishment of the organization and b) a document introducing the seal and signature of a competent person of the organization.

To work in Vietnam, the migrant workers must apply for a working visa (LD visa) as a compulsory requirement (excluding the case of visa exemption prescribed by law). The Law on Immigration defines the conditions of an LD visa (working visa) as follows: A visa may be used once or multiple times, and its purpose must not be changed.”⁹⁾

However, the new amendment Law, Article 7, Law on Immigration (amended in 2019) provides that a visa of an individual cannot be repurposed, except for the following cases:

- a) He/she presents a document proving to be an investor or a representative for a foreign organization investing in Vietnam as per the law of Vietnam.
- b) He/she presents a document proving his/her relationship with the person he/

9) Law on Entry, exit, transit, and residence of foreigners in Vietnam, No. 47/2014/QH13, hereinafter referred to as Law on Immigration, Article 7.1.

she is inviting or sponsoring, including parents, spouse, and children.

- c) He/she is invited or sponsored by agencies or organizations and presents a work permit or confirmation of eligibility for work permit exemption according to labor laws.
- d) He/she makes entry by electronic visa and presents a work permit or confirmation of eligibility for work permit exemption according to the labor laws.

1.2.4 Applying for a temporary residence card

To stay in Vietnam, foreign workers must also apply for a temporary residence permit. This permit will be issued by appending a seal in their passports or separate visas within certain time limits. The duration of the certificate of temporary residence is the same as that of the visa. Any foreigner that temporarily resides in Vietnam must, via the manager of the lodging establishment, declare his/her temporary residence at the local police authority.¹⁰⁾

An application for the temporary residence card consists of the following:

- a) A written request from the inviting entity.
- b) A declaration bearing a picture certified by the police office where the foreign worker lives.
- c) The worker's passport.
- d) Papers proving the status mentioned, for example, work permit certificate.

2. Difficulties and challenges in working in Vietnam

Although Vietnam has developed a legal framework for the management of foreign workers, foreign workers still face many difficulties.

2.1 Conflict of regulations related to work permit and visa application

Article 152 of the Labor Code provides for the requirements for the employment of

10) Law on Immigration, Article 37, Procedures for issuance of temporary residence card.

foreigners in Vietnam: (1) Enterprises, organizations, individuals, and contractors shall only employ foreigners to hold positions of managers, executive directors, specialists, and technical workers, the professional requirements **for which cannot be met by Vietnamese workers**. This indicates the strict conditions for working in Vietnam. Furthermore, the requirement of 3 years of work experience is also considered an obstacle for employers when recruiting staff. For example, when recruiting a Japanese teacher, it is very difficult to attract a person who has 3 years of teaching experience. In addition, foreign workers must prove their work experience by submitting certifications to employers. In situations where they had worked for different companies for 3 years, they are obligated to get certificates from all companies. If they do not have work experience certifications, they will not receive work permits. Consequently, they cannot work in Vietnam.

Work available to foreigners in Vietnam takes several forms: a) performing employment contracts; b) performing intra-company transfer program; c) performing contracts or agreements on business, trade, finance, banking, insurance, science and technology, culture, sports, education, vocational training, and health; d) providing services under contracts; e) offering services; f) working for foreign non-governmental organizations or international organizations in Vietnam that have been granted operating licenses following Vietnamese law; g) working as volunteers; h) taking charge of establishing their commercial presence; i) **working as managers, executives, experts, and technical workers**; k) performing packages or projects in Vietnam; or l) accompanying members of foreign representative bodies in Vietnam who are authorized to work in Vietnam under an international treaty to which the Socialist Republic of Vietnam is a signatory (Article 2 (1), Decree No.152/2020).

Foreign workers must also apply for work permits and residence registration in the competent authorities in Vietnam. Article 10 of the Law on Immigration defines conditions for issuing LD (working visas) for migrant workers when they have *work permits under the Labor Code*. These conditions include the application for work permits before entry into Vietnam. However, foreign workers have faced numerous difficulties in applying for visas and work permits as they often cannot obtain a work permit be-

fore entering Vietnam to apply for a work visa.

To work in Vietnam, a foreign worker needs to apply for a work visa (LD) as Article 7.1 states that the purpose of a visa cannot change.¹¹⁾ In addition, Article 10 defines conditions for issuing a visa: *(c) Any foreigner who comes to work in Vietnam must have work permits under the Labor Code*. This means that a foreign worker needs to apply for or submit a work permit before applying for a work visa (LD visa). However, a foreigner may not obtain a work permit before coming to Vietnam. The work permit is often issued after the foreigner comes to Vietnam.

Article 9 of Decree 152/2020 regulates the application procedure for a work permit, and it is a very complicated procedure. The competent organs responsible for issuing LD visas are the Department of Immigration (Ministry of Public Security) and the Immigration Office (Police Department of Province level) where organizations/companies have offices. On the contrary, the work permit will be issued by the Department of Labor, Invalid, and Social Affairs (DOLISA). However, there is a lack of cooperation between the two State organs for issuing visas and work permits to foreign workers before entry to Vietnam. In general, foreign workers can only obtain a 3-month visa (LD visa) to enter Vietnam and complete the application for a work permit and temporary residence registration. The question of whether a foreigner should apply for a work permit or visa first remains. How can they apply for a work visa without a work permit?

2.2 Submission of documents

The documentary requirements under Decree No 152/2020 have caused some problems for foreign workers, especially Japanese workers. For example, a foreign worker who wants to obtain a work permit as an expert must submit a document supporting that he/she is a bachelor's degree holder. However, there is a difference in the application of these regulations if the foreign worker can only submit a "certificate of university graduation." According to the DOLISA, a "certificate" is not acceptable, and foreign work-

11) Law on *Entry, exit, transit, and residence of foreigners in Vietnam*.

ers must submit a “Degree.”¹²⁾ As a result, foreign workers cannot obtain the work permit. Moreover, if a foreign worker wants to apply for a “manager” or executive position, the company must submit proof of this position. For example, if a foreign worker will work as the head of the personnel department and will not be designated to the “manager” or executive position, he/she can only apply for a position as an expert. This regulation restricts foreign workers from working in Vietnam. For example, a Japanese worker may not have a bachelor’s degree to obtain a work permit as an expert or a manager because he/she is not eligible for these positions according to the regulations (although the worker has 20 years of experience in personnel management but does not have a bachelor’s degree of personnel management).

The regulations also provide that all documents must follow the procedures for consular legalization and certification of documents: *“Any document mentioned in clauses 2, 3, 4, 6 and 8 hereof is 1 original or certified true copy; for documents of foreign countries, unless they are exempt from consular legalization under an international treaty to which the Socialist Republic of Vietnam and the concerned foreign country are signatories or under the principle of reciprocity or as per the law, they must be consular legalized, translated into Vietnamese and certified.”* (Article 9 (10), Decree No.152/2020).

The period for obtaining a work permit is often 1 month, and the employer needs to submit the application documents at least 15 days in advance. Then, the work permit will be issued within 5 days (Article 11, Decree No.152/2020). However, it often takes more than a month to get a work permit as the employer needs to get different documents from the competent authorities/departments, such as certified/official criminal records from the consular office and criminal records issued by the Department of Justice at a provincial level where the foreign worker has previously visited Vietnam.

Especially during the COVID-19 pandemic, the Vietnamese agency, organization, or enterprise or the foreign organization or enterprise operating in Vietnam where the for-

12) The Japanese Embassy submitted proposal to the Ministry of Labour – Invalid and Social Affairs to solve this issue.

foreign worker is expected to work must ask for approval from the Department of Health to approve the worker's entry to Vietnam. Approval must be obtained from the Department of Health and submitted to the DOLISA.

Following Article 9 of Decree 152/2020, the documents to be submitted to DOLISA include a health certificate or report on medical examination issued by authorized foreign or Vietnamese health organizations or agencies as well as the criminal records. If the foreign worker is a legal resident in Vietnam, only the criminal record issued by the competent Vietnamese authority is required. According to these regulations, foreign workers must apply for criminal records issued by the Department of Justice. In principle, the Law on Criminal Record 2009 defines the time limit for the issuance of a foreigner's criminal record as 15 days (Article 48). However, because most of the Justice Departments in Vietnam are not able to issue the criminal record within the time limit prescribed by law, cases of late issuance are quite high (they have risen from 39% to 62% in seven provinces).¹³⁾ On average, it takes nearly 2 months for foreign workers to get a work permit as they must submit other documents issued by different authorities. Therefore, the foreign workers may be deported or forced to leave Vietnam after entry without a work permit. Article 153 (2) of Labour Code 2019) provides that "*Any foreign employee working in Vietnam without a work permit shall be deported or forced to leave Vietnam by immigration laws.*" "The process of applying for a work permit is often lengthy and complicated, requiring many documents stamped by just as many entities. Health checks, criminal history checks, proof of qualifications (and that means the original certificate of higher education qualifications; yes, the one you have hanging on your wall at home or in your office)."¹⁴⁾ The question of whether the employer should apply for a work permit before signing the probation contract or after remains. This is a valid question because if the employer signs the probation contract with foreign workers without a work permit, it will be considered an invalid contract,

13) Cấp phiếu lý lịch tư pháp, cách nào tiện cho dân, <http://vnexpress.net/tin-tuc/phap-luat/cap-phieu-ly-lich-tu-phap-cach-nao-tien-cho-dan-3398864.html> accessed 29 September 2016.

14) Brett Davis, "Vietnam Eases the Way for Foreign Workers," *Forbes*, accessed October 1, 2016, <http://www.forbes.com/sites/davisbrett/2016/02/21/vietnam-eases-the-way-for-foreign-workers/>.

as was the case in Windsor Company and Mr. Fields (from the United Kingdom).¹⁵⁾

2.3 Conflict of duration between a work permit and a contract

The duration of the certificate of temporary residence is the same as that of the visa. If the duration of the visa is not longer than 15 days, the duration of the temporary residence permit shall be 15 days. If the visa symbol is DT or LD,¹⁶⁾ the duration of the temporary residence permit shall not exceed 12 months, and the issuance of a temporary residence card shall be considered (Article 31, Law on Immigration). Furthermore, Article 38, paragraph 4 of Law on Immigration determines that the duration of an LD or PV1 temporary residence card shall not exceed 2 years. Therefore, the duration of the residence permit is a maximum of 2 years. Article 155 of the Labor Code provides that *“The maximum duration of a work permit is 02 years. A work permit may be extended once for up to 02 more years.”* Article 10 of Decree 152/2020 states that the validity period of a work permit shall not exceed 2 years and be equal to the duration of the labor contract to be signed. According to Article 20 of the 2019 Labor Code, the type of labor contract includes 1) indefinite-term labor contract and 2) definite-term labor contract (12–36 months). Article 22 also stipulates that “In case the two parties enter into a new labor contract with a definite-term, only one additional definite-term labor contract may be signed; after that, if the employee continues working, an indefinite-term contract must be entered into.” However, if the duration of the labor contract is 3 years, it also requires the foreign worker to extend the duration of the work permit and the residence permit if they continue to work in Vietnam after 2 years. This conflict between the duration of work permits and contracts remains a complicated procedure for foreign workers. If the duration of a work permit is defined as the same as the duration of the labor contract, a foreigner does not need to re-apply for a work permit or a residence permit.

15) The case will be discussed in session 3 of this article.

16) DT and LD (investment and working visa).

2.4 Strict conditions for changing work purpose

Under the Law on Immigration 2014, foreign workers cannot apply to change the purpose of work when they are in Vietnam: “*A visa may be used once or multiple times and its purpose must not be changed*” (Article 7.1). When a foreign worker enters Vietnam under a work visa, his/her employer must submit a visa application form to the immigration office mentioning the purpose of the work, for example, working for company A. Then, if he/she wants to work for company B, he/she must go back to their home country or another country and re-apply for another work visa. For a foreigner who comes to Vietnam to study, he/she must also leave Vietnam and re-apply for a work visa. This regulation causes difficulty to foreign workers who wish to work in Vietnam. It is also a time- and money-consuming process.

To apply for an LĐ visa, foreign workers must submit a written request for the work permit *made by the employer* according to the regulations of the Ministry of Labour–Invalids and Social Affairs (Article 9, Decree 152/2020). However, Article 7.1 of the Law on Immigration determines that the purpose of entry cannot change, and a work visa is also needed. There is some ambiguity as to what foreign workers should do in case they change their job/position to one that is not the same as defined in their original work permit. Hence, in 2019, the amended Law on Immigration provides for some exceptional cases in which the purpose of the work visa can be changed: a) if the worker presents a document proving to be an investor or a representative for a foreign organization investing in Vietnam as per the law of Vietnam; b) if the worker presents documents proving his/her relationship with a person inviting or sponsoring, for example, parents, spouse, children; c) if the worker is invited or sponsored by agencies or organizations and presents a work permit or confirmation of eligibility for work permit exemption according to the relevant labor laws; and d) if the worker makes entry by electronic visa and presents a work permit or confirmation of eligibility for work permit exemption according to the relevant labor laws. However, this change cannot solve the aforementioned problem. Moreover, if foreigners came to Vietnam for study or travel purposes, they are not allowed to change their visa purpose. The regulation causes problems for foreign workers as it is time- and money-consuming.

2.5 Access to social insurance

Article 2, section 2 of the 2014 Law on Social Insurance provides that “*Employees who are foreign citizens working in Vietnam with work permits or practice certificates or practice licenses granted by Vietnamese authorities shall be covered by compulsory social insurance under the Government’s regulations.*” Therefore, foreign workers must pay for compulsory social insurance when they are working in Vietnam. Decree No. 143/2018 dated 15 October 2018 also stipulated that employees who are foreign nationals working in Vietnam shall be required to participate in the compulsory social insurance program if they obtain work permits, practicing certificates, practicing licenses issued in Vietnam, indefinite-term employment contracts, or employment contracts valid for at least 1 year with employers in Vietnam (Article 2, section 1). Compulsory social insurance benefits include sickness, maternity, occupational accident, disease, retirement, and death insurance benefits. Foreign workers will pay for compulsory social insurance accounting for 8% of their monthly retirement and death benefits from January 1, 2022 (Article 12, section 1). Then, foreign workers has started to pay for social insurance covering sickness, maternity, occupational accident, and disease in December 1, 2018.

Regarding social insurance of foreign workers, the following issues remain:

First, the calculation of the date to access social insurance: The date to access social insurance is different from the date of the granted work permit since the issued date of work permit is often later than 2 months (in practice) in comparison with the date of signing of the labor contract.

Second, it is difficult to calculate the retirement benefit for foreign workers at the end of their employment in Vietnam and their subsequent move to other countries for work: the question is can they transfer their retirement benefits? Decree No. 143/NĐ-CP only provides that foreign workers can apply for payment of retirement benefits when their work permits have expired. Article 15 defines the processes for handling the one-off social insurance benefit payment:

- + Within 10 days before the employment contract is terminated or the labor permit, practicing certificate, or practicing license expires (whichever comes

first), if the employee does not continue to work under an employment contract or does not apply for the renewal of his/her permit, certificate or license, and he/she wishes to receive the one-off social insurance benefit payment, he/she shall be required to submit necessary application documents to the social insurance agency.

- + Within 5 working days from the date of receipt of all the required documents, the social insurance agency shall be responsible for processing employees' applications and paying social insurance benefits to employees. In case of refusal, a written response with clearly stated reasons must be given.

It is difficult for foreign workers to continuously apply for retirement benefits if they have changed their places of work (countries) several times.

Third, double labor contracts also cause difficulties in accessing social insurance and will be subject to sanctions.

Regarding labor contracts, foreign workers working in Vietnam can be divided into the following categories: 1) those recruited directly by Vietnamese companies, 2) those recruited by a company in their home country, and 3) those recruited by the company of a third country (e.g., Japanese working for a Singapore Company, which has an office in Vietnam). According to the Labor Code, the employer must sign a labor contract with the employees, and the duration of the labor contract is 12 to 36 months (identified-term contract). However, it is a fact that foreign workers also need to sign another contract with the company in their own countries based on these countries' labor laws. Thus, foreign workers have to comply with two legal systems; therefore, they are under double contracts and must make double payments of social insurance. The question remains of whether a foreign worker has a right to choose the country in which he/she applies for social insurance if both countries' laws define social insurance as compulsory remains. Notably, compulsory social insurance is considered as the obligation of both the employer and employee, and they will be sanctioned in cases of nonpayment or delayed payment of social insurance or where there is a failure to apply for social insurance.¹⁷⁾

Fourth, foreign workers can face the possibility of double payment for social insur-

ance:

Social insurance has been compulsory for foreign workers since 2022. However, if a foreign worker has already paid for social insurance in his/her home country, can he/she refuse to apply for social insurance in Vietnam? If he/she must pay for social insurance, then both countries must sign an agreement to prevent double payment for social insurance. Hence, social insurance should not be compulsory for foreign workers as the Law on Social Insurance currently prescribes.

Finally, foreign workers cannot select health insurance providers freely.

According to the Law on Health Insurance, a foreign worker is also subject to health

17) Decree 95/2013, Article 26. Article 26. **Violations against regulations on compulsory social insurance and unemployment insurance**

1. The worker shall be given a warning or liable to a fine of 500,000 to 1,000,000 VND for reaching an agreement with the employer to not participate in compulsory social insurance and unemployment insurance.
2. The employer shall be liable to a fine of 12%–15% of the compulsory social insurance and unemployment insurance premium at the time the administrative violation is recorded (not exceeding 75,000,000 VND) when committing one of the following acts:
 - a) Failing to pay compulsory social insurance premium and unemployment insurance premium on schedule.
 - b) Failing to pay sufficient social insurance premium and unemployment insurance premium.
 - c) Failing to buy compulsory social insurance and unemployment insurance for all the people that must have social insurance and unemployment insurance.
3. The employer shall be liable to a fine of 18%–20% of the compulsory social insurance and unemployment insurance premium at the time the administrative violation is recorded (not exceeding 75,000,000 VND) when failing to buy compulsory social insurance and unemployment insurance for all the workers that must have social insurance and unemployment insurance.
4. Remedial measures:
 - a) Compelling the payment of the omitted or deferred compulsory social insurance premium and unemployment insurance premium, applicable to the violations in Clause 1, Clause 2, and Clause 3 of this Article.
 - b) Compelling the payment of the interest on the omitted and deferred compulsory social insurance and unemployment insurance premium omitted or deferred, applicable to the violations in Clause 1, Clause 2, and Clause 3 of this Article.

Decree 88/2015, Section 19. Clause 1 of Article 26 is amended as follows: “1. Warnings or fine of 500,000 to 1,000,000 VND shall be imposed upon any worker who colludes with the employer to avoid paying compulsory social insurance and unemployment insurance or to avoid paying sufficiently.”

insurance regulations in Vietnam. Article 12 of the Law on Health Insurance provides that the following persons are eligible for health insurance: 1 (a) the group whose insurance is paid by the employers and employees, including employees on indefinite- or at least full-3-month contracts, salaried business managers, and officials and civil servants (hereinafter referred to as employees).

Health insurance is a compulsory obligation that has been applied to foreign workers since 2009.¹⁸⁾ In addition, Circular 40/TT-BYT permits registration for initial medical services covered by health insurance.¹⁹⁾ However, the foreign worker may not want to access the public healthcare system because the quality of this system remains poor.²⁰⁾ Foreign workers are also prohibited from choosing commercial health insurance providers instead of public health insurance providers to ensure that they can access adequate healthcare services. As the quality of healthcare services covered by public health insurance is still limited, foreign workers should be allowed to select their health insurance providers.

2.5 Ineffective management mechanism for recruiting foreign workers

Employers using foreign employees include 1) enterprises operating pursuant to the

18) Circular 09/2009

Article 1. Health insurance participants defined in Article 12 of the Law on Health Insurance and Article 1 of Decree No. 62/2009/ ND-CP

1. Laborers, business managers, cadres, civil servants, and employees defined in Clause 1, Article 12 of the Law on Health Insurance include:

a/ Laborers, including foreigners, working in the following agencies, units, organizations, and enterprises:

19) Circular 40/TT-BYT, Article 8: **Article 8. Registration of initial medical services covered by health insurance at initiating facilities of communes or districts**

Each participant of health insurance may register for initial medical services covered by health insurance (hereinafter referred to as initial medical services) at any of the health facilities prescribed in Articles 3 and 4 of this Circular, regardless of the administrative division, conformity with his/her workplace, place of residence, and capacity of the health facility.

20) Thực trạng đánh giá chất lượng bệnh viện Việt nam hiện nay, <http://vtv.vn/chuong-trinh-dac-sac/thuc-trang-danh-gia-chat-luong-benh-vien-viet-nam-hien-nay-20160915102540334.htm>, accessed 30 September 2016.

Law on Enterprises and the Law on Investment or international treaties to which the Socialist Republic of Vietnam is a signatory; 2) foreign or domestic contractors participating in tendering, carrying out a contract in Vietnam; 3) representative offices and branches of enterprises, agencies, or organizations permitted to be established by the competent authorities; 4) state agencies, political, socio-political, socio-occupational-political, social, and socio-occupational organizations; 5) foreign non-governmental organizations and international organizations in Vietnam; 6) state professional units established pursuant to the law; 7) foreign project offices or offices of international organizations in Vietnam; 8) operating offices of a foreign investor pursuant to business co-operation contracts or foreign contractors permitted for registration pursuant to the law; 9) organizations practicing law in Vietnam in accordance with the Vietnamese law; 10) cooperatives and cooperative groups established and operating pursuant to the Law on Cooperatives; 11) associations and business associations established in accordance with the law; and 12) business households and individuals permitted to do business in accordance with the law (Article 2, Decree No. 152/2020).

Almost every employer is allowed to recruit foreign workers. The issues are how employers can manage the recruitment processes and how violations of the worker's rights can be prevented. Local authorities still face problems in detecting illegal foreign workers because many of them come to work in Vietnam without work permits. Many legal entities have the right to recruit foreign workers by themselves. Vietnam does not apply a recruitment system through representative agencies, making it difficult to detect any case of illegal foreign workers.

2.6 Regulations on a part-time job for foreign workers

Currently, Article 20 of the 2019 Labor Code states the prescribed types of labor contracts: a) an indefinite-term employment contract, in which the two parties fix neither the term nor the time of termination of the contract and b) a fixed-term employment contract, in which the two parties fix the term of the contract for a duration of up to 36 months from the date of its conclusion. Article 32 of the Labor Code defines part-time employment: (1) a part-time employee is an employee who works for less than the

usual daily, weekly, or monthly working hours as prescribed by labor laws and the collective-bargaining agreement internal labor regulations. Then, if a foreign worker wants to work as a part-time worker (e.g., a foreigner who holds an independent visa or student visa), is he/she eligible to work as a part-time worker? The issue of whether they need to apply for a work permit also remains as a legal gap in practice. Many foreigners have part-time jobs, such as foreign-language teachers; however, they do not need to apply for work permits, and there is also no legal protection for them, such as labor contracts or social insurance.

3. Emerging issues

3.1 Protection of the rights of foreign workers

One cannot deny the fact that the increasing number of foreign workers also creates more social and legal issues. In Vietnam, the number of foreign workers is rapidly increasing. Currently, there are approximately 80,000 foreign highly skilled professionals and technical workers in Vietnam, 90% of whom have obtained work permits. The remaining 10% were either denied a work permit or currently in the application process.²¹⁾ Although the laws determine that the employment of foreign workers involves many steps and procedures, Vietnam still faces the problem of illegal foreign workers (foreigners working in Vietnam without a work permit). There are many reasons for the increase in the number of illegal foreign workers, including the following: (1) many tourists come to Vietnam and stay to work illegally; (2) some foreign companies employ staff without resorting to local authorities (as they can enter Vietnam with a tourist visa (DL type)) ; and (3) Vietnam shares its border with countries like Laos, China, and Cambodia, making it very easy for foreigners to cross the borders and work illegally there. An example for this is when 314 foreigners working illegally (without a work permit) were detected in Khánh Hòa province during the checking of 24 enter-

21) BAOMOI.COM, “Thực trạng lao động nước ngoài ở Việt Nam,” BAOMOI.COM, April 25, 2018, <https://baomoi.com/s/c/25832766.epi>.

prises/companies in 2018.²²⁾ The problem of illegal workers may cause certain legal issues to arise:

First, the accepting country needs to provide enough support to enable immigrants to live as equal members of society. Foreign workers and their families (if any) need to be capable of accessing the basic public services (healthcare, education system) and social insurance (sickness, maternity, occupational accident, disease, retirement, and death insurance benefits). The key issues are how to develop a mechanism to allow foreign workers to access the social insurance system and how they can claim their benefits when returning to their home countries. It also causes the problem of double payment (such as income tax and social insurance) if both accepting and sending countries determine that social insurance is a compulsory obligation for foreign workers.

Second, foreign workers may face difficulties in the workplace, such as discrimination and exploitation. Foreign workers, especially the lower-skilled workers (technical intern trainees) who are often not fluent in the Vietnamese language, are not usually able to solve problems of exploitation and discrimination in the workplace. Hence, if support services (language teaching, healthcare, legal aid, and counseling) are not available, foreign workers will experience difficulties. Vietnam has not yet developed a support system for foreign workers and their family members, so they are not able to access public schools (often, they can only come to international schools at a very high cost) ; the government does not provide free support services, such as language teaching and legal aid; hence, foreign workers cannot access support services in Vietnam.

Third, an increase in the number of foreign workers also gives rise to social issues (social evils or crimes). Foreign workers may escape from low-paid jobs to higher-paid jobs without permission. They may also continue working after the expiration of their visas or use tourist or independent visas to work illegally. These are big challenges for the government of the accepting country as they are responsible for detecting illegal

22) Trần ngập lao động ngoại 'chui' tại các thành phố du lịch, <https://tuoitre.vn/tran-ngap-lao-dong-ngoai-chui-tai-cac-thanh-pho-du-lich-20181114223356044.htm>, accessed 20 December 2018.

foreign workers and deporting them to their home countries. The number of foreigners who are working illegally in Vietnam is also increasing because it is very easy for foreigners to enter Vietnam from China, Laos, or Cambodia and to work there illegally. For example, the DOLISA of Binh Thuan province reported that more than 500 foreign workers are working without any work permit at the center's Vinh Tan 1 plant, which was constructed by Chinese contractors, and Vinh Tan 4, built by Japanese and South Korean contractors.²³⁾ Therefore, handling illegal work in Vietnam and Japan, such as applying deportation measures and developing effective investigation and supervision of foreign workers, are urgent tasks.

Finally, foreign workers may face a high risk of violation of the worker's rights

Visas, work permits, and resident cards are the legal documents that prove that foreign workers are working legally in a foreign nation. If they do not obtain those legal documents, they will experience difficulties in the implementation of their rights. For example, if a foreign worker works illegally, he/she cannot access social insurance services and seek legal protection. Particularly, if he/she lacks one of the necessary legal documents, such as a work permit or resident card, his/her civil rights may also be violated. In addition, according to Articles 24 and 25 of the 2019 Labor Code, an employer can sign a probation contract with a foreign worker. However, a foreign worker cannot have a work permit during his/her probationary period. Recently, there was a case of foreign workers who requested for compensation due to the termination of their contracts. The court held that the probation contract was invalid since the foreign workers did not have work permits during the probation time.²⁴⁾ Article 25 of the Labor Code provides that the probationary period shall be negotiated between the parties based on the nature and complexity of the job: the probation periods are (1) 180 days for the position of enterprise executive as prescribed by the Law on Enterprises and the Law

23) Vietnam Investment Review- VIR, "Draft Decree Hard on Illegal Labour," Vietnam Investment Review - VIR, March 31, 2018, <https://www.vir.com.vn/draft-decree-hard-on-illegal-labour-57848.html>.

24) Judgment of the Ho Chi Minh Provincial Court, Case No 102/2019/LĐ-PT on dispute of the unilaterally terminating the labor contract, dated 29 January 2019.

on Management and Use of State Investment in Enterprises; (2) 60 days for positions requiring a junior college degree or above; (3) 30 days for positions requiring a secondary vocational certificate and professional secondary school and positions of technicians and skilled employees; and (4) 06 working days for other jobs.

In 2018, a foreign worker (UK citizen) instituted a case to claim compensation in Ho Chi Minh:

- Anthony James Field (who was born in 1972, UK citizen) sued the Real State Management Group Windsor (WMC) for terminating his labor contract and for compensation and damages.
- At the court of the first instance –District 1, Ho Chi Minh City–Anthony James Field requested the WMC to compensate him the amount of 22,000 USD (2 months' salary) and compensate him for the period of his unemployment from 20/10/2015 to 26/9/2019 the amount of 388,000 USD and around 3000 USD for the working days throughout his probation.²⁵⁾
- The District Court rejected all the requests of Anthony James Field because the probation contract was invalid due to a violation of duration.
- Anthony James Field appealed to the Ho Chi Minh City Court as he did not agree with the judgment of the District Court and indicated that there were violations of the civil court procedures.
- The judgment of the Appeal Court–Ho Chi Minh City Court–also determined that: “Because Mr. Fields is a foreign worker working in Vietnam, according to the provisions of Point b, Clause 1, Article 23 and Article 169 of the 2012 Labor Code *when working in Vietnam, a foreign worker must process a work permit granted by a competent Vietnamese state agency.* This is a mandatory condition that the plaintiff must-have when starting work at Windsor Company.” During the probation, the

25) “TP.HCM: Nông vụ tranh chấp hợp đồng lao động giữa người nước ngoài và công ty Windsor,” Baodansinh, accessed February 11, 2019, <http://baodansinh.vn/tphcmnong-vu-tranh-chap-hop-dong-lao-dong-giua-nguoi-nuoc-ngoai-va-cong-ty-windsor-d88656.html>.

plaintiff did not have a work permit. On September 5, 2013, the plaintiff was granted a work permit by the DOLISA of Ho Chi Minh City, violating Article 12 of Decree 102/2013/ND-CP dated September 5, 2013. Therefore, from the above analysis, Probation Contract No. WMC/HR-23.04.2015 dated April 23, 2015, between Mr. Fields and Windsor Company was invalidated under Article 50 of the 2012 Labor Code.²⁶⁾

According to the 2012 Labor Code of Vietnam, an employer can enter a probation contract with an employee. Article 26 provides that *“An employer and an employee may reach an agreement on the probation and the rights and obligations of the two parties during the probation period. If they reach an agreement on the probation, the two parties may enter into a probation contract.”* The probation time of high professional work does not exceed 60 days. Under the judgment of Case No. 102/2019, the probation contract was invalid as Anthony James Field failed to secure a work permit during the probation period.²⁷⁾ Hence, this case is an example of the legal effect on the civil rights of foreign workers. Any foreign worker who wants to work in a foreign country needs to submit all legal requirements; the authorities will issue the related documents for their work purpose. However, it should be determined that the administrative decisions made by the government to allow persons to exercise their legal rights are different from civil rights (e.g., the right to compensation). In the above case, the probation contract was determined as invalid as the foreign worker did not have a work permit as an example of the linkage between the legal rights obtained through administrative decisions and civil rights.

3.2 COVID -19 and its impact on foreign workers

Due to the COVID-19 pandemic, countries have implemented preventive measures that have affected the rights of individuals, including foreign workers. The Vietnamese gov-

26) Judgement of the Appeal Trial – Ho Chi Minh City Court, No. 102/2019/LĐ-PT dated 29 January 2019.

27) Judgement of the Appeal Trial – Ho Chi Minh City Court, No. 102/2019/LĐ-PT dated 29 January 2019.

ernment issued Directive No. 16/CT-TTg dated March 31, 2020, for the Prevention and Control of COVID-19 and implemented the following urgent measures, including carrying out nationwide quarantine (social distancing). Social distancing measures prevent individuals and organizations from traveling and doing their business. This has caused many problems to the daily life of an individual, for example, joblessness, bankruptcy, and illness. Hence, the government needs to issue policies to support individuals and organizations to overcome difficult situations, such as allowance and subsidization. For example, the Vietnamese government has passed a VND62 trillion (\$2.6 billion) financial support package for poor people and businesses affected by the COVID-19 pandemic in 2020²⁸⁾ and the other financial support packages in 2021.²⁹⁾ In addition, tax deduction or exemption policies have been enacted since 2020 to support the business sector. However, foreign workers are not eligible to access these financial support services. The COVID-19 pandemic has also caused difficulties to foreign workers, such as joblessness and illness, but due to many inadequate policies in the management of foreign workers, as aforementioned, access to allowance or subsidies from the government remains a challenge for foreign workers in Vietnam.

Moreover, foreign workers face difficulties in applying for work permits due to strict procedures. Employers must seek approval from the Department of Health, and foreign workers must undergo a 14-day quarantine in hotels. Due to the strict COVID-19 prevention and control policies, the number of foreign workers permitted to work in Vietnam is very limited.

Importantly, Decree No. 152/2020, which is new, determines that foreign workers cannot renew their work permits issued under Decree. No 11/2016 because it contains different requirements for the issuance of work permits. However, foreign workers face

28) VnExpress, “Vietnam Approves \$2.6 Billion Support Package for Covid-19 Crisis Victims - VnExpress International,” VnExpress International – Latest news, business, travel, and analysis from Vietnam, accessed August 21, 2021, <https://e.vnexpress.net/news/business/economy/vietnam-approves-2-6-billion-support-package-for-covid-19-crisis-victims-4082541.html>.

29) “Vietnam Issues Support for Employers, Employees Hit by Fourth Wave,” Vietnam Briefing News, July 19, 2021, <https://www.vietnam-briefing.com/news/vietnam-issues-support-package-for-employers-employees-hit-by-fourth-wave-resolution-68.html/>.

difficulties in obtaining documents from foreign countries due to the COVID 19 pandemic, for example, criminal records and consular authorization. These cause many problems to foreign companies in Vietnam when sending new staff there.

4. Conclusion and recommendation

Although an increase in the number of foreign workers also causes many problems to society, such as illegal work, detrimental impacts on public safety, and violation of workers' rights, there is a high demand for human resources in this period of globalization and integration. It cannot be denied that the number of foreign workers has been significantly increasing in Vietnam; therefore, it is important to develop a comprehensive legal framework for the management of foreign workers.

Currently, foreign workers in Vietnam are facing many difficulties in applying for visas, work permits, residence registration, and social insurance. They cannot change their visa purpose in Vietnam; thus, they must re-apply for visas again, which is considered a challenge. In addition, foreign workers must also submit a lot of documents to obtain work permits only after arriving in Vietnam. It would be difficult for the employer if the foreigner cannot get a work permit after signing the contract.

The employment of foreign workers is closely related to immigration, labor resources, and social protection issues. Under international standards, foreign workers are required to be protected by law to prevent discrimination and exploitation.

To protect the rights of foreign workers and promote the quality of state management of foreign workers in Vietnam, this article proposes some recommendations to change the current regulations related to visa, work permits, and social insurance:

- It is essential to revise related regulations on changing working purposes to ensure that foreign workers are permitted to change their entry purpose within Vietnam, especially during emergencies like the COVID-19 pandemic.
- The requirements on procedures for the issuance of work permits also need to be simplified to ensure that foreign workers can obtain work permits before arriving in Vietnam. It is essential to ensure consistency of the application of the law at the lo-

cal level. The required documents for application for work permits, such as the criminal records and certificates of work experience, should be simplified. The law should determine the responsibility of employers as the guarantee of foreign workers in the application of work permits and visas.

- The Ministry of Labour-Invalid and Social Affairs must closely cooperate with the Ministry of Public Security to issue certificates of eligibility to ensure that foreign workers can start working soon after landing in Vietnam. Currently, it takes around 2 months to complete all procedures for a work permit.
- There should be a revision of the law on social insurance, which does not define all types of social insurance that are compulsory for foreign workers. Foreign workers should have the right to choose the country (home country or working country) for social insurance, excluding health insurance.
- Regulations for part-time workers should be developed to ensure that foreign workers who have student visas or independent visas are eligible to work in Vietnam. It is important to protect the rights of all workers under international standards, because, without legal protection, part-time workers may face difficulties and exploitation.
- Support systems, including language teaching, legal aid, and counseling should be developed to ensure that foreign workers can have access to basic services while living in Vietnam.

In brief, the management of foreign workers is one of the most important tasks in the process of promoting economic development in Vietnam. Vietnam only aims at accepting highly skilled professionals. However, it is facing many challenges in the management and protection of foreign workers. Hence, the current legal framework on the management of foreign workers in Vietnam is in urgent need of reform, especially considering that Vietnam is a member of the ASEAN Economic Community and that free flow of skilled labor is one of the important commitments of the member countries. Hence, Vietnam needs to reform the current regulations on visa application, work permits, and social insurance to ensure that foreign workers can exercise their rights effectively in Vietnam.

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