

HOW DOES THE RIGHT TO WORK OF FOREIGNERS IN VIETNAM CHANGE IN EMPLOYMENT CONTRACTS UNDER THE NEW LABOR CODE?

LE HO TRUNG HIEU¹, NGUYEN TRUNG THANH², SRI MULYANI³, JENNIFER BAYLON VERANCES⁴

Faculty of Law, Van Lang University, 69/68 Dang Thuy Tram Street, Ward 13, Binh Thanh, Ho Chi Minh City, Vietnam¹

Faculty of Business Administration, Posts and Telecommunications Institute of Technology, 11 Nguyen Dinh Chieu street, Da Kao Ward, Vietnam²

Faculty of Law, University of 17 Agustus 1945 (UNTAG) Semarang, Indonesia, Jalan Pawiyatan Luhur Bendan Dhuwur, Semarang, Central Java, Indonesia³

International Affairs and Linkages Department, University of the Visayas, Dionisio Jakosalem St, Cebu City, 6000 Cebu, Philippines⁴

Corresponding Email: hieu.lht@vlu.edu.vn¹

Abstract -In recent years, the increasing number of foreign employees in Vietnam has positively influenced the domestic labor market. According to the Department of Employment of Vietnam statistic by April 2021, there are 101,500 foreign employees, including about 85,000 people with work permits and nearly 16,000 people exempted from work permits. In addition, the market has witnessed a diversity of nationalities with more than 100 different countries and regions. The transnational labor movement has a great contribution to the overall development of Vietnam. Therefore, to protect the right to work of foreigners in Vietnam and balance interests with employers, the government has updated and provided modifications on policies of foreign labor management, especially in the legal framework governing labor contracts under current domestic laws. On the basis of the survey, doctrinal, and comparative legal research, this article will evaluate and analyze amendments under the Labor Code 2019 regarding foreign labor contracts in Vietnam from practical perspectives.

Key word: foreign workers, labor contracts, the Labor Code, employment, work permit.

INTRODUCTION

A labor contract with a foreigner is a written agreement between an employer and a foreign worker on paid employment, wages, working conditions, rights, and obligations of each party in a labor relationship. When establishing a relationship, the parties are required to comply with the principle of voluntariness and equality under laws on labor. In fact, this type of contract involves the participation of one party who is a foreign employee. Accordingly, compared with a domestic labor relation, a labor contract with a foreigner is not only governed by national laws but also international treaties.

In reality, there are a number of international research in relation to foreign migrant workers in Vietnam in both economic and legal contexts. Typically, Trinh (2016) shows figures about the significant contribution of foreign workers to the Vietnamese labor market and economy. In addition, the research also provided general rules about the right to work of foreigners under the Labor Code 2012. Thereby, some considerable challenges Vietnamese legislators faced in making policies and laws for foreign workers in Vietnam are identified, including labor contract and work permit, political and security issues, jobless pressure of young Vietnamese citizens, and illegal migration for work¹. However, the research fails to evaluate these hereabove issues in detail. Moreover, the research is conducted when the new labor code has not been enacted, which leads to conflicts and overlapping between the author's recommendations and new provisions. Another

¹ Trinh, Ly. (2016). *Work Related Rights of Foreign Migrant Workers in Viet Nam*.

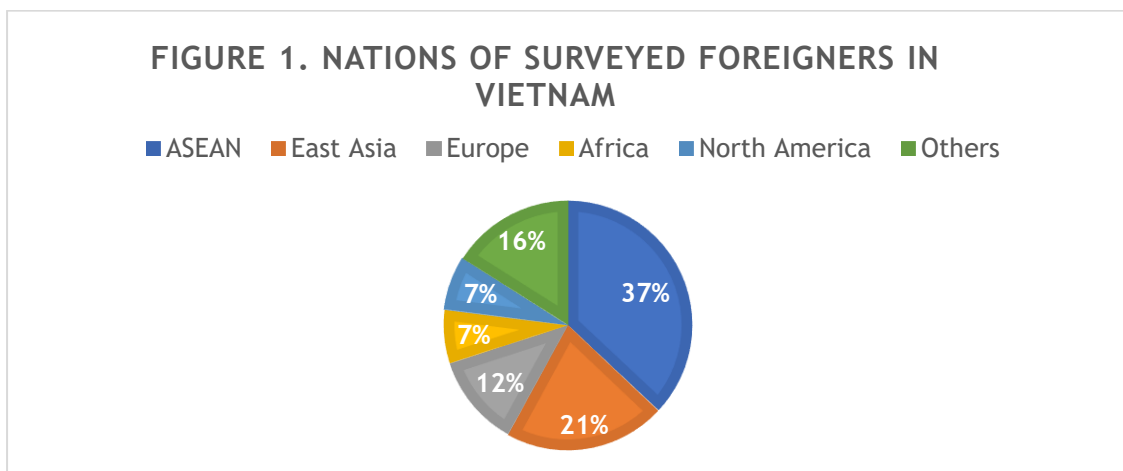
study conducted by Vu (2016) emphasized illegal foreign migrant workers and types of working visas in Vietnam, which is mentioned in previous research². Despite indicating a highly concerned issue on the right to work of foreigners, the paper lacks updating relevant rules under the new Labor Code and provide reasonable recommendation for wrongdoings in signing labor contract. Under the scope of this paper, a question is raised whether the right to work for foreigners has been guaranteed under the new Vietnamese Labor Code 2019, especially in labor contract and work permit. Thus, this paper will examine unsolved issues of previous studies before providing reasonable recommendations.

METHODOLOGY

The methods of survey, doctrinal and comparative legal research are used to reach outcomes of the study. Initially, the research applies a questionnaire test to assess the aware nesses, approachability, and concerns of foreign migrant employees about the changes of the new Code relating to labor contract. Secondly, the study provides a clear and descriptive interpretation of new amendments via legislation and case studies in order to evaluate the appropriateness of current rules. Eventually, a legal comparison is provided between relevant rules under the new and the previous Labor Code, as well as the international Conventions and other domestic legislations in the world. By virtue of this, the research will find out the grounds and objectives of legislators enacting the new law in compliance with the equity of labor relations in the international context.

RESULTS

The survey was conducted with the participation of 554 foreigners on two social networking groups of International ex-pats in Vietnam in Facebook. Under Figure 1, there are 37% of working foreigners from ASEAN countries, 21% from East Asia countries (Japan, Korea, and China), 12% from European countries, 7% from African countries, 7% from North American countries, and 16% from other nations.



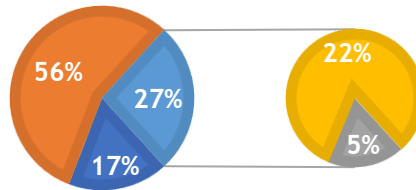
In response to the current jobs of the surveyed participants, Figure 2 illustrates that only 101 people are specialists, experts, and skilled labor in their profession (17%). In addition, 321 work as teachers in English training centers (56%), which is more double than the number of unskilled foreign workers with 152 people (27%). Foreign investors involved in the management of business activities in Vietnam have about 13 people with work permit, total of professional labors gained work permit along with fixed-term labor contract from 12 months to 36 months. Out of 152 unskilled workers, 82% of participants are tourists and travelers, and the rest has worked in Vietnam without a work permit.

² Vu, T. L (2016). Public Administration over Foreigners in Southern Cities of Vietnam. Doctoral Dissertation. National Academy of Public Administration



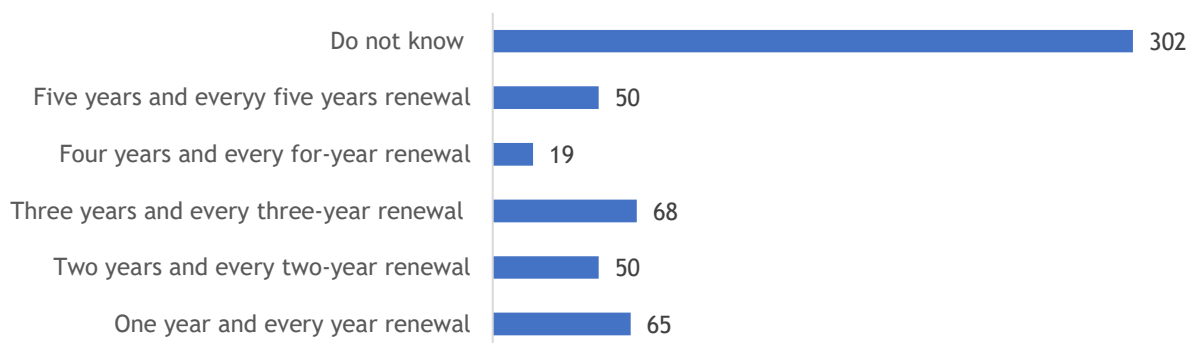
FIGURE 2. CURRENT JOBS OF PARTICIPANTS

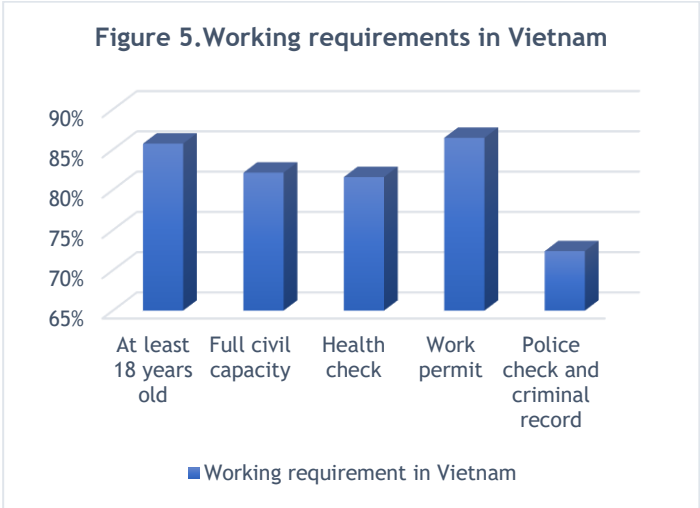
- Specialists, experts and skilled labor (100% with work permit)
- English teacher (100% with work permit)
- Unskilled workers without work permit
- Tourists and travellers



In the survey, the perception of foreign workers about the new Vietnamese labor code is asked about three issues, including work permits, labor contracts, and working conditions. Regarding work permits, Figure 3 indicates that about 9% of people respondents (50) determined correctly that the work permit has a term of 2 years and is renewed once every two years, 36% of total participants gave incorrect answers with the term of 1 year, three years, four years and even five years. Almost participants failed to know about the term of a work permit and its extension, with 54.5% (302) when claiming that all procedures for work permit are conducted via their immigration agents. In terms of labor contract, Figure 4 shows that there are 422 people respondents who signed labor contracts along with work, accounting for more than 76% of the total number. Apparently, 100% of signatories have discerned that their contract is a fixed-term contract with a maximum of 36 months. In relation to working requirements, under Figure 5, over 80% of total respondents hold a belief that at least 18 years old, full civil capacity, health and work permit are compulsory under the new Vietnamese Labor Code. The percentage of participants choosing requirements of police check and criminal record is slightly lower, with approximately 72%

Figure 3. Work permit and its extension





DISCUSSION

Previously, the Labor Code 2012 had provisions on specific requirements for foreign workers and employers, including four requirements for foreign workers, the form of a labor contract, and notification of employers on the use of foreign workers to labor management agencies. However, after a period of implementation, unclear regulations have appeared under the Labor Code 2012, causing difficulties in signing labor contracts with foreigners, especially clearly defining relevant subjects in labor relations with foreign elements, types of labor contracts, and cases of termination of labor contracts. Therefore, the amendments under the Labor Code 2019 are necessary for the context of globalization and labor transfer. Simultaneously, Vietnam is also a member of the World Labor Organization via joining 25 international labor conventions.

1. Requirements of a foreign employee entering into labor contracts

Firstly, the Labor Code 2012 provided four requirements that a foreign employee shall meet. Under Article 169, a foreign worker is required to

“have full civil act capacity; have professional qualifications, skills, and health in accordance with job requirements; not be a criminal or be examined for penal liability under Vietnamese and foreign laws; have a work permit issued by a competent Vietnamese state agency, except for the cases specified in Article 172”³

The Labor Code 2019 has revised three of the four requirements for foreign workers in Vietnam, which is more in line with international agreements. Especially when Vietnam has recently joined the CPTPP with commitments in chapter 19 on labor in the process of protecting the rights to work under the declaration of the ILO 1998. Particularly, three modifications are stipulated under the new Code, including the requirements of age, health, professional qualifications, and the capacity to take legal responsibility of foreign workers⁴. The Labor Code 2019 has added a specific age requirement for foreign workers to be 18 years old, consistent with the Civil Code 2015. In addition, the new Code formalizes the requirement for health, which ensures at the request of the Ministry of Health instead of arbitrarily stipulating "suitable for job requirements" as before. According to Clause 2, Article 23 of Decree No. 152/2020/ND-CP, a foreign worker is required to attach a health certificate valid for 12 months from the date issued by a competent agency or foreign or Vietnamese medical organization in the submission of work permit application⁵. Currently, this is a relatively practical regulation applied in countries with developed public health systems, such as the US, UK, and Australia. Foreign migrant workers in these nations shall guarantee health criteria

³ National Assembly of Vietnam. (2012) Labor Code 2012, Article 169.

⁴ Ha Hien (2021). New points on contracts with foreign workers under the Labor Code 2019. FDVN Law Firm.

⁵ Government of Vietnam, (2020). Decree 152/2020/ND-CP regulating foreign workers working in Vietnam and recruiting and managing Vietnamese employees working for foreign organizations and individuals in Vietnam, Article 23

under laws on immigration and employment. These regulations aim to protect the health and safety of foreign workers and ensure the public health aspects of the country where they work. Regarding professional qualifications, the new Code only requires foreign workers to work experience and professional qualifications without being appropriate to job requirements⁶. To clarify this provision, the Government of Vietnam promptly issued Decree 152/2020/ND-CP on foreign employees in Vietnam and the recruitment and management of Vietnamese employees of foreign organizations and individuals in Vietnam. Vietnam, which only indicates a few subjects need experience and expertise in accordance with job positions specified hereunder, such as foreign experts, technical workers, executives, and managers. The final requirement amended under the Labor Code 2019 is that the foreign worker is "not a person who is currently serving a penalty or has not yet been cleared criminal records" (point c, clause 1 of Article 15) instead of a criminal as previously⁷. The additional regulation is more specific about the possibility of criminal prosecution of foreign workers to protect better national security. Simultaneously, according to this provision, a foreign worker who commits crimes but is exempt from punishment, without any criminal record, is able to work and enter into labor contracts in Vietnam⁸. Therefore, before working in Vietnam, a foreign worker shall have a criminal record card with a period not exceeding six months from the date of file and document submission as required under Clause 3 of Article 9 of Decree No. 152/2020/ND-CP⁹. Currently, the requirements of criminal record and health status in labor relations with foreigners are necessary in some countries. For example, to apply for a temporary or permanent skilled worker visa in Australia, the applicant needs to have the results of a medical examination at a medical facility designated by the immigration department within 12 months¹⁰. At the same time, foreigners working in Australia are required to have a criminal record from their country of citizenship within six months, which is attached to the application for skilled working visas¹¹.

Second, the Labor Code 2019 has determined that only people with foreign nationality can sign and perform labor contracts in Vietnam, which eliminates stateless people (Clause 1, Article 151). Previously, the Labor Code 2012 did not specify this provision, which leads to gaps in the determination of subjects in entering into labor contracts with foreign elements. This is because Clause 1, Article 3 of the Law on foreigners' entry into, exit from, transit through and residence in Vietnam 2014, "Foreigner is a person having documents proving foreign nationality and a stateless person entering, exiting, transiting and residing in Vietnam"¹². Furthermore, under Clause 5, Article 3 of the Law on Nationality 2008, amended and supplemented in 2014 "Foreigners in Vietnam are foreign citizens and stateless persons permanently or temporarily residing in Vietnam"¹³. According to the aforementioned laws, foreigners under Vietnamese jurisdiction include foreign nationals and stateless people. However, the reality shows that a foreign employee entering into and performing labor contracts is required to have one or more nationalities recognized when working in another country and have the civil capacity in accordance with laws of the country of citizenship¹⁴. This means the rights and legal responsibilities of a foreign worker shall be explicit before entering into any labor relations. Meanwhile, stateless people do not receive the protection of any country in

⁶ Chad Mek (2022). Vietnam facilitates the process of granting work permits to foreign workers. Law firm Le and Tran. https://letranlaw.com/en/insights/viet-nam-tao-dieu-kien-thuan-loi-cho-quy-trinh-cap-giay-phep-lao-dong-cho-nguoi-lao-dong-foreign-country/#Mien_giay_phep_lao_dong

⁷ National Assembly of Vietnam. (2012) Labor Code 2019, Article 15.

⁸ See Ha Hien, above n.4.

⁹ Government of Vietnam, (2020). Decree 152/2020/ND-CP regulating foreign workers working in Vietnam and recruiting and managing Vietnamese employees working for foreign organizations and individuals in Vietnam, Article 9.

¹⁰ Department of Home Affairs (2023). Character requirements for visas. <https://immi.homeaffairs.gov.au/help-support/meeting-our-requirements/character>

¹¹ Ibid.

¹² National Assembly of Vietnam. (2014). Law on entry, exit, transit and residence of foreigners in Vietnam in 2014, Article 3

¹³ National Assembly of Vietnam. (2014). Law on Nationality 2008, amended and supplemented in 2014, Article 3

¹⁴ See Ha Hien, above n.4.

case of risky situations and breaches of law. Consequently, both employers and foreign employees confront risks and breaches of law in the signing and performance of labor contract. Even, state authorities have difficulty managing and protecting the right to work of foreigners in Vietnam¹⁵.

Third, foreign workers who want to perform a labor contract in Vietnam need a work permit issued by a competent authority. However, in some special cases, employees do not need a work permit but are still allowed to participate in establishing labor relations with the employer (Article 154, Labor Code 2019)¹⁶. In addition to the cases specified in the 2012 Labor Code, the new law allows foreign workers to work in Vietnam to be exempted from work permits in the case of “married to a Vietnamese and living in Vietnam.” Vietnamese territory” in Clause 8, Article 154¹⁷. The addition of the above provisions creates favorable conditions for foreign workers and protects their human rights when they get married and permanently settle in Vietnam. At the same time, This regulation shortens administrative procedures for both foreign workers and competent authorities¹⁸. However, risks may arise in practice when workers do not meet the professional, skilled, and healthful capabilities to work in Vietnam. In some cases, these subjects take advantage of loopholes in the law to marry Vietnamese citizens in order to legalize being allowed to work in the Vietnamese territory. This is a fairly common phenomenon in countries with high levels of immigration, such as Australia, Canada, and the United States. Many foreign subjects do not meet the labor conditions, especially the language ability in the country of residence, so they perform the act of fake marriage to apply for naturalization¹⁹. In addition, the Labor Code 2019 tightens the conditions for exemption from work permits for owners or capital contributors of limited liability companies, Chairman of the Board of Directors, or a member of the Board of Directors of a joint-stock company: must be based on the value of contributed capital that requires the approval of the Government²⁰. This overcomes a limitation that currently does not stipulate the minimum amount of capital contribution to become a member of the board of directors or a capital contributor of a limited liability company according to the Law On Enterprises and The Law On Investment 2020. In some cases, foreign employees and employers can agree with each other on a small contribution of foreigners to the enterprise to recognize them as capital contributors of the company or members of the Board of Directors and are exempt from the issue of work permits²¹. This situation occurs a lot in some fields related to foreign factors, such as tourism, restaurants, and hotels. The addition of government control limits the loss of employment opportunities for domestic workers, ensuring the purpose of protecting domestic workers. According to Decree 152/2020/ND-CP, effective from February 15, 2021, the Government requires the capital contribution value of the above entities to be 3 billion VND (nearly 128 thousand US dollars)²².

2. Type of contract and term for entering into labor contracts with foreigners

Firstly, the Labor Code 2019 only allows a foreign worker to sign a fixed-term labor contract, which must not exceed the duration of a work permit²³. Hence, the transformation of labor contracts will not be applied to foreigners in the same manner as domestic labor. This means a foreign worker cannot sign an indefinite-term labor contract after a maximum of two times of signing fixed-term labor contracts (Article 20). Under all circumstances, foreign workers are only allowed to enter into fixed-term contracts. In fact, types of labor contracts are important aspects

¹⁵ Hai Vu, Anh Phan, Hieu Le, Quynh Doan (2022). Corporate Social Responsibilities in Concluding, Implementing, and Terminating Labor Contracts with Foreign Employees Working in Vietnam. *Laws on Corporate Social Responsibility and the Developmental Trend in Vietnam*. Springer Publisher

¹⁶ National Assembly of Vietnam. (2019). Labor Code 2019. Article 154

¹⁷ Ibid.

¹⁸ See Hai, Anh, Hieu, and Quynh, above n.14.

¹⁹ See Ha Hien, above n.4.

²⁰ National Assembly of Vietnam. (2019). Labor Code 2019, Article 154, Clause 2.

²¹ Ibid.

²² Government of Vietnam, (2020). Decree 152/2020/ND-CP regulating foreign workers working in Vietnam and recruiting and managing Vietnamese employees working for foreign organizations and individuals in Vietnam, Article 7.

²³ See Hai, Anh, Hieu, and Quynh, above n.14.

of determining obligations and compensation of employers in case they unilaterally terminate labor contracts illegally and cause damage. Accordingly, the choice of a right labor contract will make the rights and obligations of the relevant parties legitimate under laws on employment. For example, a typical case is shown according to Judgment 640/2018/LD-PT dated June 28, 2018, of the People's Court of Ho Chi Minh City²⁴. Mr. H was a foreign worker at Q school under a labor contract signed for two years from May 15, 2013, to July 31, 2015, with a work permit extended until October 21, 2017. After their labor contract expired, both parties did not renew another labor contract. However, Mr. H continued to work until the end of March 30, 2016. One day later, School Q sent a notice to terminate the labor contract with Mr. M (30 days prior notice). Mr. H said that Q School unilaterally terminated the labor contract in an illegal manner. At the same time, Mr. H believed that his current labor contract transformed into an indefinite-term labor contract. Thus, Mr. H asks School Q to compensate the following payments: the amount of money on 15 working days because School Q violated obligations with 45 days prior notice, the salary on the number of days off per year that Mr. H did not take leave and the salary on the number of days that he cannot work until the Court of Appeal delivered the judgment on June 28, 2018. After reviewing the case, the People's Court of Ho Chi Minh City concluded that Mr. H shall only perform a labor contract based on the maximum term of his work permit of 2 years. When the term of his work permit expires, both parties are required to renew another new labor contract if their agreement is reached. The Court did not accept the request of Mr. H when he claimed that his current labor contract was an indefinite term. As a consequence, Mr. H was only compensated for the salary for his annual leave from School Q with the termination date of his work permit on October 21, 2017, but not June 28, 2018. after the appellate trial. In addition, the Court also annulled the claim of Mr. H for compensation for breach of the 15-day prior notice obligation due to the fact that his labor contract was still a fixed term, which only required the 30-day prior notice. Under the Labor Code 2012, although types of contracts signed by a foreign worker are not stipulated clearly, the maximum term of a work permit is two years as required (Article 173)²⁵. In this case, the explanation of the Court is reasonable because the term of a labor contract with a foreign worker needs to depend on the term of his/her work permit. Therefore, the signing of an indefinite labor contract is impossible under Vietnamese laws on employment. To avoid mistakes and disputes in the performance of labor contracts, The Labor Code 2019 has supplemented and clearly defined that foreign workers are only allowed to sign in fixed-term labor contracts.

Second, the Labor Code 2019 stipulates that the maximum term of a work permit is two years and can be extended once for two years (Article 155)²⁶. In addition, under Clause 2, Article 151 of the Labor Code 2019, the term of the labor contract with foreign workers shall not exceed the term of the work permit. In case foreign workers are recruited to work in Vietnam, both employer and employee shall agree to enter into multiple fixed-term labor contracts²⁷. Thus, the maximum term of a labor contract with a foreigner is still 24 months. Furthermore, in case a foreign worker applies for an extension or has a new work permit, he/ she can continue to sign a fixed-term labor contract with the employer based on mutual agreements. Previously, the Labor Code 2012 does not clearly stipulate the extension of a work permit, number, and types of labor contract with foreigners. The amendments under the new Code have resolved the difficulties of the contracting parties in case the work permit expires, and a new labor contract must be renewed. According to the law on labor, the content of a labor contract of a foreigner is required to be consistent with that of a work permit with a maximum term of 2 years. Assuming that related provisions under the Labor Code 2012 are applied, signing a new indefinite-term labor contract is a violation after the parties have

²⁴ The People's Court of Ho Chi Minh City (2018). Judgment 640/2018/LD-PT dated June 28, 2018 "Rev/dispute on unilateral termination of labor contract"

²⁵ National Assembly of Vietnam. (2012) Labor Code 2012, Article 173.

²⁶ National Assembly of Vietnam. (2019). Labor Code 2019, Article 155.

²⁷ National Assembly of Vietnam. (2019). Labor Code 2019. Article 151.

completed two definite-term labor contracts²⁸. This is because the content of the new labor contract is not consistent with the expired work permit. Provided that foreign workers want to continue working in Vietnam, they are required to exit Vietnam and then re-enter (Hannah Huynh, 2021)²⁹. From a practical perspective, it can be seen that the right to work of foreign workers in Vietnam is restricted under this provision, which hinders their desire to work in Vietnam for a long time. Before the Labor Code 2019 has effect, a vast number of employers still have difficulty in compliance with the conversion of type of labor contracts in practice. For example, The Department of Employment sent Official Letter No. 75/CVL-QLLD³⁰ on a labor contract with foreigners working in Vietnam on January 25, 2019, in response to DIGI-TEXX Vietnam Co., Ltd about the term of the labor contract with the foreign worker; and GRENTEK Co., Ltd on signing labor contracts with foreigners. Relevant questions are mentioned in Official Letter No. 981/CVL-QLLD³¹ on the labor contract with a foreigner working in Vietnam on September 20, 2019. Two businesses are concerned on what type of contract is renewed with foreign workers after two consecutive fixed-term contracts are terminated, whereas the maximum term of a work permit is only two years. However, the Ministry of Labour, War Invalids and Social Affairs failed to answer the question in case the fixed-term contracts are expired. The response only mentions that the maximum duration of work permit is two years under article 173 of the Labor Code 2012³². In addition, a work permit is expired in the event that contents of a labor contract are inconsistent with that of the work permit under Clause 3, Article 174 of this Law³³. Under the new Code, Articles 155 and 151 of the Labor Code 2019 have provided further clarification to solve the current issue businesses have encountered in signing labor contracts with foreigners³⁴.

3. Termination of labor contract

According to Article 36 of the Labor Code 2012, termination of labor contracts will be specified in 10 cases³⁵. This rule will apply to both domestic and foreign workers regarding labor contracts. However, in practice, some situations that are exclusive to foreign workers are able to cause the termination of a labor contract, such as the expiration or revocation of the work permit, the expulsion of the foreign workers at the request of competent authorities and under Vietnamese law³⁶. These cases require both the employee and the employer to terminate the contract without voluntary, which has not yet been provided under the Labor Code 2012. To overcome the problems, Article 34 of the Labor Code 2019 has added three more cases of termination of labor contracts, two of which are related to foreign labor. Specifically, foreign employees working in Vietnam are expelled under legally effective court judgments or decisions of competent state agencies. Moreover, the expiration of a work permit for foreign employees working in Vietnam is stipulated under Article 156 of the Code. Obviously, a work permit and the legal responsibility of a foreign worker are important grounds for giving rise to labor relations in the contract. These amendments are reasonable which are updated to reduce the possibility of termination of a labor contract with foreign workers in practice. Therefore, negative legal consequences and labor disputes can be minimized through these new provisions.

²⁸Hannah Huynh (2021). The decisive role of work permits in resolving labor disputes. Law firm Le and Tran. <https://letranlaw.com/en/insights/vai-tro-quyet-dinh-cua-giay-phep-lao-dong-trong-giai-quyet-tranh-chap-lao-dong/>

²⁹Ibid.

³⁰ Department of Employment of Vietnam. (2019). Official Letter No. 75/CVL-QLLD “Rev/v on labor contract with foreigners working in Vietnam on January 25, 2019”

³¹ Department of Employment of Vietnam. (2019). Official Letter No. 981/CVL-QLLD “Rev/v on labor contract with foreigners working in Vietnam on September 20, 2019”

³² National Assembly of Vietnam. (2019). Labor Code 2019, Article 173.

³³ National Assembly of Vietnam. (2019). Labor Code 2019, Article 174.

³⁴ National Assembly of Vietnam. (2019). Labor Code 2019, Article 155 and 151.

³⁵ National Assembly of Vietnam. (2012) Labor Code 2012, Article 36

³⁶See Hai, Anh, Hieu, and Quynh, above n.14.

CONCLUSION

From the above-mentioned issues, the Labor Code 2019³⁷ provides new positive changes to ensure the right to work of foreigners under labor contracts, including civil act capacity of foreign workers, work permits, types of contracts, and contract conversion and contract termination. In fact, the new Code has only been in effect for more than a year; however, previous problems many businesses were concerned has solved significantly. This has proved that the new amendments contribute to creating favorable conditions in the process of signing and performing contracts with foreigners. In addition, foreign workers feel safer and more equal when working in Vietnam. From a macro perspective, the changes in the new Code attract more high-quality foreign workers to work in Vietnam in the near future, promote global labor mobility, and realize international labor conventions that Vietnam is a signatory.

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³⁷ National Assembly of Vietnam. (2019). Labor Code 2019. Labour Social Printing Company