

## Navigating the intricacies of a socialist system: Labour outsourcing in Vietnam

Published: 10/01/2019 at 03:05 PM

### Online news:

Since its World Trade Organisation accession in 2007, Vietnam has been an attractive destination in ASEAN for foreign investment, with overseas companies eager to offer their goods and services to the growing Vietnamese market. In parallel, Vietnam has emerged as one of the top countries in the world for business process outsourcing (BPO), attracting foreign companies with affordable and skilled Vietnam-based labour to handle back office and IT functions.

The country's BPO industry has grown at a rate of over 20% annually for the past decade, and a 2015 report from New York-based commercial real estate company Cushman & Wakefield, ranked Vietnam as the top BPO location globally. While official data is not publicly available, based on informal conversations with senior staff from the Ministry of Labour, Invalids, and Social Affairs, approximately 210 companies were registered and operating as outsourcing service providers in Vietnam at the end of 2018.

With a population of nearly 100 million, over 60% of whom are under the age of 35, Vietnam offers prospective outsourcers a young, well-educated, and technically skilled workforce at costs that remain low compared to traditional outsourcing hubs like China and India. In addition, the country's English-language ability has risen rapidly, especially among skilled workers, and a growing number of Vietnamese are developing proficiency in Chinese, Japanese, and Korean languages.

Recognising its competitive strengths in this area, the Vietnamese government has committed to supporting and creating favourable conditions for foreign businesses to outsource to Vietnam. However, despite efforts to improve the institutional framework and transparency, not all of the labour-related legislation is clear and can be fully enforced in practice.

## Labour Outsourcing Regulations

Regulations on labour outsourcing are mainly covered under the 2012 Labour Code and Decree No. 55/2013/ND-CP of the Government dated May 22, 2013, as amended on July 23, 2014 ("Decree 55"). Under Article 3 of this legislation, labour outsourcing is defined as a service of subleasing employees to work for other companies to fill vacant working positions for which such companies cannot find workers.

In order to be licensed as an outsourcing service provider, a company must satisfy certain conditions including: having legal capital of VND 2 billion (approximately USD 85,550) --a joint venture outsourcing service provider also needs to have total asset value of at least VND 20 billion (approximately USD 427,750), having an office lease of at least two years, and having a legal representative who has at least three years of experience.

It is worth noting that not all categories of vacant working positions can be filled with a replacement based on the labour outsourcing model. Appendix 5 of Decree 55 only allows 17 job categories to be subleased, a somewhat eclectic list including: translators/interpreters/stenographers; secretaries/administrative assistants; receptionists; tour guides; sales assistants; project assistants; programmers for manufacturing machinery systems; technicians for manufacture or installation of television or telecom equipment; technicians for operating, testing or repairing construction machinery and equipment or for manufacturing electrical systems; sanitation workers for buildings and factories; data editors; security guards/bodyguards; telemarketers/customer service workers via telephone; processors of financial or tax issues; technicians for repairing or testing automobiles; industrial technical scanners or draftsmen (artists), interior designers; and drivers.

Vietnamese vendors cannot provide--and foreign companies cannot engage--labour outsourcing services for any job not mentioned in this list. The list has been valid for over five years and regulators have no official plan to broaden or update it. This has created some difficulties for companies which desire to have outsourced employees in accordance with their business needs.

For instance, there is a high demand for companies to have a strong and skilled team dedicated to marketing activities, but not all companies--especially small and medium-sized companies--have the resources or the desire to build up their own marketing teams from scratch. Instead, they would prefer to use an available source of skilled marketers provided by a qualified vendor, while maintaining control over the source in various aspects (such as providing training about their products or being involved as a consultant in the recruitment process). However, based on the list of 17 job categories above, from a strict view of the law, outsourcing of such activity is not allowed.

Another complication is that the duration of any labour outsourcing must not exceed 12 months (per Article 54.2 of the Labour Code, and Article 26 of Decree 55) and the vendor is prohibited from continuing to use subleased staff after the expiration of the 12-month period (Per Article 4.2.c of Decree 55). This drawback might make outsourcing--as part of a company's long-term business plan--less feasible and less profitable, even when the desired positions for outsourcing are on the permitted list. The flexibility provided by using outsourced personnel is less advantageous if a company has to constantly replace and retrain the staff filling those positions.

## An Alternative to Labour Outsourcing

When labour outsourcing is not a viable option, a company can enter into a service contract under which a service provider sends its employees to perform the service in the premises of the service user. There is no specific provision under Vietnamese law that prevents the parties from entering into this arrangement, and, in practice, many companies use this option for outsourced services not expressly permitted under Decree 55.

However, to prevent the risk of this relationship being viewed as (prohibited) labour outsourcing, the service contract must be carefully drafted to avoid any misinterpretation. Accordingly, the contract should not include provisions that allow the service user to directly manage the performance of each employee under the service contract; or request the service provider's employees to follow the handbooks/policies of the service user (except for provisions on working hours). The service provider should also be licensed to provide the services contemplated in the contract.

While the abovementioned practice fails to meet the same level of convenience and flexibility as traditional labour outsourcing, it is a practical option to meet business needs while remaining in compliance with Vietnamese laws and regulations.

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