Perfecting the law on sanctioning administrative violations in terms of labor in Vietnam – an approach from the perspective of ensuring employees' rights

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Abstract

Labor relations are established by law as an equal civil relationship between the parties. However, given its own characteristics, the employee is often the weaker party compared to the employer. On that basis, employees often face the risk of being infringed upon their legitimate rights and interests by their employers. In order to minimize this risk and ensure equality in labor relations, from the point of view of law implementation of state organizational activities, the author explains the theoretical bases and content of the legislative regulations on sanctioning organizational violations in the field of labor in Vietnam. Thereby, proposing some solutions to improve the law on sanctioning organizational violations in this field from the perspective of ensuring the rights of workers.

Keywords*: sanction organizational violations, labor, workers' rights.*

Introduction:

Article 23 of the United Nations Universal Declaration of Human Rights affirms: "*Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment*". The right to work and have a job helps employees earn income, generate material and spiritual wealth to support themselves and their families, and dedicate themselves to the maintenance and development of society. Therefore, in addition to the human rights of labor and employment, the existence of labor relations in society is common. In Vietnam, Section 1, Section 2, Paragraph 3, of the Labor Code No. 45/2019/QH14 (Labor Code 2019), stipulates: "An employee is a person who works for the employer under a contract, a salary is paid and subject to the management, administration and supervision of the employer"; "Employers hire and hire employees to work for enterprises, companies, companies, cooperatives, families, and those who agree; If the employer is a person, he must have full civil law powers*".* This has shown that in this relationship, to some extent, employees rely on the employer at least in terms of (i): economic aspect: because the employer creates job, provides "livelihood" and pays wages to workers; and (ii) the organizational aspect: because employees work based on rules and regulations created by the employer and the working environment developed by the employer. In addition, the employer has the right to manage and supervise the employee, and has the right to reward and discipline the employee according to the labor rules set forth by him in compliance with labor law. In light of the above dependence, employees have to face the risk of being infringed upon their legitimate rights and interests by their employers. According to the provisions of Vietnam's labor law, in case of an individual labor dispute, the competence to settle it may be exercised by the labor mediator, the arbitration council, or the people's court. Along with that, the method of settlement at the Court can be applied directly without previous conciliation prerequisites in many cases[11], and this is also considered an effective method in settling disputes in general. However, the resistance of workers in particular and labor disputes in general from the method of dispute resolution in court is very limited. Specifically, according to statistics on the website announcing the judgments and decisions of Vietnamese courts[12], the number of labor disputes resolved in Vietnamese courts is 4,024 cases[13], this number is extremely modest, accounting for less than 0.4% of the total number of public judgments. The number of labor cases is less than 1/3 compared to organizational cases, 1/53 compared to criminal cases; 1/45 compared to civil cases, nearly 1/5 compared to commercial business cases and only 1/150 compared to marriage and family cases[14]. However, the mechanism to ensure the rights of employees in labor relations in Vietnam is not only reflected through the dispute settlement mechanism at the court, conciliator, arbitration council or complaint mechanism of employees to agencies and persons who are competent to perform state organizational management. Vietnamese law also offers a mechanism to ensure the rights of workers indirectly through examination, inspection and supervision by state organizational agencies over the activities of enterprises in the labor sector. Thereby, the work of detecting violations of the employer in the relationship with employees in the "organizational management" stage without any resistance from the employees is handled and resolved. Therefore, in order to ensure the equal labor-legal relationship of the subjects and ensure the legitimate rights and interests of employees, the legal provisions on sanctioning

organizational violations in the labor field in Vietnam are critical content that needs to be further researched and perfected.

1. Theoretical And Legal Basis For Sanctioning Organizational Violations In The Field Of Labor In Vietnam – Approach From The Perspective Of Ensuring Workers' Rights

In the 2013 Constitution of Vietnam, human rights, basic rights and obligations of citizens are allocated into one chapter which is the second one following the first chapter on political regime. Accordingly, regarding the right to work and labor relations (including other relationships directly related to labor relations – a new concept that first appeared and is regulated in Article 1, Labor Code 2029), Clauses 2 and 3, Article 35 of the 2013 Constitution stipulates: "*2. Wage workers are guaranteed fair and safe working conditions; salary, rest regime. 3. Discrimination, forced labor, and the use of workers below the minimum working age are strictly prohibited".* Clause 2, Article 57 of this Constitution also stipulates: *"2. The State protects the legitimate rights and interests of employees and employers and creates conditions for building progressive, harmonious and stable labor relations.* Concretizing this right, the Labor Code 2019, effective from January 1, 2021, stipulates the State's policies on labor in Article 4, i.e. "*Ensure legal and legitimate rights and interests of employees, employees without labor relations; encourage agreements to ensure employees have more favorable conditions than those prescribed by the labor law"; "Ensure gender equality; stipulate labor regimes and social policies to protect female workers, workers with disabilities, elderly workers, and underage workers"*. Furthermore, the Labor Code 2019 also contains specific provisions on the rights and obligations of employees and employers in Articles 5 and 6; regulations on forming labor relations in Article 7 and prohibited acts in the labor field in Article 8.

Sanctioning of organizational violations is a content in state organizational management activities, applied by competent persons in accordance with the law (on behalf of the State) towards subjects who commit organizational law violations. The law on handling organizational violations in the field of labor with an approach from the perspective of ensuring the rights of employees in this article points out the violations of the organizational law by the employer towards the employees, in labor relations and other relationships directly related to the labor relations with adverse legal consequences that the employer has to bear before the State. Therefore, the law on handling organizational violations in the labor sector from the perspective of ensuring workers' rights is studied on the basis of the following characteristics:

Firstly, the legal basis for handling organizational violations in the labor field is the dangerous and guilty acts of the employer in the labor relationship and other relationships directly related to the labor relationship which must be handled according to the law.

Secondly, the subject to be handled for violations within the scope of the research is the employer, in the capacity of the manager, operator and supervisor of the employee.

Third, the handling of this organizational violation is carried out by the State, officials and civil servants within the scope of their competence in accordance with the law.

Fourth, the legal basis and sanctions applied to handle violations of the organizational law in the field of labor are mainly regulated in the Law on Handling of Organizational Violations No. 15/2012/QH13, amended and supplemented in 2020[15] (Organizational Violations Handling Act) and Decree No. 12/2022/ND-CP January 17/2022/ND-CP labor, social insurance, and approval of organizational violations working abroad under an agreement in Vietnam effective from January 17, 2022 (Decree No. 12/2022/ND-CP).

Fifth, the sanctioning of organizational violations in the field of labor is meant to ensure the legitimate rights and interests of employees, and is an effective tool to ensure the effectiveness of the fight and prevention of violations. administration, ensuring strict enforcement of labor laws.

2. Legal Provisions And Practical Implementation Of The Law On Sanctioning Organizational Violations In The Field Of Labor In Vietnam – Approach From The Perspective Of Workers' Rights

Firstly, related to the identification of acts considered organizational violations in the field of labor. Decree 12/2022/ND-CP stipulates violations, sanctioning forms, and remedial measures for violations in the field of labor listed and described in the Articles from 7 to 38; competence, procedures and implementation of forms of sanctioning organizational violations from Article 47 to Article 61. Decree 12/2022/ND-CP does not provide for principles of sanctioning of organizational violations, statute of limitations for sanctioning organizational violations, the cases where organizational violations are not sanctioned, the acts that are strictly prohibited in the

sanctioning organizational violations, etc., so in principle, these contents will be generally applied according to the provisions of the Law on Handling of Organizational Violations.

Decree 12/2022/ND-CP is relatively comprehensive compared to previous decrees on the approval of organizational violations by determining violations of organizational laws in the labor sector in line with the Labour Code 2019. The decree identifies and prescribes sanctions related to various violations of organizational law by users that have not previously been established such as: sexual harassment at work but not to the extent of criminal prosecution (Decree 12/2022/ND-CP, Section 3 of Article 11); forcing employees to perform labor contracts to repay employers' debts (Point B, Section 4, Article 11 of Decree 12/2022/ND-CP); Managing labor discipline for employees who are in the following periods: sick leave; nursing leave; leaving with the consent of the employer; to be detained; kept in custody; Waiting for the results of the competent authority to be investigated, verified and concluded for the violations mentioned in Decree No. 12/2022/ND-CP of Sections 1 and 2 of the Labour Code, Article 125 (Point DD, Section 3, Article 19); failure to ensure the implementation of gender equality and measures to promote gender equality in one of the following aspects: recruitment; Arrange; employment system; Train; working hours; comfortable time; salary; other regimes (Point a, Section 1, Article 28 of decree 12/2022/ND-CP); abuse, sexual harassment, forced labor, or the use of force against domestic workers, but also the amount of criminal prosecution (Section 4 of Decree 12/2022/NÁ-CP, Article 30). However, there are still some laws in the Labour Code 2019 but have not yet been defined as organizational violations in Decree 12/022/ND-CP.:

- The case the employer temporarily transfers the employee to a job other than the labor contract for the reason “in the case of production and business needs”. Article 29 of the Labor Code 2019 stipulates that in this case, the employer must specify in the labor regulations the cases in which the employer is temporarily transferred to a job other than the labor contract due to business and production requirements. This is a reasonable regulation to avoid the risk that the employer will arbitrarily assign the employee to work other than the labor contract, especially in cases where the employer employs less than 10 employees (arbitrariness is more likely to happen in case of small scale). According to the provisions of the labor law, employers employing less than 10 employees are not required to register labor regulations at state agencies[17]. However, Decree 12/2022/ND-CP “forgot” to define this as a violation that must be organizationally handled (this behavior is not yet “dangerous” enough to be considered a criminal offense and is not considered a “crime” as defined in the Penal Code of Vietnam).

- The case for employees working part-time. According to Clause 3, Article 32 of the Labor Code 2019, part-time employees are entitled to wages; equality in exercising rights and obligations with full-time employees; equality of opportunities, non-discrimination, ensuring occupational safety and hygiene. In the post-Covid 19 period, the need to contract and work part-time has become a tendency for reasons derived from both employers and employees. For employees, due to the effects and deterioration of health, especially for elderly workers, the need for a part-time job is appropriate (and is also encouraged for the elderly according to Clause 2, Article 148 of the Labor Code 2019). For employers, considering the limited production demand and employment situation, the requirement to sign a part-time labor contract with the employee is appropriate in order to retain the employee in the context of economic recovery after the pandemic. The "Impact Report of the COVID-19 Pandemic in the First Quarter of 2022 on the Labor and Employment Situation in 2022" has been created more and more based on the International Labour Organization's (ILO) "World Employment and Social Outlook" report on the forecast of labour market resilience in 2022 compared to the fourth quarter of 2019. Full-time jobs18. However, Decree 12/2022/ND-CP has not yet provided for violations and related sanctions enforced by employers when they fail to meet this regulation.

Decree 12/2022/ND-CP does not specify violations and associated organizational sanctions if the employer does not provide the employee with regulations regarding employment, place of work and working conditions, working hours, working hours, safety, occupational hygiene, wages, forms of payment, social insurance, health insurance, unemployment insurance, regulations on protection of business privacy, protection of privacy of technology and other matters related to direct conclusion. Labour contracts requested by employees in accordance with the provisions of Section 16 of the Labour Code 2019 on the obligation to provide information at the time of entering into labour contracts.

- Although the Labor Code 2019 mentions “other relationships directly related to labor relations” in the scope of regulation. However, there are no official guidelines on this relationship. At the same time, Decree 122/2022/ND-CP also does not define and stipulate the sanction of organizational violations for violations (if any).

Second, in terms of the form of sanctions and remedial measures. Decree 122/2022/ND-CP has applied fines as the main penalty (a warning penalty is only applied for violations of regulations on domestic workers in case without contract in writing and paying for transportation when the workers leave their jobs and return to their places of residence unless they terminate their labor contracts early). This shows that organizational sanctions

applied to organizational violations in the labor sector are more severe and deterrent than those specified in previous Decrees. Additional sanctioning measures and remedial measures are basically consistent with the provisions of the Law on Handling of Organizational Violations. However, there are still some shortcomings such as:

- Many sanctions are a mere formality: fines with a symbolic level of fine without additional sanctions or corresponding remedial measures. For example, for discrimination in labor, the common fine ranges from 5,000,000 VND to 10,000,000 VND[19] for individuals (organizations are subject to a double sanction in comparison with individuals as prescribed in Clause 1 of Article 6 of this Decree).

- The form of sanctions and remedial measures have not yet ensured the balance and the interests of employees, or sanctions without appropriate remedial measures to restore the employees' legitimate interests, such as: the employer recruiting trainees to work for them with a training period exceeding 03 months[20] specified at Point c, Clause 2, Article 14 of the Decree. 12/2022/ND-CP, but this Decree only stipulates the form of fines without remedial measures such as forcing the termination of violations, forcing the employer to sign a labor contract when the prescribed conditions are met.

Third, the practice of detecting and handling violations revealed inadequacies. This is demonstrated in the results of the implementation of the law on sanctioning organizational violations. The inspection work only focuses on handling violations related to the field of social insurance, but does not pay attention to the inspection and examination of violations in the implementation of the law in the field of labor. This can be partly attributed to low awareness of the importance of regulations in the labor sector in general; the limitation in the number of contingent of cadres and civil servants in state organizational management which is not commensurate with the volume and tasks of work; the weakness of the institutions to ensure inspection, detection and handling of violations. Besides, the employees themselves are not really interested in their statutory benefits such as working conditions, working time, rest, and performance of labor contracts. Therefore, many contents about working conditions are consistent with international standards and are internalized but have not really received attention and "exaction" from workers themselves. This is also the reason why employers are indifferent to workplace policies that apply to employees.

3. Some Recommendations To Improve The Law On Sanctioning Organizational Violations In The Field Of Labor In Vietnam – Approached From The Perspective Of Ensuring Workers' Rights

According to point d, Clause 1, Article 3 on the principles of handling organizational violations in the Law on Handling of Organizational Violations 2012, "*an organizational violation shall be sanctioned only when there is an organizational violation as prescribed by law".* This requires organizational violations to be specified in legal documents. In other words, it requires the legality and legal basis of sanctioning violations[21]. For that reason, on the basis of analyzing some inadequacies in part 2 of the article, the author proposes to supplement and adjust a number of provisions in Decree 12/2022/ND-CP related to penalties for organizational violations in the field of labor, specifically:

First, supplement organizational violations according to the provisions of the Labor Code 2019 for the following cases: (i) the employer does not specify in the labor regulations the cases "due to the need of production and business requirements" as the basis for applying the temporary transfer of employees to other jobs compared with the labor contract; (ii) the employer has unfairly treated full-time employees in terms of opportunities, discrimination, occupational safety and health; (iii) the employer fails to fulfill the obligation to provide information when entering into a labor contract when the employee requests it.

Second, study the basis for the development and application of sanctions and appropriate remedial measures for each act of organizational violation, ensuring fairness, objectivity, harmony and balance of interests of the parties in the employment relationship. In particular, not only focusing on sanctioning the employer, but also having the opposite effect on the employment, life and activities of the employees. This does not ensure sustainable benefits of workers in general. Specifically, for the form of sanction, it is necessary to have a basis to develop a principle to determine the fine level for each act, to consider adjusting the fine level for typical and specific acts that the parties and society are concerned about in order to not only have a deterrent effect but also a legal educational meaning. Remedial measures should secure the nature of overcoming consequences, restoring the original state, and ensuring order in management activities[22]; at the same time, remedial measures may be applied regardless of the statute of limitations and time limit for sanctioning organizational violations[23]. Therefore, for each violation, the Government should pay attention to developing and establishing remedial measures corresponding to the violation in order to ensure its practical significance and effective application in practice.

Third, it is necessary to strengthen the institutions and methods of checking and monitoring the implementation of labor laws by employers. The reporting and implementation of the labor law are researched in the direction of declaration and digitization in order to streamline organizational procedures and avoid reporting without data and necessary information.

Finally, raise awareness of workers and employers about human rights in general and workers' rights in particular; about the labor law and the law on sanctioning organizational violations in the field of labor through the method of propagating and disseminating the law on topics in localities and industrial zones. On that ground, the employer will be proactive in how to behave and strictly comply with the provisions of the labor law; the employees are also fully aware of their rights and the method of protecting their interests, and can apply for settlement in necessary cases.

Conclusion

Ensuring workers' rights - human rights through legal policies to sanction organizational violations in the field of labor is crucial content in state organizational management activities. However, this work does not mean tightening the sanction level and applying other strong sanctions such as additional sanctions and remedial measures to negatively affect the employers. State organizational management of labor relations in the law and practice of sanctioning organizational violations needs to be studied and implemented fairly and objectively, ensuring stable and harmonious interests between employers and employees. This is even more meaningful in the period of economic recovery after the Covid-19 pandemic in the world and Viet Nam, which is having a significant impact on the labor situation, employment and income of the parties in the labor relationship. After all, the ultimate purpose of management activities (through sanctioning organizational violations) is to ensure and maintain harmonious and stable social relations, creating conditions for development of social life.

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