

LEGAL NEWSLETTER

NHQuang&Associates



IN THIS LEGAL NEWS LETTER

**SOME NEW STIPULATIONS
ON INITIAL SHARE SALE OF
EQUITIZED ENTERPRISES**
Page 2

**NEW REGULATIONS GUIDING
IMPLEMENTATION OF SOME
ARTICLES OF THE SOCIAL
INSURANCE LAW ON
COMPULSORY SOCIAL
INSURANCE**
Page 3

**SOME OUTSTANDING
PROVISIONS IN THE DRAFT
RESOLUTION GUIDING THE
APPLICATION OF
COMPENSATION FOR NON-
CONTRACTUAL DAMAGE**
Page 5

Notable activity in August 2021

On August 18, 2021, under the framework of EU JULE Programme, the Ministry of Justice and UNDP co-organized the second webinar on the Draft Report on the Development of a Comprehensive Strategy to Strengthen Legal Awareness, Focusing on Improving Legal Awareness on Rights and Guaranteeing the Exercise of Rights of Vulnerable Groups. Mr. Nguyen Hung Quang - Managing Partner of NHQuang&Associates, on behalf of the Research Group, presented the contents of the Report, focusing on the changes in the Report based on the experts' comments from the first webinar.

This webinar had the attendance of over 30 legal experts. Beside contributing to the Report finalization, the experts also discussed policy recommendations for better legal dissemination in the coming years

SOME NEW STIPULATIONS ON INITIAL SHARE SALE OF EQUITIZED ENTERPRISES

HAI DANG

On May 17, 2021, the Ministry of Finance promulgated Circular 32/2021/TT-BTC guiding the initial sale of shares and the management and use of income obtained from the equitization of a state-owned enterprise and from the conversion into a joint stock company of a single-member limited liability company with 100% of its charter capital invested by a State-owned Company (**Circular 32**). Several key contents of Circular 32 are as follows:

Firstly, Circular 32 stipulates the initial selling price of shares according to the share purchasers including: investors purchasing shares through auction, employees, trade union at the enterprise and strategic investors. Specifically:

(i) Selling price of shares for investors through auction is the bid price at the auction which is determined as winning bid. The determination of auction results is carried out according to the principle of selecting the bid price from high to low for a sufficient number of shares offered but not lower than the starting price in accordance with clause 5, Article 6, Circular 32.

(ii) The preferential selling price for employees is determined at 60% of the value of a share at par value (VND 10,000/share) for employees working under labor contracts, corporate manager of the equitized enterprise or the similar purchasers at level II enterprise but have not yet enjoyed the preferential purchasing policy in other enterprises, employees representing households having long-term stable contracts with agricultural and forestry companies.

(iii) Trade union at enterprise is also entitled to a preferential share price equal to par value (VND 10,000/share).

(iv) For purchasers as strategic investors: Circular 32 clearly stipulates the determination of the selling price of shares with the aim of ensuring the selling price of shares, avoiding losses and inequality among purchasers. For example, when conducting

auction between strategic investors, the bid price (determined as winning the auction by the principle of high to low selection) is not lower than the average winning bid price of the public auction.

Secondly, Circular 32 stipulates 04 methods of selling shares including: auction, direct agreement, underwriting, and book-building. **Auction** method is applied for auction to the public, and auction for the strategic investors. In the case of public auction, the number of shares that employees and trade union in the enterprise refuse to buy and the number of shares that strategic investors have not subscribed to buy up will be sold in the auction to the public. Auction for strategic investors is applied when there are 02 or more strategic investors satisfying the requirement for share subscription and the total number of shares subscribed is greater than the number of shares offered to strategic investors. Regarding the **direct agreement** method, this method is applied for selling to strategic investor when only 01 strategic investor subscribes for shares. Also, this method is applied to sell unsold shares and sell to employees, trade unions in equitized enterprises. **Underwriting** method is implemented for the initial share sale of equitized enterprises. Lastly, **book-building** method is, in Circular 32, referred to Circular 21/2019/TT-BTC on the initial sale of shares and transfer of state capital by book-building method.

COMMENTS AND RECOMMENDATIONS

Circular 32 has provided clear and specific regulations to support equitized enterprises in terms of initial share sales. Circular 32 replaces the provisions of Circular 40/2018/TT-BTC and its amending Circular 34/2019/TT-BTC guiding the initial sale of shares and the management and use of income obtained from the equitization of a state-owned enterprise and from the conversion into a joint stock company of a single-member limited liability company with 100% of its charter capital invested by a State-owned company, which are no longer relevant to practice. When implementing the initial share sale, the equitized enterprises must clearly identify the purchasing subjects, the methods to be applied in each specific case. Moreover, it is suggested that the equitized enterprises should update the provisions in Circular 32 and relevant legal documents as the basis to plan for initial share sales in compliance with applicable laws.

NEW REGULATIONS GUIDING IMPLEMENTATION OF SOME ARTICLES OF THE SOCIAL INSURANCE LAW ON COMPULSORY SOCIAL INSURANCE

NGOC HA

On July 7, 2021, the Ministry of Labor, War Invalids and Social Affairs issued Circular 06/2021/TT-BLDTBXH amending Circular 59/2015/TT-BLDTBXH guiding the implementation of some articles of the Law on Social Insurance on compulsory social insurance (**Circular 06**). The Circular takes effect on September 1, 2021 and provides some outstanding contents related to employees' rights as follows:

Firstly, supplementing incomes that are not subject to compulsory social insurance contributions. To conform to Article 3 Circular 10/2020/TT-BLDTBXH on elaborating and guiding certain articles of the Labor Code on employment contracts, collective bargaining council and occupations, jobs with negative impacts on reproductive function and children raising, the incomes not subject to compulsory social insurance contributions added by Circular 06 include: "Additional payments with undetermined amounts along with the salary agreed in the employment contract, which are paid regularly or irregularly in every pay period associated with the working process and performance results of employees". These incomes supplement to those not subject to social insurance contributions such as bonuses as prescribed in Article 104 of the Labor Code, bonuses for initiatives; mid-shift meal allowance; vehicle, cell phone, travel, lodging, daycare, children raising allowances; allowances for the employees with relatives who are dead or get married, employee's birthday, allowances for the employees suffering from financial hardship resulted from work accident, occupational disease, etc.

Secondly, providing the regulations on time calculation in the case where an annual leave



coincides with maternity leave. Circular 06 provides specific guidelines for calculating maternity leave period in accordance with Articles 32, 33, Clause 2 Article 34 and Article 37 of the Law on Social Insurance for cases where employees are taking annual leave, permitted personal leave, unpaid leave under labor laws as follows:

- The period that overlaps with annual leave, permitted personal leave and unpaid leave shall not be eligible for maternity benefits;
- Leave periods other than annual leave, permitted personal leave and unpaid leave shall be eligible for maternity benefits in accordance with Articles 32, 33, Clause 2 Article 34 and Article 37 of the Law on Social Insurance.

Thirdly, clearly stipulating male employees' receipt of one-time allowance upon childbirth in accordance with Article 38 of the Law on Social Insurance. Accordingly, Circular 06 has added points c and d to Clause 2, Article 9 of Circular 59/2015/TT-BLDTBXH as follows:

- If the mother engages in social insurance but is ineligible for maternity benefits when giving birth, while the father has paid social insurance premiums for full 06 months in 12 months before the childbirth, the father is entitled to one-time allowance when giving birth, which is 02 months' base salary in the month of childbirth for each child.
- The husband of a surrogacy mother is entitled to one-time allowance as prescribed in Clause 1, Article 9 of Circular 59/2015/TT-BLDTBXH.

Fourthly, stipulating the level of sickness benefits when taking leave in incomplete months. Clause 2, Article 1, Circular 06 has amended and

supplemented the calculation method for enjoying the sickness benefits that require long-term medical treatment with the days of leave less than a full month at point b, Clause 2, Article 6, Circular 59/2015/TT-BLDTBXH according to the following formula:

Benefit level = Salary to pay social insurance premiums of the month preceding the month of leave/ 24 days x Percentage of entitlement to sickness benefits (%) x Number of leave days entitled to sickness benefits.

Accordingly, employees who take sick leave within the days less than a full month will be entitled to a rate proportional to the number of odd days and up to one-month sickness allowance.

At the same time, Circular 06 also amends and supplements the level of sickness benefits for employees who contribute social insurance premiums to sickness and maternity fund, are subject to sickness or accident rather than occupational accidents or must take leave to take care of their sick children being under 7 years old with leave period of 14 days or more within a month (including cases of unpaid leave). Accordingly, the benefit rate will be calculated based on the salary to pay social insurance premiums of the month immediately preceding the month of leave, instead of the monthly salary serving as the basis for payment of social insurance contributions of that month as specified in Clause 3, Article 6, Circular 59/2015/TT-BLDTBXH. In the case where employees remain sick and must take leave in subsequent months, sickness benefits shall be calculated based on the monthly salary serving as the basis for social insurance payment of the month preceding the month of leave.



COMMNETS AND RECOMMENDATIONS

Circular 06 has amended and supplemented a lot of specific guiding regulations that are still unavailable in applicable law on compulsory social insurance regimes or are inconsistent with related legal provisions. This helps to ensure better protected rights of employees in the process of engagement in compulsory social insurance. This is also one of the efforts of the Ministry of Labor, War Invalids and Social Affairs to strengthen and perfect the policies on social insurance for Vietnamese employees.

Employees and businesses should keep updated and study the provisions of Circular 06 to apply appropriately during the implementation of social insurance procedures, ensuring the rights of their employees in the coming time.

SOME OUTSTANDING PROVISIONS IN THE DRAFT RESOLUTION GUIDING THE APPLICATION OF COMPENSATION FOR NON-CONTRACTUAL DAMAGE

HAI LINH

After more than 15 years of implementation, Resolution 03/2006/NQ-HDTP guiding the application of a number of provisions of Civil Code 2005 on compensation for non-contractual damage promulgated by the Judges' Council of the Supreme People's Court (**Resolution 03**) has revealed many obstacles and inadequacies because it is inconsistent with the provisions of the Civil Code 2015 and no longer suitable with actual conditions. To overcome the above obstacles and inadequacies, the Supreme People's Court is drafting a Draft Resolution guiding the application of a number of provisions of the Civil Code 2015 on compensation for non-contractual damage (**Draft Resolution**) to replace Resolution 03. In this Newsletter, NHQuang will analyze some outstanding provisions of the latest Draft Resolution (the 2nd Draft which was uploaded on the Government Portal on August 5, 2021).

Grounds giving rise to damage compensation liability

The Draft Resolution stipulates that the liability to compensate for damage only arises when all the 4 factors below appear:

- (i) Any damage occurs;
- (ii) There must be an illegal act infringing upon the life, health, honor, dignity, reputation, property, legitimate rights and interests of other persons;
- (iii) There must be a cause-effect relationship between the damage that occurs and the infringement mentioned above;



(iv) The person causing damage is not responsible for the compensation in the case that the damage is caused by force majeure events or is entirely due to the fault of the aggrieved party, unless otherwise provided for by law.

Compared with Resolution 03, the Draft Resolution removes the factor "*There must be an intentional or unintentional fault of the person causing the damage*". Fault is understood as a psychological state of a person, thus it is difficult to determine at the time of committing the violation act, whether the person causing the damage is at fault unintentionally or intentionally. This provision of Resolution 03 has placed the burden of proof on claimants, making it more difficult to claim. In addition, the removal of the request on proving the fault of the person causing damage also aims to be consistent with the provisions of the Civil Code 2015 on compensation for non-contractual damage. The Civil Code 2015 also removed the term "*intentional/unintentional fault*" in the general provisions on compensation for non-contractual damage in Article 584 to ensure fairness in the settlement of such cases. In fact, judgments on non-contractual damage only determine if there is a fault or not and to which party the fault belongs (the party causing damage or both parties - in the case where the aggrieved party is also at fault) as the basis for determining compensation liabilities; while the "*unintentionality/intentionality*" of the fault is not addressed.

Principle of compensation for damage

Basically, the principles of compensation for damage in the Draft Resolution are inherited from Resolution 03 such as the principle of respecting the parties' agreement on issues related to compensation, the principle of compensation for all damage, or the principle

that the Court must quickly settle the claim for damage so that the damage can be compensated promptly.

In addition, the Draft also supplements a number of new principles to be consistent with the provisions of the Civil Code 2015 as well as with the reality, including:

(i) In the case that the aggrieved party is the partly at fault for causing the damage, such party shall not be compensated for that part of damage.

(ii) The parties whose rights and interests are infringed shall not be compensated for the part of the damage that occurs due to their failure to adopt necessary and reasonable measures to prevent or limit the damage, while they could know or see it in advance and have sufficient conditions to prevent and limit the damage from occurring, but let the damage happen.

Furthermore, the Draft Resolution amends the conditions for the persons causing the damage to enjoy reduction in compensation amount. Previously, under the Resolution 03, one of those conditions was that the damage caused must be too large for their available and long-term economic capabilities, consequently they cannot afford to compensate for the full or most of such damage. However, it is difficult to determine what percentage (%) out of the total damage to be considered the "*large damage*", and it is also difficult to determine the duration of "*long-term economic capabilities*" of the persons causing the damage. To overcome these obstacles and inadequacies, the Draft Resolution has revised this condition so that the reduction is only based on the available economic capabilities of the persons causing the damage and the ability to compensate in cash of the person causing the damage is determined to be only ½ of the damage at maximum instead of "*large damage*" as stipulated in Resolution 03.

The statute of limitations for initiating a claim for damage compensation

According to Resolution 03, the statute of

limitations for initiating a lawsuit to claim damages is 2 years from the date on which the legitimate rights and interests of the relevant individuals, legal entities and other subjects are infringed. This provision causes problems in practical application due to the basis for determining the time when "*legitimate rights and interests ... are infringed*". In fact, there are cases where those with rights and interests infringed do not have the right to initiate a lawsuit because they are underage or do not have civil liability capacity. There are also cases where the time when the damage actually occurs is different from the time when the person with the right to claim for compensation knows that the damage has occurred, even the statute of limitations for initiating such lawsuit expires as prescribed in Resolution 03. Therefore, to solve the obstacles and to be consistent with the Civil Code 2015, the Draft Resolution stipulates that the statute of limitations is determined "*from the date when the person with the right to claim knows or should know*". The above provision helps to ensure the right to initiate a lawsuit of the claimant if the aggrieved people cannot initiate the lawsuit for a long time or permanently (for example, due to severe injury, inability to perceive) so as to protect the legitimate rights and interests of the aggrieved people; it also helps to ensure the right to initiate the lawsuit of the claimant in the case that they know or should know about the damage after the time when the damage actually occurs.

In addition to the above contents, the Draft Resolution also provides guidance on other contents such as: capacity of individuals to be responsible for damage compensation; reasonable expenses specified in Articles 590, 591, 592 of the Civil Code 2015; damage resulted from infringement upon health, life, honor, dignity, and reputation; compensation for damage caused by sources of extreme danger.

Currently, the Supreme People's Court is collecting comments on this Draft. Individuals and organizations interested in the Draft can find the full text of the Draft Resolution at: http://chinhphu.vn/portal/page/portal/chinhphu/congdan/D_uThaoVanBan?_piref135_27935_135_27927_27927.mode=reply&_piref135_27935_135_27927_27927.id=4467 to send comments.



AUTHOR TEAM



NGUYEN VAN HAI DANG

Legal Consultant



NGUYEN NGOC HA

Senior Associate



LÊ HAI LINH

Legal Consultant

EDITORIAL TEAM



NGUYEN THUY DUONG

Senior Associate

DESIGNER



NGUYEN HOANG AN

Please visit us at:



Ha Noi Office:
Villa B23, Trung Hoa - Nhan Chinh
Nguyen Thi Dinh Street, Nhan Chinh Ward
Thanh Xuan District, Ha Noi, Viet Nam
Tel 84 24 3537 6939
Fax 84 24 3537 6941
Web: www.nhquang.com

Ho Chi Minh City Branch:
First floor, Harmony Tower, No. 47-49-51
Phung Khac Khoan Street, Da Kao Ward
District 1, Ho Chi Minh City, Viet Nam
Tel 84 28 3822 6290
Fax 84 28 3822 6290
Email: contact@nhquang.com