



# Risks in Terminating Problem Employees

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# Who?

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- Employees committing acts of misconduct;
- Underperforming employees.



## Why this matters...

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- No “at will” employment in Vietnam.
- Limited termination bases with complicated procedures and documentation.
- Many employers are not aware of the termination processes and documentation.
- Employees often bring wrongful termination lawsuits and win.
- Reinstatement is a mandatory remedy.



Example: Worst Case  
Scenarios – Dismissal and  
Poor Performance

# Worst Case Scenario – Act of Misconduct

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## Minh

- Minh has disclosed your company's confidential information
- Problems with:
  - Minh's labor contract: no provision on confidentiality obligation
  - The Internal Labor Regulations: not properly registered
- You lose your temper, and fire Minh on-the-spot in front of the whole office.



# Worst Case Scenario – Poor Performance

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## Nam

- Indefinite term contract
- Nam's work is riddled with errors and he cannot improve
- Problems with having no:
  - No written description of Nam's job duties;
  - No performance appraisals;
  - No performance management policy;
- You lose your patience with Nam, and terminate him on-the-spot for the poor quality of his work.



# Consequences.....

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- Employees initiate lawsuits for wrongful unilateral termination.
- The employees win.
- The termination is illegal.
- The judge orders the following:
  - Reinstatement
  - Pay the employees their full salaries and benefits for the period they did not work
  - At least 2 months' salary for emotional distress



## More consequences...

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- Must negotiate with employees and pay extra so they don't come back
- They don't want to leave....
- The employees also tell their sob stories to the world
- Dangerous example set for other employees





## What went wrong? – Minh (Misconduct)

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- To lawfully dismiss an employee for cause, a company must have **Internal Labor Regulations (ILRs)** which are properly registered with the labor authority.
- **Labor contracts/ILRs** should address the duty to keep information confidential.
- The company did not follow any of the **set legal procedures for dismissal**.
- While ignoring the legal procedures for dismissal, the employee was humiliated.



# What went wrong? – Nam (Poor Performance)

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- The employee should be subject to a **probation period** and then **a fixed term (1-3 years) contract** before an indefinite term contract.
- An employee's job description, including the expected performance level, should be specified in the employee's labor contract.
- Employer must have a **Performance Management Policy** formulated in consultation with the trade union
- Performance appraisals and warnings should be documented in writing
- **Termination Notice** (30 or 45 days) is required for this type of termination, depending on contract term



DISMISSAL

# Legal Bases for Dismissal for Cause

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- Committing the following breaches regardless of the damage:
  - Stealing/embezzling company assets;
  - Gambling;
  - Deliberately causing injury;
  - Disclosing trade or technological secrets;
  - Using drugs at the workplace;
  - Infringing employer intellectual property rights.
- Committing other breaches causing serious damage or threatening to cause particularly serious damage to employer interests or assets (“**Other Breaches**”);



## Legal Bases for Dismissal for Cause, ctd.

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- An employee who has previously been disciplined by an extension of wage increase timing, recommits the same offense during the trial period; or recommits the offense after being demoted; and,
- An employee takes five accumulative days off in one month or 20 accumulative days off in one year without proper reasons.



## But, not so simple...

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- Even if misconduct is listed in the Labor Code, it must still be included in the registered Internal Labor Regulations (“**ILRs**”).
- For Other Breaches, damages to the employer caused by the misconduct must be **quantifiable** and meet a certain monetary threshold
  - ILRs should specify threshold
  - The threshold for material damage is defined by the employer, but it may be challenged by the labor authority if it is too low.



# Other considerations

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- Cannot dismiss employees in the following circumstances:
  - On sick leave or on leave with employer's consent;
  - Detained or in prison;
  - Investigation of misconduct by competent agency is ongoing;
  - Pregnant, on maternity leave (female employees)
  - Employees (both male and female) raising a child under 12 months old.
- Limitation periods apply
  - 6 months from the date the breach **occurred** - (not from the time the breach is discovered)
  - 12 months for a breach relating to finance, assets, or the disclosure of technological or business secrets
  - If employee has protected status (as above) and limitation period expires, only get 60 more days
  - Dismissal decision must be issued within the limitation period





# The Importance of Internal Labor Regulations

# Internal Labor Regulations

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- Internal Labor Regulations (“**ILRs**”) are a company’s written rules setting out working conditions, rest times, and labor discipline
- ILRs must specifically state which acts of misconduct are subject to dismissal
  - Acts listed in the Labor Code
  - “Other Breaches” specified by Company which caused a specific monetary threshold damage (i.e., serious damage) to the Company’s assets/ interests



## Internal Labor Regulations (Cont'd)

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- ILRs should indicate a monetary threshold of damage caused by Other Breaches which will qualify an act for dismissal
  - Should be somewhat significant
  - In practice, often very hard to show quantifiable damage for many acts of misconduct
- Labor authority reviews and confirms the registration of ILRs.



# Recommended Action Plan

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- Make sure the ILRs are up-to-date
- Register the updated ILRs with the labor authority
- Strictly follow the disciplinary procedures
- Improve your relationship with the trade union (company trade union or immediate upper level trade union).



# POOR PERFORMANCE TERMINATION

# Legal Bases

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An employer may terminate an employee due to poor performance if the employee ***frequently fails to perform his assigned tasks*** (Labor Code 1994, and Labor Code 2012)

The definition of “***frequently failing to perform Employee’s assigned tasks***”

<b>Before March 2013 (Labor Code 1994)</b>	<b>From March 2013 (Labor Code 2012)</b>
<ul style="list-style-type: none"><li>- Employee is served with two written warnings within a months; and</li><li>- Repeats his shortcomings</li></ul>	<ul style="list-style-type: none"><li>- Determined under the employer’s performance management policy; and</li><li>- The performance management policy is issued in consultation with trade union</li></ul>



# Notice Obligations

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- Notice requirements:
  - Indefinite term contract: at least 45 days
  - Definite term contract (12-36 months): at least 30 days
  - Seasonal contract (<12 months): at least 03 working days
- Question: advance notice as agreed in the labor contract (e.g., 3 months)?



# Protected Employees

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Termination by Employer is not allowed if:

- Employee suffers sickness, labor accident, occupational disease
- Employee is taking annual leave, private leave or other approved leave
- Employee is pregnant, taking maternity leave, raising children under 12 months old





# Recommended Action Plan

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- Employee's labor contract should include a written job description, listing expected performance level
- Conduct frequent performance reviews with written minutes
- A performance management policy should be issued in consultation with the trade union
- Probation period (60 days maximum): important so employer can judge employee's performance.
- First contract should be a fixed-term for 1-3 years. Also provides the employer with further opportunities to end employment relationship.



# Practical Alternatives to Dismissal & Poor Performance Termination

# Mutual Termination Agreement

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## Pros

- Avoids proving legal bases for termination (Registered ILRs/ Performance Management Policy)
- Avoids onerous termination procedures
- Avoids the risk of a wrongful termination lawsuit
- Employee is terminated quickly
- No risk of employee coming back

## Cons

- Almost always requires a settlement payment as consideration – very distasteful where employee has committed serious acts of misconduct
- Severance is payable for mutual termination, but not dismissal
- Usually must keep full facts confidential - cannot use employee as an example



Quiz: Subject to Dismissal?

# Would these acts of misconduct be subject to dismissal?

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1. Taking kickbacks from suppliers in exchange for agreeing to contract with them on behalf of the company.
2. Smoking in a prohibited area.
3. Disclosing confidential information to a competitor.
4. Skipping work for three consecutive days without calling in.
5. Bribing a government official.
6. Misusing the company taxi card for personal purposes.



## What to remember....

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- If you fail to follow required legal procedures and lack required documentation, you may not be able to legally terminate an employee for misconduct or poor performance.
- It is essential to consider these issues in advance, before a problem arises.
- Ensure your HR team understands the required legal procedures and has put into place ILRs and a Performance Management Policy.
- Please reach out to us for assistance if you need help.



**Any Questions?**

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# Thank you!

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