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MAI DUC THIEN

THE LAW ON LABOUR DISPATCH IN VIET NAM: THEORETICAL AND PRACTICAL ISSUES

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Scientific supervior: 1. Dr. Nguyen Xuan Thu.

2. Dr. Do Ngan Binh.

Reviewer 1:

Reviewer 2:

Reviewer 3:

The dissertation will be examined by Examination Board at Hanoi Law University dated ……..

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INTRODUCTION

1. The necessity of the study

In the labor market, there are always specialized organizations to provide personnel related services for enterprises directly using employees; in which, there is a service to provide employees who come to work directly for enterprises for a certain period of time, called the labour dispatch.

This is a flexible method of using employees to help businesses and enterprises optimize the personnel costs with suitable personnel. Therefore, labour dispatch is a popular and well-developed business in developed countries such as the US, Europe, Japan, Korea, and China. Labour dispatch in Viet Nam has been formed and developed quickly since the beginning of foreign investment in Viet Nam, particularly in provinces with the development of industrial zones.

In terms of labor and employment, labour dispatch is a specific employment relationship, in which the employee has two employers at the same time - called "Triangle employment relation". This "co-employer" relationship, although has positive points of job opportunities for employees, but also has been potentially risky not only in terms of job opportunities, sustainable jobs but also in ensuring the fundamental principles and rights at work for employees. Therefore, most countries have enacted laws to regulate labour dispatch activities, including Viet Nam.

In Viet Nam, for the first time, the Labor Code 2012 officially regulated the adjustment of the labour dispatch activities, then the Labor Code 2019 continued to stipulate with amendments and supplements. Howver, the law on labour dispatch in Viet Nam has existing problems and shortcomings. The situation of violating the law on labour dispatch still occurs commonly in practice. In addition, with the trend of globalization, the gig-economy, labour migration and the digital revolution, it is clear that labour dispatch in Viet Nam will inevitably thrive; The protection of worker' interests in the triangle employment relationship will certainly be complicated and unpredictable.

Such situation requires the adjustment and amendments of legislation on labour dispatch in Viet Nam. And to do that well, it is necessary to be studied more thoroughly about the theoretical bases of the labour dispatch and the law stipulating the issue; The real operation of the labour dispatch and the current situation of implementing its related legislation in Viet Nam should be identified and evaluated more deeply to serve as the foundations for further amendments of the law on labour dispatch.

Therefore, the the topic of the research has been chosen titled: "Laws on labour dispatch in Viet Nam: theoretical and practical issues" for the dissertation of the Doctor of Laws.

2. Research purposes and tasks

The dissertation aims at four purposes: Firstly, to research, evaluate and analyze the overview of the researches on labor dispatch and the law on labour dispatch; Secondly, to enrich and

clarify the theoretical bases of labor dispatch and the laws on labor dispatch in terms of legal science; Thirdly, to provide scientific evaluation and comments on the contents of the law on labor dispatch in Viet Nam up to now and accordingly to the new regulations of the Labor Code 2019, the current situation of labor dispatch; to clarify the role and trend of labor dispatch activities in Viet Nam in the new context with linkage to the trend of trade integration, international labour mobility; Fourthly, to propose recommendations to improve the law and the effective implementation of the law on labor dispatch in Viet Nam.

To achieve the above research purposes, the main research tasks of the dissertation include: (1) Overall assessment and comment on the achieved results, issues to be resolved in the published researches on labor dispatch; (2) Analyzing and clarifying the theoretical bases of labor dispatch and the amendments of the law on the issues in relations and comparisons to the updated international law; (3) Scientific comments, analysis and evaluation of the legal contents governing the labor dispatch in Viet Nam, in which, focusing on 06 main contents: the objects, conditions of the labor dispatch's activities, the contract of labor dispatch, the rights and obligations of involving parties, the state management of the labor dispatch's activities, settlement of disputes on labor dispatch; (4) Evaluation and analyzing the need to consolidate the law on labor dispatch in Viet Nam and proposing recommendations to improve the law and the effectiveness of the law implementation on labor dispatch.

3. Research subject and scope of the study

The research subject of this dissertation includes: (1) theoretical issues about labour dispatch such as theoretical basis on the economic - social - legal views; (2) theoretical issues about the law on labour dispatch such as: concepts, characteristics, roles, principles and contents; (3) the situation of labor dispatch before and after being regulated by laws; (4) the movement and development trend of the labour dispatch in Viet Nam; and the need and direction of law in the coming time.

Scope of research: this dissertation focuses on researching the nation-wide implementation of law and practice on labor dispatch in Viet Nam up to now.

4. Research methodology

This dissertation uses the main research methods such as Analytical Method, Proof Method, Comparative Method, Synthetic Method, Prediction Method, Expert Method, Statistical Method ... The methods are combined and used in a flexible way to clarify the content of the dissertation.

5. New contributions of the dissertation

Being the first of Thesis of PhD in Law to study on the theoretical and practical issues of implementing the law on labor dispatch in Viet Nam in a systematic, comprehensive and intensive manner. The dissertation contains 3 new results, as stated in the information on new research findings of the Doctoral dissertation.

6. The scientific and practical significance of the dissertation

The content of the dissertation provides theories about employment relations in general and labor dispatch in particular, the law and legislation on labor dispatch and scientific perspectives for reviewing law, law enforcement and policy-making on labour dispatch in practice in line with the requirements of consolidation of the labor market institutions in the context of trade integration and labour migration trend. Therefore, the thesis can be used for reference in many fields: theoretical research, law making, policy making, policy implementation, teaching, researching.

7. The dissertation structure

The dissertation includes 4 Chapters as follows: Chapter 1. Overview of the research situation; Chapter 2. Theoretical issues on labor dispatch and law on dispatch labor; Chapter 3. Legal status and practice of implementing the law on labour dispatch in Viet Nam; Chapter 4. Improving the law and the efficiency of implementation of the law on labour dispatch in Viet Nam.

In addition, the dissertation also has an Introduction, Conclusion by Chapter, General Conclusion, Appendices, List of references and List of the author's dissertation related to the subject.

CHAPTER 1.

OVERVIEW OF RESEARCH SITUATION

1.1. Overview of researches and issues related to the dissertation topic

With regard to the overview of published researches on labour dispatch, the dissertation's author arranged and assessed the research situation in three groups: (1) The researches on the theory of the labour dispatch and the law on labour dispatch; (2) The studies on the current law on labour dispatch; (3) The studies on recommendations to amendment the law on labour dispatch. For each group, the dissertation has evaluated the content and clarified the key results of each research/study, the inherited contents and the ones that need further studies to solve in this dissertation.

1.2. Researched issues related to the dissertation's topic and some evaluatings

Firstly, in terms of theory: the studies have pointed out the basic contents of the labour dispatch that need to be addressed (including what are specific content and why the law needs to regulate labour dispatch, what regulations need to be made to adjust the labour dispatch ...). This is the foundation for the dissertation's author to inherit and continue to develop a more comprehensive research on the theoretical basis system of the labour dispatch and the law on labour dispatch.

Secondly, in terms of legal status and practical implementation: many researchs have made comments and assessments of the advantages and disadvantages of the provisions on labour dispatch; the results achieved as well as the limitations and shortcomings in the practical implementation of the law on labour dispatch. These research values have the meaning of "suggesting" for the dissertation's author to study more on regulations on labour dispatch in Labor Code 2019 that none of the previous research have focused in.

Thirdly, in terms of recommendations to consolidate law: a number of researches have proposed solutions to perfecting the law on labour dispatch around the world and in Viet Nam. However, Vietnamese researches mainly propose "suggestive" solutions to develop law based on the reference of laws in other ocuntries in the world or evaluating the legal framework in compared to other countries' legislations without without going deeply into theoretical and practical analysis of each major content of the the provisions of the labour dispatch in the Labor Code 2019.

1.3. Basic issues to be solved in the dissertation

Selecting this topic at the doctoral level, the dissertation must research and solve the following basic issues:

Firstly, to evaluate more comprehensively and further clarify the theoretical basis of the labour dispatch and the law on labour dispatch such as the concepts, characteristics, and role of the labour dispatch and the law on labour dispatch. At the same

time, it is necessary to further clarify the basic contents of the laws on labour dispatch.

Secondly, evaluating, providing comments and analysis of the provisions on labour dispatch in Viet Nam in 6 major issues and practical implementation.

Thirdly, proposing direction for perfecting the law, identifing solutions to amend and supplement the law and improve the efficiency of the implementation of the law on labour dispatch in Viet Nam in the coming time.

1.4. Research theory

The dissertation used the following 5 research theories: General Theory of Employment, Interest and Money by John Maynard Keynes (1883-1946); Labor exchange theory by Michael Albert and Robin Hahnel; Contract Theory of Oliver Hart and Bengt Holmström; Theory of Psychological Contract; The theory of employment relationship and law governing the relationship of the parties in the employment relationship.

1.5. Question and hypothesis of the research

The author has posed three groups of research questions corresponding with three hypotheses and expected research results, including: (1) Theories of the labour dispatch and the law on labor dispatch; (2) The current situation of the law on labour dispatch and its implementation in Viet Nam; (3) Proposing to improve the law and the efficiency of law implementation on labor dispatch; (4) Consolidation of and improved implementation of the law on labour dispatch in Viet Nam.

CHAPTER 2.

THEORETICAL ISSUES OF LABOUR DISPATCH AND LAW ON LABOR DISPATCH

2.1. Theoretical issues on labour dispatch

** The concept and nature of the labour dispatch*

The dissertation has analyzed different concepts and perceptions of labour dispatch around the world and in Viet Nam and then to provide the concept as follows: "Labour dispatch is a labor service business of any organization/individual - called the labour dispatch institution - that provide the employees hired by itself to come to work for another organization/individual - called the dispatched labour - for a certain period of time for the purpose of collecting service fees. During working time for the user, the dispatched employee is subject to the assignment and direct management, administration and supervision of the users while her/his wages and other fundamental social rights at works are ensured by the labour dispatch institution".

From the perspective of employment relations, the nature of the labour dispatch is described very succinctly through the idiom: "Hiring but Not Using; Using but Not Hiring ".

The structure of the labour dispatch relationship is described by the triangular structure of the subject, in which the employee has 2 employers. To clarify the nature of the labour

dispatch relationship, the dissertation has analyzed the differences of the labour dispatch with the traditional employment relationship, employment co-operation relationship, labor outsourcing service relationship, and labor insourcing service relationship.

* *Characteristics of the labour dispatch*

The dissertation identifies 8 characteristics of the labour dispatch, including: First, the labour dispatch is originated from the market economy, only formed and developed in the market economy; Second, labour dispatch involves three parties; Third, the dispatch institution is the employer for the dispatched employees; Fourth, the labour user is the party that directly manages, supervises and operates the performance of the work for the employee during the working period; Fifth, the rights of the dispatched worker are guaranteed by the dispatch institution; Sixth, labour dispatch business is a conditional business; Seventh, it is a service and business of the dispatch company but it provides temporary support for the user of the employee; Eighth, labour dispatch is the issue with both economic and social aspects.

* *The role of the labour dispatch*

Labour dispatch has important role in supporting the overall labor market, increasing flexibility for the labor market, bringing profits to dispatch company, reducing personnel costs and management time for corporate user while increasing

opportunities to find jobs, income and professional skills for the employee.

2.2. Theoretical issues of the law on labour dispatch

** Concept, characteristics of labour dispatch*

The dissertation has analyzed the legal concepts and perspectives, and on the basis of comparison with the concept, nature and characteristics of the labour dispatch as identified in Section 2.2, the dissertation's author propose the concept of the law on labour dispatch as follows: "The Law on labour dispatch is a system of legal regulations issued to regulate social relations arising in the labour dispatch activities and guaranted enforcement by State".

The law on labour dispatch has 2 characteristics: stipulating the rules of handling behavior of three subjects in the labour dispatch relation; aiming at protecting employees while recognizing the difference of employment relationship - co-employer relationship - to create legal framework for the labour dispatched institution and the corporate user in labour dispatch relationship.

** The role of the law on dispatch labor.*

Firstly, the law directs the subjects in the labour dispatch relationship through the promulgation of regulations for the subjects to implement in practice. Secondly, the law protects the fundamental principles and the rights of employees at workplace; encourages activities to promote the development of the labor market, and at the same time restricts activities that infringe the legitimate rights and interests of the subjects and of the State.

Thirdly, the law creates a mechanism to handle disputes arising in the labour dispatch activities to protect the interests of the subjects and ensure the harmoniously and stably industrial relation.

** Principle of the law on labour dispatch*

First, protect basic rights at the workplace of employees; Second, to ensure activities of labour dispatch is conditional business; Third, to define the responsibilities between the 2 employers (labour dispatched institutions and corporate user) for ensuring basic rights at the workplace of the employee; Fourth, respect and ensure the legal agreement between the employee and employers.

** Basic contents of the law on labor dispatch.*

Base on the concepts of "content" and "law on labour dispatch labor", the definition is proposed that: "the content of the law on labour dispatch is a synthesis of regulations/rules on labour dispatch enacted and enforced by the State and documented in a specific legal form"; those legal forms are legal documents and the judgments of the court.

From the above definition and through studying the legal system of a number of countries in the world and Viet Nam, 6 contents of the law on dispatch labor have been identified by the author, including: (1) provisions on the subject of the labour dispatch; (2) regulations on conditions for labour dispatch business; (3) regulations on d labor dispatch contract; (4) provisions on rights and obligations of the parties in the labour dispatch relationship; (5) regulations on State management for

labour dispatch; (6) regulations on the settlement of disputes on labor dispatch. For each of the above contents, the comments and in-depth evaluation have been made with reference to the laws in some countries around the world to provide more deepen understanding of these theoretical issues.

CHAPTER 3.
LEGAL STATUS AND IMPLEMENTATION OF THE LAW ON LABOUR DISPATCH IN VIET NAM

The Chapter has evaluated, commented and analyzed 6 key contents of law on labour dispatch in Viet Nam; of which, the dissertation has: (1) provided scientific comments on the provisions under the Labor Code 2019 and its under-law documents; (2) evaluated the implementation of that law.

3.1.1. Subject of labour dispatch relations

The dissertation has evaluated and analyzed the legal provisions on 3 subjects according to the Labor Code 2019, namely (1) the dispatch company; (2) the corporate user company; (3) the dispatched employee. The general assessment shows that the legal provisions of Viet Nam are compatible with the laws of most countries in the world and are relatively consistent with the practice. However, there are 4 points that have not promoted the development of this activity in the future labor market.

Through the assessment, it is shown that the officially reported data on the labor dispatchis lower than the real figure

which does not reflect correctly the real situation of the labour dispatch.

3.2. Conditions of labour dispatch business

The dissertation has evaluated and analyzed the contents of the law stipulating four types of conditions of labour dispatch business, including: (i) business conditions of dispatch company; (ii) conditions of corporate user of dispatched worker; (iii) conditions on the list of jobs to be performed by labor dispatch; (iv) conditions on the term of doing labour dispatch business.

The ssessment and analysis of data shows that the requirements for the deposit of VND 2 billion is a financial burden for enterprises operating in the field; the rigid stipulation on the list of 20 jobs to be performed in labour dispatch has not met market demand.

3.3. Labour dispatch contract

There is only one Article in the Labor Code stipulating the labour dispatch contract. However, this article does not cover some "core" elements of a labour dispatch contract, such as: the scope of provision and use of this service, the price of labour dispatch service, the payment period, cases of invalid contract and settlements of those contracts, determining responsibilities upon contract termination.

Therefore, actual implementation has caused many problems such as: "general variable" signing a contract with a different name from the labour dispatch contract, the content of the labour dispatch contract has not really clear terms on responsibilities, obligations and the benefits of the employees, most of the employees cannot understand contents of the labour dispatch contract.

3.4. Rights, obligations of each party in labour dispatch relations

The dissertation has evaluated, commented and analyzed 03 main contents including: (i) Rights and obligations of the labour dispatch institution/company; (ii) Rights and obligations of the user; (iii) Rights and obligations of the dispatched worker. Basically, the rights and obligations of the entities in the labour dispatch relations as stipulated by Viet Nam's labor law are relatively consistent with international practices. However, the law has not specified some important rights and obligations such as: no specific regulation on the responsibilities for settlement of the labour dispatch dispute; terms of payment of the remuneration and salary for dispatched employee, particularly the bonuses arising from the results of working at the corporate user; measures ensuring opportunties for learning, training, and improvement of living standards for dispatched employees; the right to dialogue and collective bargaining of the dispatched employee; the choice of joining trade union at the workplace; employee's social welfares in the labour dispatch contract ..

3.5. State manegement on labour dispatch

The duties and competence of the state management authority on labour dispatch have clearly shown in legal provisions with specific responsibilities for each state agency from the central to local levels. However, in practice, state management has not met the requirements such as: the number of labor inspectors is not enough compared to required inspection tasks and no specialized inspector on dispatch labor; the limited capacity of several officials on labor dispatch management; limited funding for the state management of labor dispatch…

3.6. Settlement of disputes on labour dispatch

The current Vietnamese labor law does not stipulate the dispute settlement of labour dispatch among three parties. In stead, it only covered the individual labor dispute between dispatched employee and dispatch company.

According to the information collected from author's own survey, up to now, there has been no lawsuit at the People's Court on a dispute related to labour dispatch. And, non labor complaint and denunciation related to labour dispatch has been made to state agencies at the central and local levels.

CHAPTER 4.
CONSOLIDATING THE LAW AND IMPROVING THE EFFICIENCY OF IMPLEMENTATION OF THE LAW ON LABOUR DISPATCH IN VIET NAM

4.1. The direction for consolidating the law and the efficient implementation of the law on labour dispatch

Base on the analysis of the theoretical and practical bases of the labour dispatch in Chapter 1, Chapter 2 and the assessment of the legal status of the labour dispatch in Viet Nam in Chapter 3, this dissertation suggests some directions for conslidating the law and the improving the implementation of the law on labour dispatch as follows: First, consolidating the law on labour dispatch in Viet Nam has to ensure the legalization of the direction and perceptions of the Viet Nam Communist Party and consistence with the Viet Nam's Constitution in 2013. Second, consolidating the law on labour dispatch in Viet Nam must focus on solving the problems of the practical implementation and compatible with international law on labor dispatch; Third, consolidating the law on labour dispatch in Viet Nam reaffirm the recognition that labour dispatch is an indispensable activity of the labor market and a trend in the modern world of work. Fourth, it is necessary to codification the labor law to eliminate outdated rules to the labor market and to add new rules that orient the labor market in general and the labour dispatch market in particular in the future. Fifth, it is necessary to stipulate regulations to ensure

the harmonization of the interests of different parties in the labour dispatch relations, including giving the priority to the protection of the labor's rights at the workplace.

4.2. Recommendations of consolidating the law and the efficiency of implementation of the law on labour dispatch

4.2.1. Recommendations for consolidating the law in Viet Nam

** Overview on consolidating law on labour dispatch in Viet Nam.*

Ideology on legal system design: the dissertation's author consider that the key for consolidating the law is to define the direction/ideology of designing the legal system on labour dispatch for the labor market in the future. Comparing with the current situation of the Vietnamese labor market, the auther found that it is right time to consider applying a more open legal system model on labour dispatch rather than the current legal system that tightly controls this business.

Regarding to the form of the legal system on labour dispatch: as labour dispatch is uniquely characterised with triangle employment relationship and the law must cover the relations among 3 parties, the legal regulations on labour dispatch should be consolidated towards being a separate and specilaized regulations in the labor law. Accordingly, the legal provisions on labour dispatch in Viet Nam should be gathered to form a separate sptipulation, with 2 options (1) enacting a separate law;

or (2) a separate Chapter in the Labor Code rather than being a Section in the Labor Contract Chapter in the current Labor Code.

It is the belief of the author that both of the above-mentioned options are feasible if the policy-making agency determines to do so.

** Recommendations for consolidating the law on labour dispatch in Viet Nam:*

Firstly, regarding to parties of the labour dispatch relations, it is necessary to expand (1) the legal status of the party doing labour dispatch ; (2) the scope of the legal status of dispatched worker; (3) Limitation of the term of labour dispatch.

Second, regarding to conditions of labour dispatch business: (1) amend the regulations on the conditions of the legal representative of the dispatch company; (2) with regard to the responsibility for the deposit, adjust the deposit level to fit with the conditions of the labour dispatch business appropriate to the size and business scope of the company or using bank's guarantee instead of deposit; (3) consider expanding the list of occupations and jobs that are allowed to labor dispatch.

Third, labour dispatch contract: (1) adding some key provisions on the contents; (2) adding provision on invalid labour dispatch contracts in a way that is consistent with principles of the civil law and, at the same time, in line with the characteristics of the labour dispatch relation; (3) adding regulations on the responsibility of providing the other dispatched worker to match

the requests of the user; (4) adding provisions on cases of labour dispatch contract's termination.

Fourth, regarding to the rights and obligations of the parties in labour dispatch relation: (1) amend the article on the responsibility of dispatch company to notify to the dispatched worker of the content of the labour dispatch contract only on the provisions of the rights and obligations of the dispatched worker; (2) removing Clause 3, Article 56, Labor Code in 2019, on the responsibility of the dispatch company rto notify the company user of the employee's resume, the employee's requirements; (3) stipulating clearly the application of the labor disciplinary regulations of the user company with regard to labor discipline to the dispatched worker; (4) specify in more details on the rights and responsiblities of the dispatch company and of the corporate user to the dispatched workers when he/she suffers an occupational accident or risk or upon arising labour dispute; (5) supplementing provision on identifying the responsibilities of the corporate user to the dispatched worker in some special cases (such as: the dispatch company violates the regulations on the term of labour dispatch, having no permit to run the dispatch business, delayed wages payment to dispatched worker); (6) Consider amending regulations on the obligation to ensure that the equal pay for dispatched worker.

Fifth, regarding to the state management of dispatch labor: (1) adding specific provisions on state management on labour dispatch activities; (2) adding regulations on strengthening

coordination in the management of labour dispatch among competent agencies, including state labor management agencies, trade unions, employers' organizations and employee's organization in the enterprise; (3) legislation on inspecting, examining and handling violations need to be revised towards tightening and aggravating to limit violations of the labour dispatch field.

Sixth, regarding the settlement of labor dispatch disputes: it is necessary to develop separate provisions to regulate this particular employment relationship in a way to supplementing the principle of determining the ultimate responsibility for ensuring employment for dispatched worker in case one of the two parties is at risk leading to the termination of its operation.

4.2.2. Recommendations of improving the efficiency of implementation of the law on dispatch labor

The dissertation proposes some recommendations to improve the efficiency of implementation of the law on labour dispatch as follows: First, promoting propagation and dissemination of the law on labour dispatch; Second, clearly defining the responsibilities of the specialized agency responsible for state management of labor dispatch; Third, strengthening inspection and examination of the implementation of the law on labour dispatch; Fourth, strengthen management coordination among agencies, organizations and individuals.

CONCLUSION OF THE DISSERTATION

On clearly defining research purposes and tasks, using appropriate research methodologies, the thesis has met the proposed research objectives, including:

1. Researching the contents of the research works and providing the overall assessment of the studies on the thesis' topic.

2. Explaining more clearly and deeply the theoretical issues on the labour dispatch (such as the concept, nature and characteristics of the labour dispatch), the law on labour dispatch (such as the concept, characteristics, contents and roles of law on labour dispatch).

3. Solving comprehensively the current state of Vietnam's law on labour dispatch and implementation in practice.

The study of the current status of law on labour dispatch in Vietnam is carried out on the basis of scientific assessment and analysis of the legal provisions on labour dispatch in Viet Nam in comparison with those ones in some countries in the world such as Germany, Japan, Korea, China, South Korea. On the basis of clarifying the practice and development trend labour dispatch activities in Vietnam, the Thesis has pointed out the achievements as well as limitations and obstacle in the legal regulations and practical implementation of the law on labour dispatch in Vietnam.

4. Basing on assessing the current state and practical implementing of the law on labour dispatch, the thesis has set out directions to improve the law on labour dispatch. Accordingly, 7 groups of solutions to consolidate the law on labour dispatch, including overall recommendation and 06 groups of solutions on contents of the law on labour dispatch and improving the effectiveness of the implementation of the labour dispatch law in Viet Nam in the future.

Above are all the results obtained from the research of the Doctoral Thesis titled "Law on labour dispatch in Viet Nam: Theoretical and practical issues"../.