

ASSESSMENT OF THE COMPATIBILITY OF VIETNAMESE LAW WITH ASEAN COMMITMENTS ON THE PROTECTION OF LABOR RIGHTS OF MIGRANT WORKERS

Dr. Nguyen Thanh Huyen
University of Law, Vietnam National University, Ha Noi
huyennt76@vnu.edu.vn

Abstract:

Global economic integration has been promoting the flow of migrant workers from one country to another in the region and worldwide to work and seek better income. In the ASEAN region, labor migration is considered a crucial driver of economic growth and development in both countries of origin and destination. An estimated 20.2 million migrants originate from ASEAN countries, of which nearly 6.9 million are intra-ASEAN migrants¹. And to ensure the rights of migrant workers, it took ASEAN countries ten years to reach a consensus on protecting and promoting the rights of migrant workers. This article assesses the compatibility of Vietnamese regulations with ASEAN commitments on the protection of labor rights of migrant workers, such as the right to receive employment information, and working conditions; the right to fair treatment in the workplace, eliminating forced labor and discrimination in the workplace; the right to join a trade union... To conduct this research, this study used analytical research methods through synthesis, comparison, and legal analysis, emphasizing literary research based on secondary research data. The results of the article are some recommendations to improve Vietnamese laws and enforcement mechanisms to fulfill its regional commitments to protect the labor rights of migrant workers from ASEAN to Vietnam.

Keywords: ASEAN, migrant workers, labor rights

1. The concept of migrant workers in international and Vietnamese law

What is a migrant worker? According to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990 and the ASEAN Consensus on the Protection and Promotion of the Rights of Migrant workers (hereinafter referred to as the ASEAN Consensus), the term “migrant worker” refers to a person who is to be engaged, is engaged, or has been engaged in a remunerated activity in a State of which he or she is not a national². The term “*labor migrants*” is defined as those who move for employment³. The International Labour Organisation (ILO) explains the term “migrant for employment” means a person who migrates from one country to another intending to be employed otherwise than on

¹ International Labour Organization and International Organization for Migration (2018) “Risks and rewards: Outcomes of labor migration in South-East Asia -Key findings in Vietnam”.

² Clause 1, Article 2 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990 and Article 3, Chapter 2 ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers

³ International Organization for Migration (IOM) and Labour Migration – Inforsheet_2008

his account and includes any person regularly admitted as a migrant for employment⁴. So, the sign to identify migrant workers here is based on the differences in territory and borders of the country, which is the movement of workers from the country they are holding nationality to the country they do not have a nationality.

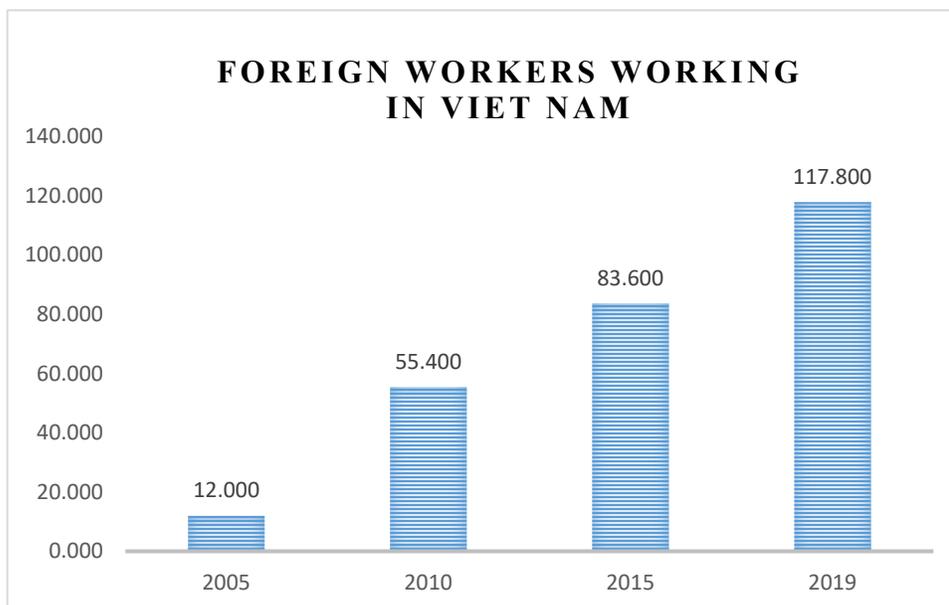
The Vietnamese Labor Law does not have the concept of migrant workers or foreign workers but rather defines them by listing the working forms of foreign workers. According to the 2019 Labor Code, foreign workers who want to enter Vietnam to work (including in the form of labor contracts) must be foreign citizens and fully meet the legal conditions of the law. The identification of foreign nationals requires confirmation of nationality and does not include stateless persons. Thus, the Labor Code 2019 and Decree No. 152/2020/ND-CP do not have the concept of “*foreign worker*” in the labor contract relationship. But the concept of the foreign worker is understood as a person with foreign nationality entering Vietnam to work following Vietnamese law, and there is no separate regulation that applies to foreign workers who come from the ASEAN countries compared to foreign workers from other countries and territories around the world. Thus, Vietnamese law is also similar to international law when considering the "nationality" factor of workers at their workplace to determine whether they are migrant workers or not. However, the difference is that Vietnamese law only identifies foreign workers as having foreign nationality, not including stateless people.

2. The current status of Vietnamese law on the protection of migrant workers' rights and compatibility with ASEAN regulations

2.1. Regulations on the right to choose employment and access information about the employment of migrant workers

Along with economic, cultural, and social development cooperation with international organizations, countries, and territories, Vietnam has become an attractive destination for foreign investors and workers in recent years. The number of foreign workers entering Vietnam has increased dramatically in recent years

⁴ Clause 1, Article 11, C97_Migration for Employment Convention (Revised), 1949 (No. 97) and Clause 1, Article C143_Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) of ILO



Source: TS. Vu Thanh Liem “Foreign workers in Vietnam through statistics”⁵

Vietnamese law recognizes that employees have the right freely choose their jobs and workplaces⁶. However, for foreign workers working in Vietnam, the right to elect the work is more limited than for Vietnamese citizens. The necessary and sufficient conditions for foreign workers to work in Vietnam are:

- ✓ Being 18 years or older and having full legal capacity;
- ✓ Having professional qualifications, techniques, skills, and working experience;
- ✓ Having enough health and strength as prescribed by the Minister of Health;
- ✓ Not being a person who is currently serving a penalty or has not yet had his/her criminal record cleared or is being examined for penal liability under foreign or Vietnamese laws.
- ✓ Having a work permit issued by a competent Vietnamese agency, except for cases in which a work permit is not required.

If the above conditions are met, foreign workers are allowed to work in Vietnam.

Currently, Vietnamese law only allows employers to employ foreign workers for four (04) job positions.

Firstly, job positions for managers, including the owners of sole proprietorships, general partners of partnerships, chairpersons of Members’ Councils, members of Members’ Councils, presidents of companies, chairpersons of Boards of Directors, members of Boards of Directors, Chief Executive Officers, and individuals holding other managerial titles as specified in the

⁵ Nguồn: TS. Vũ Thanh Liêm “Lao động nước ngoài ở Việt Nam qua con số thống kê” <https://consosukien.vn/lao-dong-nuoc-ngoai-o-viet-nam-qua-con-so-thong-k.html>, truy cập 14:21 Ngày 06/10/2022

⁶ Point a Clause 1 Article 5 Labor Code 2019

company charters⁷. To identify a foreign worker as a manager, the enterprise needs to provide the following documents: (i) In case the manager is also the legal representative of the enterprise, the enterprise needs to provide certificate of business registration. (ii) In case a manager holds managerial positions within the company and is recognized by the company's charter, the enterprise shall provide the charter of the enterprise and decide to appoint such a manager.

Secondly, the job position is the CEO. He or she is the head and directly manages the units under agencies, organizations, and enterprises, for example, the CEO or the head of a branch, or the head of a representative office of an enterprise. To prove that the employee is the CEO, the enterprise needs to provide the following documents: (i) a Certificate of branch operation registration or Representative office operation registration certificate; (ii) The company's charter records the position of CEO.

Thirdly, the job position is the expert. To be able to work in the expert position, a foreign worker needs to meet one of the following conditions: (i) Possess a university or equivalent or higher degree and at least 03 years of working experience in his/her trained discipline relevant to his/her expected job assignment in Vietnam; (ii) Having at least 05 years of experience and possessing a practicing certificate relevant to his/her expected job assignment in Vietnam; (iii) Special cases shall be decided by the Prime Minister at the proposal of the Ministry of Labor, Invalids, and Social Affairs⁸.

Fourthly, the job position is technical labor. A foreigner may work in the position of a technical worker in one of the following two cases: (i) Possessing a diploma in a technical or another discipline with a training period of at least 01 year with the same document certified to hold an equivalent position for 03 years or more of a foreign enterprise or organization. (ii) A written certification that the employee has held the same position for 05 years or more at a foreign enterprise or organization⁹.

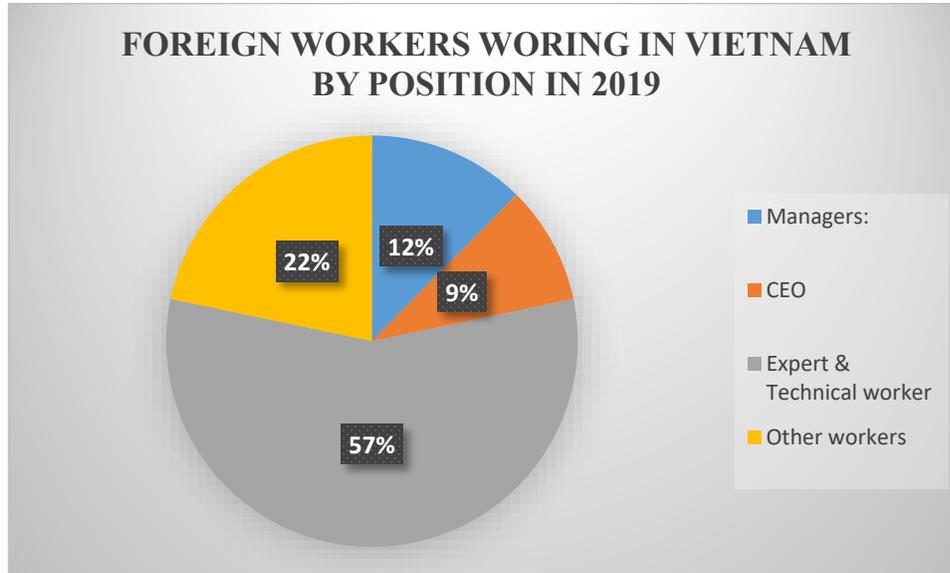
In the percentage of foreign workers entering Vietnam to work by job position in 2019, experts and technical workers still account for the highest ratio.

⁷ Clause 4 Article 3 Decree 152/2020/NĐ-CP “On foreign workers in Vietnam and recruitment and management of Vietnamese workers working for foreign organizations and individuals in Vietnam” (hereinafter referred to as Decree 152/2020/NĐ-CP)

⁸ Clause 3 Article 3 Decree 152/2020/NĐ-CP

⁹ Clause 6 Article 3 Decree 152/2020/NĐ-CP

CHART 2



Source: TS. Vu Thanh Liem "Foreign workers in Vietnam through statistics"¹⁰

Compared with the regulations on the employment of foreign workers according to the employment position of ASEAN countries, the regulation of Vietnam and Myanmar are quite similar (Myanmar only uses foreign workers for the position of technicians, while Vietnam only uses it for high-skilled workers). Meanwhile, other countries such as Singapore, Thailand, and Malaysia use foreign workers for many job positions, and these countries also issue many types of work permits for them the different job positions¹¹.

Foreign workers are not allowed to immigrate to Vietnam to find the above job positions freely, the law stipulates that employers in Vietnam (except contractors) determine their employment needs of foreign workers for each job that the Vietnamese worker cannot perform and report to the Ministry of Labor - Invalids and Social Affairs or the People's Committee of the province where foreign workers are expected to work¹². Thus, most Vietnamese employers wishing to recruit and employ foreigners must discuss and negotiate with them about jobs, working conditions, salary levels, etc. If the employee is a foreigner who agrees to work in Vietnam, the employer shall carry out the procedures to request the competent State agency to issue a work permit so that they can enter Vietnam to work. The term of a work permit issued to a foreign worker entering Vietnam to work in Vietnam is for the duration requested by the applicant but must not exceed 02 years¹³. This regulation of Vietnam is similar to that of most

¹⁰ Nguồn: TS. Vũ Thanh Liêm "Lao động nước ngoài ở Việt Nam qua con số thống kê"
<https://consosukien.vn/lao-dong-nuoc-ngoai-o-viet-nam-qua-con-so-thong-k.html>, truy cập 14:21 Ngày 06/10/2022

¹¹ ASEAN (2021) "Comparative Study on Laws and Policies in the Management of Migrant Workers in ASEAN" Table 2: Number, Name and Target Group of Employment Permit/s Issued in AMS, page 26, 27, 28

¹² Point a, Clause 1 Article 4 Decree 152/2020/NĐ-CP

¹³ Article 10 Decree 152/2020/NĐ-CP

countries in ASEAN¹⁴. After the foreign worker is granted a work permit, the parties enter into a written labor contract and the employer must send the signed labor contract upon request to the competent authority to issue the work permit¹⁵.

Foreign workers can access information on legal regulations related to working conditions and procedures in Vietnam through the competent state agencies in Vietnam. For example, the Employment Department under the Ministry of Labour, Invalids, and Social Affairs and Departments of Labour, Invalids, and Social Affairs of the provinces where the foreign worker intends to work. Regarding job search in Vietnam, they can be through the help of internal recruiters (Finding a job with the help of in-house recruiters) or through recruitment companies (Finding a job via recruitment). agencies) such as Robert Walters Vietnam Company Limited (<https://www.robertwalters.com.vn>); Michael Page International (Vietnam) Co., Ltd (<https://www.michaelpage.com.vn>); Monroe Consulting Group Vietnam Co., Ltd (<https://www.monroeconsulting.com>), etc. Thus, this regulation of Vietnam is compatible with commitments to the right to access employment information and employment conditions related to employment from the appropriate authorities and recruitment agencies in the host country under the ASEAN Consensus¹⁶.

2.2. Regulations on the right to fair treatment in labor, prohibiting forced labor in the workplace of migrant workers

“Fair treatment” refers to just and reasonable treatment applied to migrant workers in the workplace concerning working conditions, safety, and access to recourse in the event of employment subject to the prevailing national laws, regulations, and policies of the Receiving State¹⁷. ASEAN countries agree to promote equal treatment of gender and nationality and protect and promote the rights of migrant workers, especially women...¹⁸. Agreeing with this commitment, Vietnamese law also prohibits discrimination in labor (discrimination, exclusion, or preference) based on race, skin color, national origin or social origin, nationality, gender, age, pregnancy status, marital status, religion, belief, political view, physical disability, family responsibility, or HIV infection status, or for the reason of establishing, joining, or operating in a trade union organization or an employees’ organization at an enterprise, which affects equality in employment or career opportunities¹⁹; strictly prohibit employee abuse, forced labor and sexual harassment in the workplace²⁰. In addition, Vietnam's labor law also elaborates specific regulations to ensure the right to be treated fairly and equally between male and female workers, Vietnamese workers, and foreign workers working in Vietnam in labor relations.

¹⁴ ASEAN (2021) “Comparative Study on Laws and Policies in the Management of Migrant Workers in ASEAN” Page 32

¹⁵ Clause 3 Article 11 Decree 152/2020/NĐ-CP

¹⁶ Article 13 Chapter IV. ASEAN Consensus on the Protection and Promotion of the Rights of Migrant workers

¹⁷ Article 7 Chapter IV. ASEAN Consensus on the Protection and Promotion of the Rights of Migrant workers

¹⁸ Point e Article 1 Chapter I. ASEAN Consensus on the Protection and Promotion of the Rights of Migrant workers

Khoản 8 Điều 3 BLLĐ 2019

¹⁹ Clause 8 Article 3 Labor Code 2019

²⁰ Article 8 Labor Code 2019

Firstly, the fair treatment of working conditions for migrant workers. They are guaranteed the same working conditions as Vietnamese workers and no discrimination in the employment relationship, except for the limitation on the position of employment where foreign workers are employed, which is mentioned in section 2.1.

- *Regulation on working time and rest time,* there is no difference between foreign workers working in Vietnam and Vietnamese employees. Working hours shall be agreed upon by the parties in the labor contract but must not exceed 08 hours per day and 48 hours per week²¹. Regarding the regulation on rest time, foreign workers working in Vietnam are guaranteed the right to rest breaks during working hours, breaks between shifts, weekly breaks, personal breaks, public holiday leaves, and annual leave like Vietnamese workers. In addition, foreign workers working in Vietnam entitles to an additional 02 days off on public holiday leaves, which is the National day and the traditional New Year's day (if any) of the country of which the foreign worker is a national²².

- *Concluding and performing labor contracts,* when entering into an employment contract and during the performance of a labor contract, the labor law prohibits the keeping of the employee's identity papers, diplomas, and certificates or requires the employee to take measures to money or other property security for the performance of the labor contract. This provision is consistent with the content of the ASEAN Consensus “*migrant workers have the right to keep their passports and original work and personal documents issued by the Government following the laws, regulations, and policies of the Government receiving country.*”²³ During the working process, if the employer wishes to use the employee to work overtime, it must agree with the employee besides ensuring the scheduled time conditions, spare time, and paid wages for employees when working overtime. It is an adequate legal measure to ensure no forced labor. Regarding the term of the labor contract, Vietnamese law stipulates that indefinite-term labor contracts with migrant workers are not applicable because it is related to the duration of the work permit.

- *To ensure occupational safety, hygiene, and social insurance regimes for foreign workers working in Vietnam,* foreign workers also have full rights and obligations for the application of occupational safety, hygiene, and social insurance in their labor relations as Vietnamese workers. For foreign employees working in Vietnam who have entered into a labor contract of 01 year or more, from December 1st, 2018, the employer shall pay monthly premiums on the monthly salary fund on which social insurance premiums are based for them, including 3% to the Sickness and Maternity Fund and 0.5% to the Labor Accident and Occupational Disease Insurance Fund²⁴. After only 03 months of implementing the social insurance policy

²¹ Clause 1 Article 105 Labor Code 2019

²² Clause 2 Article 112 Labor Code 2019

²³ ASEAN (2021) “Comparative Study on Laws and Policies in the Management of Migrant Workers in ASEAN”, Article 9 Chapter III.

²⁴ Decree No. 143/2018/ND-CP. According to Decree 58/2020/ND-CP, from July 1st, 2020, if any enterprise meets the prescribed conditions, the contribution to the occupational accident and disease insurance fund can be reduced to 0.3% of the salary as the basis for the employee's social insurance payment.

for foreign workers working in Vietnam, the total amount of social insurance premiums paid by foreign workers across the country reached more than 100 billion VND; the total number of participants in social insurance for foreigners nationwide is 8,730 units with the number of employees is 51,524 people²⁵. As for the retirement and survivorship fund, foreign workers working in Vietnam and employers will start to pay from January 1st, 2022, employees to pay 8% of their monthly salary, and employers to pay 14% of the monthly employee's wage²⁶. The monthly salary on which social insurance premiums are based and defined as a job- or title-based wage amount, wage-based allowance, and other additional amounts by the labor law and agreed by the parties in the labor contract. In case the employee's monthly salary is higher than 20 times the base salary²⁷, the monthly wages on which social insurance premiums are based equally to 20 times the base salary²⁸. In case foreign workers work in Vietnam by being intra-corporate transferees or if they have reached the retirement age, as prescribed by law not eligible to participate in compulsory social insurance²⁹. The regulation on participation in the compulsory social insurance for foreign workers working in Vietnam is a progressive point to ensure the welfare of foreign workers and concurrently enhance the responsibility of employers for foreign employees working in Vietnam. However, when implementing this regulation, there is also a problem that may be foreign workers have to pay social insurance in both the country of their nationality and Vietnam - where they are working. According to the labor law of Vietnam, only foreign workers working in Vietnam under the category of intra-enterprise mobility or who have reached retirement age are not eligible to participate in compulsory social insurance. In addition, Vietnam has only signed a bilateral agreement on social insurance with Korea to avoid the need for employees to pay two times for social insurance, and the time of payment of social insurance for employees will mutually recognize by both parties together³⁰.

Health insurance is the kind of compulsory insurance applied to foreign workers working in Vietnam under labor contracts of 03 months or more³¹. Regarding health insurance premiums: Foreign workers pay one-third, and employers pay two-thirds according to the maximum contribution rate of 6% of monthly salary (currently, health insurance is applying a premium rate of 4.5% of monthly wage)³². The basis for determining the wages of foreign workers participating in health insurance: is the salary stated in the labor contract and must calculate in VND. In case the remuneration of the labor contract defines in a foreign currency, the foreign currency rate shall convert based on the average exchange rate on the interbank foreign currency

²⁵ “64% người nước ngoài lao động tại Việt Nam đóng BHXH bắt buộc” <https://baochinhphu.vn/64-nguoi-nuoc-ngoai-lao-dong-tai-viet-nam-dong-bhxh-bat-buoc-102253208.html>, truy cập 8:11 ngày 07 tháng 10 năm 2022

²⁶ Clause 1 Article 12 and Article 13 Decree 143/2018/NĐ-CP

²⁷ According to Decree 38/2019/ND-CP, Vietnam's current base salary is VND 1,490,000

²⁸ Clause 3 Article 89 Law on Social Insurance 2014

²⁹ Clause 2 Article 2 Decree 143/2018/NĐ-CP

³⁰ Bilateral Agreement on Social Insurance between Vietnam and Korea signed on November 14, 2021

³¹ Point a Clause 1 Article 12 the Law on Health Insurance 2008, amended 2014

³² Point a Clause 1 Article 13 the Law on Health Insurance 2008, amended 2014 and Point a Article 7 Decree 146/2018/NĐ-CP, Detailing, and guiding measures to implement, a number of articles of the Law on Health Insurance

market announced by the State Bank by law. Method of payment of health insurance: The employer will pay the employee's health insurance premium and deduct the health insurance premium from the employee's salary to pay at the same time to the monthly health insurance fund³³.

- To ensure wages for the employees, the law stipulates that employers make certain equal wages, regardless of gender, for employees doing work of equal value³⁴. The parties in the labor relationship can agree on the salary, but the salary according to the job title must not be lower than the regional minimum wage³⁵. Wages paid to employees are in Vietnam Dong, and that for the foreign employee can be in foreign currency³⁶. This regulation makes it easy for foreign workers to use their wages.

Secondly, prevent and combat sexual harassment in the workplace.

Creating and maintaining a safe, hygienic, and healthy working environment for employees is the responsibility of the employer. One of the activities to maintain a safe and healthy working environment is to develop and effectively implement the prevention and combat of sexual harassment in the workplace. Regulation on sexual harassment in the workplace has prohibited behavior since the 2012 Labor Code³⁷. However, until the labor code 2019, the definition of sexual harassment in the workplace is regulated by law³⁸. It becomes the contents of collective bargaining between the representative of employees and employers³⁹. Moreover, the employer has to guide the prevention and combat of sexual harassment in the workplace, the order, and procedures for handling sexual harassment at the workplace into the internal labor regulations⁴⁰. For foreign workers, the marked regulation on the avoidance of sexual harassment at the workplace makes it easy for them to implement and comply, especially in a working environment with little difference in culture for them.

Thirdly, several other regimes aim to ensure equality and combat discrimination in labor.

- The State shall plan and take measures to organize kindergartens in places with many laborers⁴¹. Employers are responsible for helping and supporting the construction of kindergartens or a part of kindergarten expenses for employees⁴². This regulation applies to male and female employees, Vietnamese citizens, and foreign workers who are raising children supported by the employer with childcare costs. Previously, in the Labor Code 2012, this regime

³³ Clause 1 Article 15 the Law on Health Insurance 2008, amended 2014

³⁴ Clause 3 Article 90 Labor Code 2019

³⁵ Clause 2 Article 90 Labor Code 2019

³⁶ Clause 2 Article 95 Labor Code 2019

³⁷ Clause 2 Article 8 và Clause 1 Article 183 Labor Code 2012

³⁸ Clause 9 Article 3 Labor Code 2019

³⁹ See Article 67 Labor Code 2019

⁴⁰ See Article 188 Labor Code 2019

⁴¹ Clause 5 Article 135 Labor Code 2019

⁴² Clause 4 Article 136 Labor Code 2019

only applied to female employees who raise children⁴³. Thus, this regulation in the Labor Code 2019 has ensured equality and no distinction between male and female employees.

- Employers are not allowed to arrange for employees to work at night, work overtime and go on long business trips if they are raising children under 12 months old unless otherwise agreed by the employees⁴⁴. This provision applies to all employees (including male and female employees, Vietnamese employees, and foreign workers). It has overcome the limitation of the Labor Code 2012 on the responsibility of raising children under 12 months of age between male and female employees. Because the Labor Code 2012 stipulates: *“Employers are not allowed to employ female employees to work at night, work overtime and go on long business trips in the following cases: a) Pregnancy from the 7th month or the 6th month if working in highland, deep-lying, remote areas, border areas, islands; b) Are raising children under 12 months old”*⁴⁵.

- Employers may not dismiss or unilaterally terminate the labor contracts with employees for reasons of marriage, pregnancy, maternity leave, or raising children under 12 months of age (it applies to both male and female employees)⁴⁶. This regulation has also overcome the limitation of the Labor Code 2012. Because the labor code 2012 only gives this protection to female employees as follows: *the employer may not dismiss or unilaterally terminate the labor contract with female employees for reasons of marriage, pregnancy, maternity leave, or raising children under 12 months old*⁴⁷.

- Employees are guaranteed their old jobs when they return to work after their maternity leave has expired as prescribed, without any reduction in wages, rights, and benefits compared to before the maternity leave. In case the old job is no longer available, the employer must arrange another job for them with a salary not lower than the salary before the maternity leave⁴⁸. Maternity leave obeys the law on social insurance. It applies to both female and male employees (when the male employee has a wife giving birth to a child or the male employee undergoes sterilization). Therefore, regulations on job security for employees (including male and female workers, both Vietnamese and migrant workers) after the maternity leave period is over are appropriate and ensure fairness, not only apply to female employees like the Labor Code 2012⁴⁹.

- Employees are fully informed about jobs that adversely affect reproductive function. Labor law not only stipulates the list of jobs that affects the reproductive function of female but also of male employees⁵⁰. It is a very progressive regulation to protect the health of employees and the normal development of the next generation. Previously, Vietnam labor law only stipulated the list of jobs that employees can't do⁵¹.

⁴³ Clause 6 Article 153 and Clause 4 Article 154 Labor Code 2012

⁴⁴ Point b, Clause 1 Article 137 Labor Code 2019

⁴⁵ Clause 1 Article 155 Labor Code 2012

⁴⁶ Clause 3 Article 137 Labor Code 2019

⁴⁷ Clause 3 Article 155 Labor Code 2012

⁴⁸ Article 140 Labor Code 2019

⁴⁹ Article 158 Labor Code 2012

⁵⁰ Article 142 Labor Code 2019

⁵¹ Article 160 Labor Code 2012

- The above provisions apply to employees, ensuring equality and no discrimination between male and female workers, between Vietnamese and foreign workers, and are compatible with the regulation of ILO Convention No. 111 on Discrimination in Employment and Occupation, 1958, and ILO Convention No. 100 on equal pay between male and female workers for work of equal value, 1951, and under the ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers⁵².

2.3. Regulations on the right to establish and join a representative organization of workers at the grassroots level of migrant workers

Currently, Vietnamese labor law recognizes that employees have the right to establish, join and operate trade unions following the Law on Trade Unions and have the right to establish, join and participate in activities of their organization's employees at the enterprise⁵³. However, the Trade Union Law 2012 has not recognized the right to establish and join foreign employees working in Vietnam⁵⁴. Foreign workers working in Vietnam can join Enterprise-based Employees' Organizations⁵⁵. This provision is compatible with the ASEAN Consensus "*Migrant workers have the right to join trade unions and associations under the national laws, regulations, and policies of the host country*"⁵⁶.

However, in practice, Enterprise-based Employees' Organizations have not been established in Vietnam because there are no guidelines for implementation. This is also a limited point, leading to foreign workers not being able to exercise their rights as recognized in the ASEAN Consensus and the Labor Code 2019.

3. Some recommendations

3.1. Recommendations to improve the legal regulations on jobs that employed migrant workers

The regulation of employment positions for foreign workers depends on the labor needs of each country. In the context of economic integration, attracting many foreign investors to invest in economic development, Vietnam has implemented a policy of using foreign workers with high professional qualifications that the domestic labor force unsatisfactory is suitable for the circumstance of economic development of the country. However, regulations on standards for technical workers are still not strict, creating opportunities for many foreign workers to come to Vietnam to work but not necessarily "technically qualified workers." Technical workers are foreign workers in one of the following cases: *a/ Having been trained in a technical or another discipline for at least 01 years and having at least 03 years of working experience in his/her trained discipline; b/ Having at least 05 years of working experience relevant to his/her expected*

⁵² Article: 7,9,13,14,17 ASEAN Consensus on the Protection and Promotion of the Rights of Migrant workers

⁵³ Clause 1,2 Article 170 Labor Code 2019

⁵⁴ Vietnamese employees working in agencies, organizations, and enterprises have the right to establish, join and operate trade unions, Article 5 of the Law on Trade Unions 2012.

⁵⁵ Clause 2 Article 170 Labor Code 2019

⁵⁶ ASEAN (2021) "Comparative Study on Laws and Policies in the Management of Migrant Workers in ASEAN", Article 20 Chapter IV.

*job assignment in Vietnam*⁵⁷. According to this regulation, a foreign worker who is not trained in any technical specialized but has 05 years of experience working a suitable job that the foreign worker expected to work in Vietnam may consider "a technical worker." Employers may recruit foreign workers to work in Vietnam because Vietnamese workers can not do this kind of job. This regulation will affect the loss of employment opportunities for Vietnamese workers and many socio-economic and cultural issues in our country. For instance, in Nghe An province alone, within ten years (From 2010 to the end of 2020), the provincial police have detected and handled 172 cases related to activities of foreigners, of which 249 people picked up violations of the law in the field of immigration⁵⁸.

3.2. Recommendations to improve the law on ensuring insurance benefits for migrant workers

Vietnam's implementation of social insurance and health insurance policies for foreign workers working in Vietnam is a progressive policy to ensure their rights and to exercise equality in rights without discriminating between Vietnamese workers and foreign workers working in Vietnam on labor security policies. At the same time, this regulation also makes foreign workers feel secure when working in Vietnam because the welfare regime is guaranteed, for example, sickness, occupational accident, occupational disease, maternity, etc. retirement, and death. If foreign workers satisfy the conditions prescribed by law, they are entitled to the one-time social insurance regime. Each year of paying social insurance premiums is entitled to 02 months of the average monthly salary on which social insurance premiums are based⁵⁹. According to the Vietnam-Korea Bilateral Agreement on Social Insurance, if the total period of cumulative insurance participation in a Contracting Party is less than 18 months, the implementing agency of that Contracting Party will not be required to apply the calculation of the total period of participation in social insurance to consider enjoying the monthly pension scheme, and the computation of one-time social insurance payment will base on the actual time of participating in social insurance in the Contracting Party⁶⁰.

Besides the advantage side of this regulation, the disadvantage also needs to be considered when implementing it in practice the foreign workers coming to Vietnam to work may be paid the same social insurance contributions in their country's nationality. Vietnam has only signed a bilateral agreement with South Korea on social insurance, while foreign workers working in Vietnam come from many countries. According to 2019 statistics, foreign workers with Chinese nationality account for 19.4%, South Korea at 18.3%, Taiwan (China) at 12.9%,

⁵⁷ Clause 6 Article 3 Decree 152/2020/NĐ-CP

⁵⁸ Trần Thị Thanh Mơ (2021) “Công tác quản lý lao động nước ngoài ở Nghệ An hiện nay và một số giải pháp trong thời gian tới” <https://nghean.dcs.vn/vi-vn/tin/cong-tac-quan-ly-lao-dong-nuoc-ngoai-o-nghe-an-hien-nay-va-mot-so-giai-phap-trong-thoi-gian-toi/405132-738680-23086>

⁵⁹ Point c, Clause 2 Article 9 Decree 143/2018/NĐ-CP

⁶⁰ Chính Phủ (2021) Tờ trình số 323/TTr-CP, ngày 08/9/2021, Tờ trình UBTVQH cho ý kiến về việc ký Hiệp định BHXH giữa Chính phủ Nước XHXHCN Việt Nam và Chính phủ Đại Hàn Dân Quốc.

Japanese at 9.5%, and laborers coming to Vietnam from other countries at 39.9%⁶¹. Therefore Vietnam needs to promote negotiation and signing of bilateral agreements on social insurance to avoid overlapping social insurance contributions and recognize the time of social insurance payment.

In addition, for foreign workers working in Vietnam to use social and health insurance, Vietnam needs to pay attention to supporting them to communicate and exchange at social insurance agencies or medical examination and treatment facilities. The reason is that not all foreigners speak Vietnamese well.

3.3. Recommendations to improve the law on the right to join the representative organization of workers at the grassroots for migrant workers

Currently, the number of foreign workers working in Vietnam has been increasing continuously for many years (see Chart 1). Therefore, in addition to state management of foreign workers working in Vietnam, they also need a representative organization to protect their legitimate rights and interests. The fact that Vietnamese law stipulates that employees have the right to choose to join a representative organization of workers at the grassroots⁶² is extreme progress for workers to exercise their right to freedom of association under the Convention. No. 98 of the ILO Convention on the Right to Organize and Collective Bargaining, 1949, to which Vietnam is a member, and is a meaningful legal basis for Vietnam to implement new-generation trade agreements (Ex: CPTPP Agreement⁶³ and EVFTA Agreement⁶⁴). However, for these regulations can be implemented in practice, the Government needs specific guidance on the following issues:

- (i) Dossier, order, and procedures for registration;
- (ii) Competence and procedures for granting and revoking registration;
- (iii) State management over financial matters and assets of the employee's organization at the enterprise;
- (iv) Division, separation, consolidation, merger, dissolution, right of association of employees' organizations at the enterprise.

In addition, the Vietnam Trade Union also needs to study to propose amendments to the Law on Trade Union 2012 and the Charter of Vietnam Trade Union in the direction of opening the conditions and subjects to join the Vietnam Trade Union (including foreigners working in Vietnam). Although, this is an issue that needs careful consideration because the Vietnam Trade Union is a socio-political organization. Besides its primary function as representing employees, taking care of and protecting legitimate rights and interests of employees, Trade Union also

⁶¹ Nguồn: TS. Vũ Thanh Liêm “Lao động nước ngoài ở Việt Nam qua con số thống kê”
<https://consosukien.vn/lao-dong-nuoc-ngoai-o-viet-nam-qua-con-so-thong-k.html>, truy cập 14:21 Ngày 06/10/2022

⁶² Article 170 Labor Code 2019

⁶³ CPTPP Agreement (Comprehensive and Progressive Agreement for Trans-Pacific Partnership)

⁶⁴ EVFTA Agreement (European-Vietnam Free Trade Agreement)

participates in state management and socio-economic management; participates in the examination, inspection, and supervision of the activities of state agencies.

Conclusion

Today, in an increasingly "flat" world, the need to exchange goods, services, capital, and labor between countries is increasing. That promotes the process of legal harmonization in the region and internationally. In the field of labor, countries in the world have developed legislation following the recommendations of the ILO, especially the basic international labor standards in the 1998 Declaration of this Organization. The ASEAN Consensus on the protection of the labor rights of migrant workers also aims to protect the fundamental rights of migrant workers under basic international labor standards. This article has analyzed, commented on, and assessed the compatibility between Vietnamese law and ASEAN commitments on protecting the rights of foreign workers working in Vietnam. On that basis, this study proposes some recommendations to improve Vietnam's labor law to ensure the rights of migrant workers working in Vietnam.

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