

To Compensate Workers for Damage in Case of Illegal Termination of Labor Contracts

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Abstract

Unilateral termination of a contract means the termination of the labor contract by the employer or the employee without the consent of the other party. Accordingly, when terminating the labor contract, there will be two cases, one is unilaterally terminating the labor contract in accordance with the law or unilaterally terminating the labor contract illegally. Although the law has a mechanism for one of the parties to unilaterally terminate the labor contract (hereinafter referred to as unilateral termination), to ensure benefits for the other party, the Labor Code also stipulates it is very clear which cases can be terminated, which cases cannot be terminated. Most of the cases that the law that allows unilateral termination may arise from other objective or subjective reasons, but in general, doing unilateral work will significantly reduce the significant damage to the party who is doing the job. This study focuses on analyzing the contents related to the termination of illegal labor contracts of both employers and employees, thereby pointing out the shortcomings in the Law, specifically the Ministry Labor Code 2019.

Keywords: Compensate, workers for damage, illegal termination, labor contracts, Labor Code 2019.

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INTRODUCTION

The labor contract is a legal institution that has always been recognized and specified in the labor law system of our country since the founding of the country [1, 2]. However, only since our country has recognized and developed the economy according to the socialist-oriented market economy model, has the labor contract really become the most popular form of labor recruitment.

According to the Labor Code 2019 [2], "an employment contract is an agreement between an employee and an employer on paid work, working conditions, rights and obligations of each party in industrial relations". Having entered into a labor contract, the termination of the labor relationship also becomes common and inevitable. In which, there are cases where the labor contract is terminated by the employer illegally terminating the contract.

It can be seen that the termination of a labor contract is a very important legal event because its legal consequence is the termination of the labor relationship and especially in the case of the termination of the labor contract due to violation of the law. Laws will affect the

workers' jobs, income, and lives of workers and their families. Therefore, the labor law in particular and the law of Vietnam, in general, have provisions on compensation for workers in case of illegal termination of labor contracts in order to protect rights and interests legal rights of the employee in industrial relations.

In order to improve the quality and efficiency of the settlement of labor disputes in general and compensation disputes in particular, and at the same time protect the legitimate rights and interests of employees upon termination of the agreement. Illegal action requires the resolution of disputes must be objective, accurate, and in accordance with the law. Comprehensive review and assessment of legal regulations, point out inadequacies and problems in legal regulations, and at the same time offer solutions to improve legal regulations and improve legal regulations. Highly efficient settlement of disputes over compensation is essential.

For these reasons, the author decided to choose the topic "Law on compensation for workers in case of terminating illegal labor contracts" as his research topic.

OBJECTIVES OF THE STUDY

General Objective

The topic researches the rationale of the law on compensation for damages in case of illegal termination of labor contracts, pointing out shortcomings and limitations in the provisions of law. From there, proposing solutions to perfect the law on compensation for workers in case of illegal termination of labor contracts.

Detail Objective

To achieve the important objective set out, the topic needs to implement the following specific goals:

Research and clarify the content of legal terms and basic theoretical issues about compensation in case of illegal termination of a labor contract.

Research, analyze, and clarify the provisions of the law to adjust the regulations on compensation in case of illegal termination of the contract, as a basis for grounded assessment of the issue to adjust by law for the settlement of compensation disputes in current industrial relations.

From the current law provisions on compensation for workers in case of illegal termination of labor contracts, point out the limitations, shortcomings, and problems in the provisions of the law. From there, proposing feasible solutions to perfect the legal system and improve the efficiency of resolving disputes on compensation, protecting the legal rights of employees in labor relations.

RESEARCH METHODS, RESEARCH LIMITS, AND RESEARCH SUBJECTS

Research Methodology

The topic is completed on the basis of the methodology of Marxism-Leninism, dialectical materialism and historical materialism, Ho Chi Minh's thought on the State and law; views of the Communist Party of Vietnam on judicial reform, and building a socialist rule of law State.

Research Methods

The analytical method is used to analyze concepts and legal provisions on compensation for workers in case of illegal termination of labor contracts;

The synthetic method to arrange, link, the system of analyzed problems as well as present problems;

The comparative and statistical method is used to provide necessary data, compare, compare and clarify the current situation of the law on compensation for workers in case of termination of the agreement working together against the law, learn solutions to perfect the law;

The method of combining theoretical research with practice is also used in the implementation of the thesis to make comments, opinions, and conclusions about the research contents.

Subject limit scope

Scope of content: The scope of the thesis is the provisions of Vietnamese law on compensation for workers in case of illegal termination of labor contracts.

Scope of space: In Vietnam.

Scope of time: For 3 years, from 2018 to 2021.

Research Subjects

Research the theoretical issues of compensation and illegal termination of labor contracts;

Research on current law provisions on compensation for workers in case of illegal termination of labor contracts, conducted on the basis of access to the content and spirit recognized in the Code labor year 2019 and guiding documents.

To study the current state of law provisions on compensation for workers in case of illegal termination of labor contracts, point out inadequacies and problems in the provisions of law. From there, proposing theoretical and practical solutions with high value applicable to Vietnamese laws in improving the efficiency of settlement of disputes on compensation, protecting legal rights for labor people in case of illegal termination of the labor contract.

LITERATURE REVIEW

In recent years, compensation for damage to employees in case of illegal termination of labor contracts is one of the issues that are of great concern to society. With the desire to develop and innovate the country, as well as protect the legitimate rights and interests of workers in industrial relations, there have been much researches on general damage compensation and compensation for employees in case of illegal termination of the labor contract in particular. This is shown in the research works at many different levels and ranges which have been published.

Some of the research works such as: "Compensation for damage in Vietnamese labor law and practical application in the area of Da Nang city" by Nguyen Thi Bich Nga (2014), Post-Master of Law Study, Law Faculty - Hanoi National University, "Law on compensation for workers in industrial relations in Vietnam - current situation and recommendations" by the author Ha Thi Lan (2011), Graduation thesis, Hanoi Law University, "Labor disputes and labor dispute settlement under current labor law" by Nguyen Thi Bich (2008), Master of Law, University Ho Chi Minh City Law School, etc.

In these studies, the authors have studied systematically the issues related to damages in

accordance with the provisions of Vietnamese law. However, in the research works, the author is analyzing the problem of damages in general and compensation for damage in industrial relations in particular based on the provisions of the law, which are based on Labor Code 2012 and guiding documents. Meanwhile, the Labor Code 2019 has taken effect to replace the 2012 Labor Code and its guiding documents. Therefore, some of the contents in these studies are no longer consistent with the current law. In his research, the author will inherit a number of theoretical content about damage compensation, thereby giving analysis and evaluation based on the current law on compensation for damages the employee in case of termination of labor contract due to law violation.

In addition, there are some articles related to damages in the labor law in general, which have been published in books, newspapers, magazines such as the article "Law on termination of labor contracts. and the applied situation in Vietnam" by Diep Thanh Nguyen (2004), Journal of Scientific Research 2004, Can Tho University, article "Settlement of labor disputes in the People's Court – From Laws to practice and the number of recommendations" by Pham Cong Bay (2009), Journal of Law No. 9/2009, article "Responsibility to compensate workers for damages when unilaterally terminating labor contracts" of the author. Le Van Duc (2019) is posted on the Portal of the Legislative Research Institute under the Standing Committee of the National Assembly, etc.

In each research project, there are analyzes, assessments, and comments on compensation in the labor law from many different angles, aspects, and degrees.

However, most of the works focus on the damage compensation problem from the theoretical perspective and the main solutions in general, there is no in-depth research on the issue of compensation harm to the employee in case of illegal termination of the labor contract.

In addition, the investigation of compensation for damage to employees in case of illegal termination of labor contracts in accordance with the Labor Code 2019 and its guiding documents has not yet been conducted mention. With the aim of improving the labor law as well as improving the efficiency of labor dispute settlement, contributing to protecting the legal rights of employees in case the employer terminates the contract illegally, The author will inherit some of the theoretical content of the research works, and provide independent and systematic analysis and evaluation on the issue of compensation for workers in case of illegal termination of a labor contract.

RESEARCH RESULTS AND DISCUSSIONS

Some related concepts

Labor Contract Concept

In terms of a market economy, to employ labor, employers can choose from different ways. Employers can employ workers through direct recruitment or re-employment of workers from another enterprise. However, in these two modes, the direct labor recruitment method is always the basic recruitment method used by employers mainly because this method helps enterprises to have a workforce stable and sustainable. Moreover, the labor re-employment of another enterprise is only applicable in cases where the law allows very strict conditions, so it is not always possible for the employer to apply the method this.

In order to be able to directly recruit workers to work, between the employer and the person, it is necessary to have a commitment, legal agreement to formally establish the relationship between the parties, establish rights and obligations legal proceedings between the parties. That legal form is an employment contract.

Historically, the labor law was born after civil law. Therefore, before that legal issues related to industrial relations in general, contracts in the labor sector, in particular, were governed by the provisions of civil law. Therefore, in the past in the legal system of many countries (such as France, Germany, China, etc.) it was almost certain that a labor contract was a kind of civil contract. For example, Article 611 of the 1896 German Civil Code stipulates: "Through a contract, two parties have committed to perform an activity, they must perform that activity, and the other party is obliged to pay remuneration according to the agreement".

Contract according to Vietnamese dictionary is understood: "is a covenant agreement between two or more parties specifying the rights and obligations of the parties involved, often written in writing" [3].

The Civil Code 2015 in Article 385 states: "A civil contract is an agreement between the parties on the establishment, change or termination of civil rights and obligations" [4].

Thus, in essence, the contract must be an agreement and covenant between the parties and its content must be provisioned on the rights and obligations of the parties involved (in each specific field). A labor contract is also a type of contract (previously a labor contract was considered a civil contract, later split into a separate type of labor contract), so it must also have the nature of the contract. Generally, it is indenture, formed on the basis of the agreement of the parties. But unlike a civil contract or a commercial contract, this agreement must be an agreement between the subjects of the industrial

relations and its contents must be related to the rights and obligations of the parties involved labor system such as issues of employment, salary, working time, social insurance.

Concept on Termination of Labor Contract

Termination of a labor contract is the event in which the employee terminates working for the employer because the labor contract is automatically terminated, the employee is fired, or either party is unilaterally terminated labor contract ahead of time.

Unilateral termination of a contract is the right to "withdraw" from a previously concluded contract. In principle, breaking commitments is always discouraged, if not prohibited. However, if contract law generally provides for active breach of the commission only in the expected cases and the party breaking the commitment always has to suffer certain legal consequences, Then the labor law considers unilateral termination of the labor contract, especially the unilateral termination of the labor contract from the employee as an important right of the employee, equally important is the right to enter into a labor contract.

Point d, Clause 1, Article 5 of the 2019 Labor Code stipulates that employees have the right to "Unilaterally terminate the labor contract". In general, the cases of labor contract termination recorded in Vietnam can imagine 3 groups of causes [2];

- i) Termination of labor contract due to inevitable reasons;
- ii) Unilaterally terminate the labor contract;
- iii) Termination of labor contract due to labor reduction (including cases of labor contract termination due to changes in structure or technology, termination of labor contract for economic reasons, and termination of contract labor due to merger, consolidation, division, or separation of enterprises and cooperatives).

In particular, unilateral termination of the contract is a case noted with a lot of caution from lawmakers both in the 1994 Labor Code, the 2012 Labor Code, and the 2019 Labor Code.

Unilateral termination of the labor contract

Unilateral termination of a labor contract is the voluntary termination of the labor contract ahead of time without the mutual agreement on termination of the labor contract of one of the parties to the labor contract relationship:

The employee has the right to unilaterally terminate the labor contract in the cases specified in Article 35, Labor Code, 2019, specifically [2]:

1. The employee has the right to unilaterally terminate the labor contract but must notify the employer in advance as follows:

- a) At least 45 days if working under an indefinite term labor contract;
- b) At least 30 days if working under a fixed-term labor contract with a term from 12 months to 36 months;
- c) At least 03 working days if working under a fixed-term labor contract with a term of fewer than 12 months;
- d) For a number of specific industries, occupations, and jobs, the advance notice period shall comply with the Government's regulations.

2. An employee has the right to unilaterally terminate the labor contract without prior notice in the following cases:

- a) Not being assigned to the correct job or working place or failing to ensure the agreed working conditions, except the case specified in Article 29 of this Code;
- b) The salary is not paid in full or on time, except for the case specified in Clause 4, Article 97 of this Code;
- c) The employer is mistreated, beaten, or verbally abusive, acts affecting health, dignity or honor; forced labor;
- d) Being sexually harassed at the workplace;
- dd) The pregnant female employee must take leave as prescribed in Clause 1 Article 138 of this Code;
- e) To reach the retirement age as prescribed in Article 169 of this Code unless otherwise agreed by the parties;
- g) The employer provides dishonest information as prescribed in Clause 1 Article 16 of this Code, affecting the performance of the labor contract.

The employer has the right to unilaterally terminate the labor contract in the cases specified in Article 36, Labor Code, 2019, specifically [2, 5]:

1. An employer has the right to unilaterally terminate a labor contract in the following cases:

a) The employee regularly fails to complete the work under the labor contract which is determined by the criteria for evaluating the level of work completed in the employer's regulations. The Regulation on assessment of job completion is issued by the employer but must consult the grassroots representative organization for the place where there is a representative organization of employees at the grassroots;

b) The employee is sick or has an accident who has received 12 consecutive months of treatment for the employee under an indefinite term or has been treated for 06 consecutive months, for the employee under the labor contract. Definite term labor with a term from 12 months to 36 months or more than half the term of the labor contract for employees working under fixed-term labor contracts with a term of fewer than 12 months but their working capacity has not reverted.

When the employee's health recovers, the employer shall consider continuing signing the labor contract with the employee;

- c) Due to a natural disaster, fire, dangerous epidemic, enemy sabotage or relocation, or reduction of

production and business at the request of a competent state agency, the employer has sought all remedial measures recovery but still forced to reduce workplaces;

- d) The employee is not present at the workplace after the time limit specified in Article 31 of this Code;
- d) The employee reaches the full retirement age as prescribed in Article 169 of this Code unless otherwise agreed;
- e) The employee voluntarily quit his job without a plausible reason for 05 consecutive working days or more;
- g) The employee provides untruthful information as prescribed in Clause 2, Article 16 of this Code when entering into a labor contract, affecting the recruitment of the employee.

2. When unilaterally terminating a labor contract in the cases specified at Points a, b, c, d, and g, Clause 1 of this Article, the employer must notify the employee in advance as follows:

- a) At least 45 days for an indefinite term labor contract;
- b) At least 30 days for fixed-term labor contracts with a term from 12 months to 36 months;
- c) At least 03 working days for a fixed-term labor contract with a term of fewer than 12 months and for the case specified at Point b, Clause 1 of this Article;
- d) For a number of specific industries, occupations, and jobs, the advance notice period shall comply with the Government's regulations.

3. When unilaterally terminating the labor contract specified at Points d and e, Clause 1 of this Article, the employer is not required to notify the employee in advance.

However, the 2019 Labor Code also stipulates cases in which the employer is not allowed to unilaterally terminate the labor contract in order to ensure the legitimate rights and interests of employees.

According to Article 41 of the Labor Code (Labor Code) in 2019, the illegal unilateral termination of the labor contract is the case of terminating the labor contract in contravention of the law.

The Labor Code 2019 has specified the case where the parties are entitled to unilaterally terminate the contract and the cases that unilaterally terminate the labor contract is prohibited. Therefore, if unilaterally terminating the labor contract outside of the permitted cases, it will be considered an illegal contract terms such as:

The employee voluntarily terminates the labor contract when the employee is performing military service;

The employer voluntarily terminates the labor contract when the employee is pregnant or on maternity leave;

The employer voluntarily terminates the contract with the employee of full retirement age without prior notice;

The employee automatically terminates the contract without prior notice without any reason, etc.

Unilaterally terminate the labor contract illegally how much compensation must be paid?

The Labor Code 2019 has set out a compensation liability for the party that unilaterally terminates the labor contract illegally. As follows:

For Employers:

According to Article 41 of the Labor Code 2019, the employer, when unilaterally terminating the labor contract illegally, must compensate for the loss of material and spirit to the employee. Depending on each case, the compensation will be different. Specifically:

Case 1: Re-employing the employee, the employer must:

Pay salaries, social insurance, health insurance, and unemployment insurance for the days the employees are not allowed to work;

Pay an amount corresponding to your salary for the unnoticed days (for violations of the notice period);

Pay an additional amount to employees at least equal to 02 months' salary under the labor contract.

Basically, these compensations are still applied as the 2012 Labor Code. However, from January 1, 2021, when unilaterally terminating the contract illegally, the employer still has to pay unemployment insurance during the days the worker is not allowed to work.

Case 2: The employee does not want to work, the employer must pay:

Amounts as in case 1;

Severance allowance for employees.

Case 3: The employer does not want to receive it and the employee agrees, then must pay:

Amounts in case 2;

Agree on additional compensation for employees at least equal to 02 months' salary under the labor contract.

For Employees

When unilaterally terminating the labor contract illegally, the employee must compensate the employer with the following amounts:

Half a month's salary according to the labor contract;

The amount corresponding to the salary under the labor contract for the days without notice (if the notice period is violated);

Training costs (in case the employee receives vocational training from the employer's budget).

In addition to the compensation as analyzed above, the actual level of compensation also depends on the specific provisions in the labor contract and the agreement of the parties.

Thus, from 2021, the amount of compensation due to unilateral illegal contract termination has almost no change compared to the 2012 Labor Code.

Some Problems Arise

Compensation for damage caused by the employer unilaterally terminating the labor contract against the law First, amend the content of Clause 1, Article 42 of the Labor Code in 2019 as follows: "In some cases, the employer must accept the employee back to work according to the signed labor contract, etc." and the guiding documents will eliminate some cases of not applying this regulation to suit the practice [2].

First, the provisions on the legal consequences of unilateral illegal termination of the labor contract in the Labor Code 2019 have not separated the case of unilateral violation and the case of only violation of time limit forewarned. The law stipulates the obligation to reinstate the employee to work in the event that the employer has only violated the prior notice period which is clearly unreasonable [5]. This is because in this case, the employer has the right to terminate the employment contract with the employee at the end of the statutory notice period.

This violation results in the employee's loss of income during an unannounced period. The case where the employer does not assign a job to the employee during the prior notice is almost the same as the case where the employee is stopped working due to the employer's fault [6, 7]. And according to this Law, the employer also only has to pay the full salary to the employee during the period of work stoppage. On the other hand, for well-grounded cases (the employee regularly fails to complete the work under the contract, or because of force majeure) that require the employer to return the employee to work is a difficult regulation, making it difficult for employers.

Second, in terms of job loss benefits, the Labor Code 2019 stipulates that the time an employee has participated in unemployment insurance is not eligible for severance pay, because the level of unemployment allowance is twice as high as the severance pay, because the severance allowance is included, so in cases where employees are entitled to unemployment allowance, they will not be entitled to severance pay. In addition, the job loss allowance has the second meaning is the amount that the employer compensates the employee for the job loss caused by the causes caused by the employer.

Provisions on not paying job loss allowances to employees while the employees have participated in unemployment insurance have agreed that the severance allowance and the job loss allowance are one, losing the sense of compensation of Unemployment assistance. Thus, there has been inconsistency in the same

regulations on the working time of employees to serve as a basis for employers to pay job loss allowances.

Moreover, the grounds for termination under Articles 42 and 43 of the Labor Code 2019 are entirely created by the employer and there are grounds that the employer can actively implement it as easy as changing the organizational structure, rearranging labor. The regulation that employees are not entitled to unemployment benefits for the time they have participated in unemployment insurance will make the employer more arbitrary when applying to let employees quit their jobs. On the other hand, it is very unreasonable to have 12 months of working time to enjoy a job loss allowance. Because based on the working seniority does not reflect the nature of compensation due to the termination of the labor contract ahead of time. Therefore, it is necessary by law to ensure that all workers who lose their jobs, in this case, receive a job loss allowance.

Third, regarding the obligations of the employer in case of changes in structure, technology, or economic reasons, the provisions in Article 42 of the Labor Code 2019 show that there are two conditions for the user to employment for the resigned employee: (i) There must be an event that changes in structure, technology or because of economic reasons. The cases are considered structural, technological or due to economic reasons; (ii) The employer must implement the employment plan in accordance with Article 44 of the Labor Code 2019.

The Labor Code 2019 has not yet overcome the shortcomings when it does not regulate the legal consequences of illegal layoffs. Legal consequences of unlawful dismissal are currently specified in Decree No. 05/2015/NĐ-CP dated 12/1/2015 [4] detailing and guiding the implementation of a number of contents of the Labor Code. The same applies to unlawful unilateralism specified in Article 41 of the Labor Code 2019. This provision does not distinguish the legal consequences of the dismissal of a violation of the basis and a violation of dismissal procedures. Therefore, it is necessary to specify in the Labor Code in the direction: (i) In case the employer unlawfully fired because of the violation of the basis of dismissal, the same applies as unilateral law in Clause 1, Article 41 of the Labor Code 2019. (ii) In case the employer unlawfully fired due to the violation of procedures such as handling the absence of employees or the representative of the labor collective at the establishment then the employer is not required to return the employee to work, but only has to compensate the employee with a sum of money and be administratively sanctioned.

CONCLUSION

There are two cases of unilateral illegal contract termination: The employee unilaterally

terminates the contract illegally and the employer unilaterally terminates the contract illegally.

From the above analysis, we found that: When unilaterally terminating the illegal labor contract, both the employee and the employer have to face legal consequences from this behavior.

Thus, although the law stipulates that the employer is allowed to unilaterally terminate the labor contract, however, in some cases this is prohibited. In other words, in order to protect the interests of employees, the law stipulates cases in which employers are not allowed to exercise their right to unilaterally terminate labor contracts. Article 39 Labor Code 2012 clearly stipulates the cases in which the employers are not allowed to unilaterally terminate the labor contract in order to ensure the legitimate rights and interests of the employees.

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