

## Phuoc & Associates Legal Newsletter – November 2019



### Part 1 – Concerned issues

#### Efficiency of the Non-Disclosure and Non-Competition Agreement in a labour relationship

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Demand to sign agreements regarding information security and non-competition (Non-Disclosure-Non-Competition Agreement, abbreviated as NDA), which often incorporates a commitment to not work for a competitor after an employee terminates the labour contract (Non-Competition Agreement, abbreviated as NCA), is rapidly increasing in most domestic and foreign enterprises.

However, the realistic effect of limiting the right to work of the aforementioned employees in order to support the former enterprises or employers to protect business secrets and confidential information through NDA and NCA agreements is still questionable. Firstly, is the validity existing under the current Vietnamese law for binding employees not to work for the employer's competitors guaranteed through the NCA? Secondly, why does the employer require all employees to sign the NDA even though the effectiveness and validity is still questionable? Within the scope of this article, the writers only refer to the second question.



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### Derived from the “unsolvable” worry of employers

In recent years, more and more enterprises are looking for professional lawyers to ask for legal advice on how to prevent the extremely sensitive information of business secrets and confidential information leaked to the enterprises' competitors through former and current employees. Particularly, there are some cases where right after key employees apply for the resignation to their current employers, they work for the employers' competitors and bring all the details of the newly developed business strategies to compete against the former employers. This is truly a nightmare situation for any employer.



Although employers concern extremely regarding the above issue, they face difficulties when collecting solid evidence to prove whether the business secrets and confidential information have or have not been leaked by the employees and used by their competitors. Meanwhile, the consequences impacting the employers when their business secrets and confidential information are disclosed cannot be defined easily.

According to common reality, whether an employee signs an NDA with an employer, or how rigid the NDA is, or whether the NDA has covered the NCA agreement committing not to work for the employers' competitors, until now, a common concern of most employers is as to whether business secrets and confidential information would be revealed by former senior employees or not, especially when these senior employees are holding the valuable business information that the employers' competitors seek to obtain by any means. In other words, the existence of an NDA does not completely end the employers' concern about the business secrets and confidential information being leaked. The question is: (i) how not to be affected by the leave of the employees and keep the important business secrets and confidential information of the enterprises safe? Additionally, (ii) how to maximise the effect of the NDA in order to prevent and minimize the business secrets and confidential information from being leaked out by the employees.

### Business secrets and confidential information need to be treated as what they mean

From the labour law perspective, besides Article 23.2 of the Labour Code 2012 (Labour Code) providing the right to negotiate a business secret and confidential information, the business secret and confidential information are only defined generally in Article 4.23 of the current Intellectual Property Law, (IP Law), in which: “Trade secret means information obtained from financial or intellectual investment activities, which has not yet been disclosed and can be used in business.” Not only that, business secrets and confidential information are protected if and only if they meet three conditions prescribed in Article 84 of the IP Law including: (i) it is neither common knowledge nor easily obtainable; (ii) when used in business activities, the trade secret will create for its holder advantages over those who do not hold or use it; and (iii) the owner of the trade secret maintains its secrecy by necessary means so that the secret will not be disclosed and easily accessible.



Instead of wasting time and money to settle disputes and proving all three necessary conditions as mentioned above, enterprises should proactively build in advance physical and technical barriers (storage, extraction, utilisation) and design tight internal mechanisms so that sensitive information cannot be easily accessed and disclosed, or at least not completely disclosed easily. In order to improve and enhance the effectiveness of business secret and confidential information protection, it is necessary to classify information according to importance to have appropriate security measures. This helps the employers allocate resources appropriately, focusing on high-value,

vulnerable business secrets and confidential information. In general, while spending more time, effort and money needed for preserving other sources of information, the employers are not overly concerned about their business secrets and confidential information which requires better protection as a result of the same treatment of information that is of different importance and likely to be disclosed.

In addition, to classify any information as a business secret and confidential information, the first mandatory identifier is that it is only disseminated in the range of certain space and time and for an extremely limited number of employees who are responsible for the relevant tasks. On the contrary, it will be deemed to have been declassified when most employees of the employer, both related and unrelated to the work using the business secret and confidential information, are granted access or can access easily if they want so. In the meantime, trying to prevent it from being revealed is sometimes impossible for simple reasons such as the difficulty in determining who might disclose the business secrets and confidential information among a group of related employees. That is not to mention that if the employer does not take seriously the protection of their intellectual property information, the current law has no obligation to help and protect them. Because one of the prerequisites for the business secret and confidential information to be protected under Article 84 of the Law on Intellectual Property is it has to be secured by the owner by necessary measures so that it is not disclosed and not easily accessible.

Also, it is clear that when signing an NDA without appropriate care and continuing to entrust employees with following the agreement, employers are at risk of leaving themselves vulnerable. Even if there is a violation of the agreement caused by an employee and disclosure of the business secret and confidential information occurs, the employers may have already suffered the relevant damages. Until there is a dispute relating to the violation, the employers will be at a disadvantage for not simultaneously proving that: (a) the necessary measures have been taken to prevent the business secret and confidential information from being exposed or easily accessible, and (b) there has been an act of revealing information by the employees. In addition, any claim for actual damage need to be proved that the damage is the result of the employees' disclosure of the business secret and confidential information.

Even when the employer has proven that their information is a business secret and confidential information, and has been provided to a third party, it would be inconsequential if they fail to convince the relevant State authorities in order to believe that they have applied necessary and appropriate security measures to protect their business secrets and confidential information, resulting in them becoming the losing party. Furthermore, if the employers are fortunate enough to have a favourable judgment, the execution of the judgment against the violating employees will be extremely complicated, especially for those who have household registration in remote provinces.

### **The NDA needs to be properly understood - the second layer of protection for business secret for employers**



Once the employers keep their business secrets and confidential information and take material actions to protect them as analysed above, the actual presence of an NDA is sometimes no longer strictly necessary, especially given the many controversial issues of the implementation and application of relevant laws in Vietnam for this type of agreement when resolving a dispute. Meanwhile, even without an NDA agreement, the legal rights and interests of the employers pertaining to the business secret and confidential information are still protected in accordance with labour law and intellectual property law.

In contrary, the obligation to respect the employers' property right also arises for all relevant entities, not only the employees but also rival companies. Sanctions in the form of labour discipline (for the employees who are working) or compensation for damages outside the contract (for the employees who have resigned) are completely grounded for application based on the reality that the enterprises' assets, in this case business secret and confidential information, have been infringed upon illegally.

Of course, it will not be harmful if the employers want to use a pre-prepared NDA to apply publicly within the company with the main purpose of being a general “deterrent” to all employees in not arbitrarily disclosing internal information of the company to outsiders as well as minimising the “brain drain” or behaviours that entice the employees to work for the rival company in an unhealthy manner.

However, the fact of the matter is that the NDA is a form of document that company’s new comers must sign, and which will contain similar contents. The employees will therefore most likely consider the NDA as a normal part of the company’s on-boarding procedure without caring about the details of what is included. In addition, many of the employees may forget signing the NDA, and of course may not think much about respecting the signed agreement. At that time, the signed NDA does not seem to have much meaning in protecting the business secret and confidential information for the employers. In general, training on labour laws and confidentiality of business secrets and confidential information should also be conducted regularly within the enterprise to indirectly remind the employees of their obligations.

This makes the employers consider their investment in an NDA, and design the NDA such that its content applies to specific cases, especially targeting employees holding key positions in the employers’ businesses that the employers believe, once any specific business secret and confidential information are given to these personnel, should be given the highest priority to ensure they voluntarily respect their signatures in confidentiality commitments rather than facing legal issues that arise when any violations occur.



## Part 2 - Remarkable Regulations

### 1. Regulation on Land use fee

On 26 October 2019, the Government enacted Decree No. 79/2019/NĐ-CP, amending Article 16 of Decree No. 45/2014/NĐ-CP on collection of land use fee ("**Decree No. 79**"). In which, Decree No. 79 has following noteworthy regulations:

#### Persons allowed to owe the Land use fee

Households, individuals (including: persons contributing to the revolution; poor households; ethnic minority households, individuals; households, individuals permanently living in a commune-level area recognised as a socially – economically struggling area or an extremely socially – economically struggling area) are allowed to owe the land use fee in case they receive new land for resettlement when the Government expropriates their land in accordance with the land law.



#### Payment duration

Households and individuals allowed to owe the land use fee as mentioned above (hereafter referred to as households and individuals) must pay the fee within 05 years from the date when a decision to transfer the resettlement land is made by a competent Governmental authority and are free from paying any late payment interest in this five-year period.

If the households and individuals do not repay the debt of land use fee described in the certificate of land use right, house and other properties on land ownership (hereafter referred to as "**Certificate**") after 05 years from the date the transfer decision is made, they must pay the remaining debt and a late payment interest at the rate in accordance with the law on tax management for the overdue time till the debt is fully repaid.

#### Transitional guidelines

Household and individuals, who have owed the land use fee under the certificate and still not repaid the debt before 10 December 2019, follow the guideline as below:

In case the debt was incurred before 01 March 2016:

- Continue to repay the remaining debt of land use fee under policies and at the land prices at the time when the Certificate was issued (or at the land prices lawfully determined in the Certificate) till the end of 28 February 2021; and
- From 01 March 2021, households and individual mentioned above must repay the debt under policies and at land prices at the time of repayment.

In case the debt was incurred within the period from 01 March 2016 to before 10 December 2019:

- Continue to repay the debt at land prices as prescribed in the Certificate in conformity with Decree No. 45/2014/NĐ-CP within 05 years from the incurrence of debt; and
- After this five-year period, household and individuals must fully repay the remaining debt under policies and at land prices at the time of repayment.

**Decree No. 79/2019/NĐ-CP will come into effect on 10 December 2019.**

### 2. Guidelines for electronic invoicing

On 30 September 2019, the Ministry of Finance enacted Circular No. 68/2019/TT-BTC, guiding Decree No. 119/2018/NĐ-CP on electronic invoicing ("**EIF**") in sale of goods and provision of services, officially enforced on 14 November 2019 ("**Circular No. 68**"). In which, Circular No. 68 has following noteworthy regulations:

## Effective date



From 01 November 2020, enterprises, economic organisations, other kinds of organisation, household and individual businesses must register the application of electronic invoicing under guidelines of Circular 68/2019/TT-BTC.

### Information on an Electronic invoice

Besides basic information appearing on a paper invoice as prescribed in Circular 39/2014/TT-BTC, an EI also has: tax authority code; Governmental fee, sub-fee, and relevant contents (if any).

### Exemptions in which an EI lacking information mentioned above is allowed

- EIs in transactions at super markets, shopping malls in which the buyer is not a regular trader;
- EIs in oil – gas transactions with the buyer who is not a regular trader;
- EIs which are stamps, tickets, cards;
- Electronic airway bills issued, via websites and e-commercial systems established under international customs, to the buyer who is not a regular trader;
- Invoices in construction and installation activities; house construction under a contract;
- Electronic receipt for transportation of goods; and
- Invoice used in interlining between airlines under the regulation of International Air Transport Association.

### Application of EI for enterprises in high tax risk

Enterprises in high tax risk are enterprises that have charter capital below 15 billion Vietnam Dongs and show one in eight signs as prescribed in Clause 3, Article 6 of Circular No. 68/2019. Such enterprises are subject to using the EIs with tax authority code for 12 consecutive months.

### Cases in which use of EIs (with tax authority code or no code) is not allowed

- Including 07 cases as prescribed in Article 9 and Article 15 of this Circular; and
- Enterprises/organisations included in such cases are allowed to use the EIs again after announcing to the tax authorities of their business activities resuming or their tax code is recovered by the tax authorities; the decision on tax debt collection is dismissed.

## 3. Provisions on amending the Regulation on management and granting of social insurance codes

On 30 September 2019, Vietnam Social Insurance enacted Decision No. 1270/QĐ-BHXH, amending and supplementing a number of articles of the Regulation on management and granting of social insurance codes issued together with Decision 346/QĐ-BHXH 2019 (“**Decision No. 1270**”).

Accordingly, this decision has amended the process of updating the changes in household members participating in social insurance and health insurance as follows:

- In case the Commune People’s Committee has connected the database with the Ministry of Justice, it is not

necessary to prepare an application for a health insurance card. Instead, the Commune People's Committee only receives the List of changes in household members (Form 01-BD) with information of children granted through insurance cards from the post office.

- District-level social insurance, in this school, will automatically issue social insurance codes for children under 06 years upon receipt of data from the Ministry of Justice. On the other hand, the district-level social insurance must print the data of the list of people only participating in health insurance with social insurance codes of children under 06 years old applying for a health insurance card to transfer the Collection Management Department/Team to perform arising transactions within 24 hours.

**This decision took effect on 30 September 2019.**

#### **4. Provisions on order for grant, renewal and re-grant of Citizen's Identity Cards**

On 15 October 2019, the Ministry of Public Security enacted Circular 48/2019/TT-BCA, amending and supplementing a number of regulations on the order of granting, exchanging and re-granting Citizen's Identity Cards (CIC) ("**Circular No. 48**").

Accordingly, if citizens who carry out procedures for grants, exchanges, and re-grants of CIC at district-level CIC management agencies need to adjust and change information in household registration books, the dossiers shall be received simultaneously with CIC dossiers with the following conditions:

- The adjustment falls under the authority of the district-level Public Security Divisions; and
- Citizens produce all valid dossiers in accordance with the law on residence.

In addition, **Circular No. 48** also mentioned some new contents in the procedure for changing from Personal Identity Cards to Citizen's Identity Cards as follows:

- Citizens can declare their information to be granted CIC by using a computer instead of having to fill details manually on paper as currently;
- Revoking Personal Identity Cards, cutting their corners, completing the dossiers and returning them to the citizens who register to receive CIC by courier to the address as required; and
- Personal Identity Cards which are damaged, peeling, or unclear shall be revoked or cancelled and the dossiers will be completed as prescribed.

**Circular No. 48 will take effect on 1 December 2019.**

## Part 3 - Monthly Legal Update

No.	DOCUMENT TITLE	ISSUED DATE	EFFECTIVE DATE
<b>THE GOVERNMENT</b>			
1	Decree No 79/2019/ND-CP on amendments to Article 16 of the Government's Decree No. 45/2014/ND-CP dated 15 May 2014 regulating Collection of Land Use Fees	26/10/2019	10/12/2019
2	Decree No. 78/2019/ND-CP amending and supplementing a number of articles of the Government's Decree No. 148/2016/ND-CP dated 4 November 2016, detailing implementation of a number of Articles of Ordinance on Market Surveillance	14/10/2019	10/12/2019
3	Decree No. 77/2019/ND-CP regulating the Cooperative Groups	10/10/2019	25/11/2019
4	Decree No. 76/2019/ND-CP regulating policies for cadres, civil servants, officials, employees and personnel on payroll of armed forces working in severely disadvantaged areas	08/10/2019	01/12/2019
<b>MINISTRY OF AGRICULTURE AND RURAL DEVELOPMENT</b>			
1	Circular No. 13/2019/TT-BNNPTNT regulating alternative afforestation when changing forest use purposes to other purposes	25/10/2019	01/01/2020
2	Circular No. 11/2019/TT-BNNPTNT amending and supplementing a number of articles of Circular No. 36/2018/TT-BNNPTNT dated 25 December 2018 of the Minister of Agriculture and Rural Development amending and supplementing a number of articles of Circular No. 26/2016/TT-BNNPTNT dated 30 June 2016 of the Minister of Agriculture and Rural Development providing for the quarantine of aquatic animal and animal products	22/10/2019	06/12/2019
3	Circular No. 12/2019/TT-BNNPTNT regulating forestry statistics	25/10/2019	01/01/2020
<b>MINISTRY OF FINANCE</b>			
1	Circular No. 72/2019/TT-BTC amending and supplementing Clause 3, Article 6 of Circular No. 45/2014/TT-BTC dated 16 April 2014 guiding the collection and payment of compulsory contributions and the regulations on financial management and accounting for the fund for prevention of tobacco harms	14/10/2019	01/12/2020
2	Circular No. 70/2019/TT-BTC providing guidance on the regulations on Budget Accounting and Commune Finance	03/10/2019	01/01/2020



3	Circular No. 68/2019/TT-BTC providing guidance on implementation of some article of the Government's Decree No. 119/2018/ND-CP dated 12 September 2018 on electronic invoices	30/09/2019	14/11/2019
4	Circular No. 62/2019/TT-BTC amending to Circular No. 38/2018/TT-BTC dated 20 April 2018 of the Minister of Finance prescribing determination of origin of imports and exports	05/09/2019	21/10/2019
<b>MINISTRY OF PUBLIC SECURITY</b>			
1	Circular No. 48/2019/TT-BCA amending and supplementing a number of articles of Circular No. 11/2016/TT-BCA dated 4 March 2016 of the Ministry of Public Security regulating order of granting, renewing, and re-granting citizen's identity cards	15/10/2019	01/12/2019
<b>THE STATE BANK OF VIETNAM</b>			
1	Circular No. 15/2019/TT-NHNN amending and supplementing a number of legal documents on dossiers and administrative procedures of foreign exchange management	11/10/2019	25/11/2019
2	Circular No. 16/2019/TT-NHNN prescribing issuance of bills of State Bank of Vietnam	22/10/2019	09/12/2019
<b>MINISTRY OF HEALTH</b>			
1	Circular No. 28/2019/TT-BYT providing guidance on the information and activity reports on border health quarantine	28/10/2019	10/12/2019
<b>MINISTRY OF TRANSPORT</b>			
1	Circular No. 42/2019/TT-BGTVT prescribing criteria, inspection, supervision, evaluation and acceptance of public non-business service quality to ensure maritime safety	30/10/2019	01/01/2020
2	Circular No. 41/2019/TT-BGTVT providing amendments to the Circular No. 25/2017/TT-BGTVT dated 28 July 2017 of the Minister of Transport prescribing forms of certificates and records of satisfaction of technical safety and environmental protection requirements issued to ships, inland waterway vehicles, and industrial products used for inland waterway vehicles	30/10/2019	01/07/2020
3	Circular No. 39/2019/TT-BGTVT prescribing responsibilities of owners, crew members, operators, regarding holding of vessel crew member posts and minimum safe manning aboard inland waterway vessels	15/10/2019	01/01/2020
<b>MINISTRY OF INFORMATION AND COMMUNICATION</b>			
1	Circular No. 10/2019/TT-BTTTT promulgating	04/10/2019	01/07/2020

	“National technical regulations on electromagnetic compatibility for terminal and supporting devices in mobile information systems”		
<b>MINISTRY OF NATIONAL DEFENCE</b>			
1	Circular No. 155/2019/TT-BQP guiding to convert from state-owned enterprises and single-member limited liability companies with 100% of charter capital invested by state-owned enterprises under Ministry of National Defence into joint-stock companies	15/10/2019	01/12/2019
2	Circular No. 157/2019/TT-BQP guiding the implementation of rights and responsibilities of the owner representatives towards enterprises with 100% of charter capital owned by the State and state capital portions at enterprises decided or assigned to manage by the Ministry of National Defence	15/10/2019	01/12/2019

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