

How to Cite:

Diep, D. M., Khanh, N. D. M., & Dong, D. T. (2022). The rights to enjoy benefit from social insurance of the femalelabor: From legal theory to practical application. *Linguistics and Culture Review*, 6(S4), 114-125. <https://doi.org/10.21744/lingcure.v6nS4.2096>

The Rights to Enjoy Benefit from Social Insurance of the Femalelabor: From Legal Theory to Practical Application

Dao Mong Diep

University of Law, Hue University, Vietnam

Nguyen Dao Mai Khanh

University of Law, Hue University, Vietnam

Dao The Dong

University of Science, Hue University, Vietnam

Abstract---Social insurance is the mainstay of the social security policy associated with the employee. The right to have social insurance is the basic and specific right associated with a female worker. This group right includes the right to enjoy the sickness benefit, maternity benefit, Work Injury, Occupational Disease Benefit, Old-age Benefit, Survivor's Benefit, Medical Benefit (Health Insurance). The state has promulgated the Labor Code, the Law on Social Insurance, and other legal documents to create an implementation guide in order to build an effective legal corridor to protect the rights of female employees in enjoying social insurance. However, in reality, the right to enjoy social insurance of female employees is violated, and there is a gap between legal provisions and practical applications. This scientific paper evaluates the current status of legal provisions on the right to enjoy social insurance of female employees and the practical application of the law. From there, this paper proposes some solutions to improve the law on the right to enjoy social insurance of female employees.

Keywords---benefit, employee, female workers, social insurance, work injury.

Introduction

Women are the majority of the labor force, with extremely important positions and roles in labor relations. Female employees are employees with distinct characteristics compared to male workers in terms of psychophysiology and

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Corresponding author: Diep, D. M.; Email: dtmdiep@hueuni.edu.vn

Manuscript submitted: 27 Sept 2021, Manuscript revised: 18 Dec 2021, Accepted for publication: 04 Jan 2022

physical strength and have specific gender characteristics when participating in labor relations (Thom, 2016). Most economic, political, cultural, labor and employment rights; of female workers are mentioned in international legal documents. In particular, the international legal instrument, and the international community, acknowledges: "Countries party to the Convention must take appropriate measures to ensure... the right to social insurance for women, especially women. in cases of retirement, unemployment, sickness, disability, old age; applying for maternity leave with salary or equivalent social benefits ..." and "ensure rural women also directly enjoy social insurance programs..." (Convention) International Council on the Elimination of All Forms of Discrimination Against Women (CEDAW).

In Vietnam, the right to social insurance is defined as a right associated with employees, including female workers. In recent years, the law on social insurance has had separate regulations that are relatively suitable to the specific characteristics of female employees and are effective in ensuring the legitimate interests of employees (Van, 2017). However, besides that, inevitably, some provisions of the law are still inadequate, not close to reality affecting the rights of female workers, especially groups of rights on sickness, pregnancy and death benefits. property and retirement.

Research Results and Discussion

Practice of legislation on the right to enjoy the benefit from social insurance of the female workers

Policy of leave to take care of sick children

This is one of the rights of the female worker was established in the sick leave policy of social insurance. Accordingly, the female workers are covered by social insurance with a sick child under 7 years old will be given leave to take care of their sick children and during that time they are entitled to social insurance. The maximum period of enjoying the benefit from social insurance in this situation is 20 working days if the child is under 03 years old; Maximum of 15 working days if the child is from full 03 years old to under 07 years old. The insurance regime when taking leave to take care of the sick child is calculated base on monthly which is equal to 75% of the salary paid for social insurance in the preceding month before taking leave. In case the female employees has just started working or they have paid social insurance premium, then their working time has been interrupted. But the female employees has to take leave in the first month of returning then the benefits regime is equal to 75% of the salary which has been paid for social insurance in that month (Trang, 2019; Nyandra et al., 2018; Krueger & Meyer, 2002).

The regulation of taking leave to take care for sick children of the female workers is completely reasonable to international practices, and practical needs. Although comparative research and laws of other countries such as USA, Germany, Russia regulate this regulation in different forms such as Social Insurance, Social Assistance, Social Assistance ... etc, its main aim is to protect workers when factors appearing and affecting physical aspects of their life (Hai & Huong, 2011).

For example, the social security law of the Federal Republic of Germany states established that when a the female employee takes leave to take care of her sick child, she will receive a maximum period of enjoying the benefit from social insurance is 10 days for each child but not over 20 days per year. In case the female employees have to raise their child alone, the maximum period of enjoying the social insurance benefit is 20 days for each child but not over 50 days per year (International Labor Organization, 2006).

In real social life, around the age of 7, children often get sick making their parents have to take leave to take care of it. Especially the female workers who have noble motherhood. However, in the case of force majeure of labor relations. In order to make the best physical and spiritual condition for the female workers to completed their duties well, as long as to share risks leading to The income decline in their leave, then the social insurance has the responsibility to ensuring the income of the female workers (Sharma & Anu, 2014; Nandhini et al., 2015; Jackman, 2020).

Maternity allowance

This is a characteristic regime of social insurance for female workers. It reflects the birth and motherhood functions of this subject (Huong, 2012). Reasonable maternity allowance for female workers is an important factor to promote economic development, as well as to ensure the health of future generations and the quality of our race. Maternity allowance provides enough time for the female workers to rest and recover after giving birth. Women can have time to take care of their newborn babies helping their children fully develop. This regulation also helps the female worker have healthy conditions get the opportunity to work early before the end of maternity leave to improve their income and family life. Therefore, the maternity allowance is mainly applied to the female workers during pregnancy, miscarriage, curettage, stillbirth, medical abortion, or childbirth if the employee participates in social insurance

Comparative researches, international legal documents, and national laws all regulate this matter. For example, the law of the Russian Federation states established that maternity benefits are applied to female workers during pregnancy and childbirth. This regime also applies to the female workers nursing children under 3 months of age (Hai & Huong, 2011). In Viet Nam, the regulations of the maternity insurance regime have undergone many amendments and supplements. This process helps complete the regulations, make them more suitable to the reality, and meet the goal of protecting the health of the female workers during pregnancy, childbirth, and child care.

According to the provisions of existing laws, during the pregnancy, the female employees can take leave to go for prenatal care 05 times and 01 day each time; if they are far from medical facilities, or the pregnant woman has a medical issue or an abnormal gestation, they will have 2 days off for each antenatal care. In case of miscarriage, curettage, abortion, stillbirth or pathological abortion, the female workers are allowed to take leave under the medical facility's guidance. The maximum leave period is established that (i) 10 days if the fetus is less than 05 weeks old; (ii) 20 days from 05 weeks to under 13 weeks of gestation; (iii) 40 days

if the pregnancy is from 13 weeks to under 25 weeks of age; (iv) 50 days if the pregnancy is 25 weeks or older

Depending on the working conditions and living environment, the pregnant the female employees is entitled to take leave to enjoy the maternity regime before and after giving birth with a maximum time is 6 months, However, the maximum time for early maternity leave is 2 months. If they have twins or more, the maximum time for taking leave before maternity leave is 2 months. If the female workers have twins or have more than two kids, the mother is entitled to have 01 additional month off for each child. In the case that the employees wants to go to work earlier than the prescribed time, then they have to meet the following conditions: (i) At least 04 months after taking leave to enjoy the benefits; (ii) Must be notified in advance and approved by the employer. In this case, beside salary, the employees are still entitled to insurance until the end of the leave according to law (Atkinson, 1987; Lestari, 2021; Santri et al., 2022).

After giving birth, if the child under 2 months old dies, the female employees are allowed to take 4 months off from the date of birth; If the 2 months child or older dies, the female employees are permitted to take a 2-month leave from the date of the child's death, but the time of leave to enjoy the maternity benefits does not exceed the general regulations

In case the female employees have to nurture a newborn child, she is also permitted to take leave to take care of the child until they reach the age of full 06 months. The maternity allowance is calculated by 100% of the average salary of the months that the female employees have paid for social insurance in 06 months before taking leave to enjoy the maternity benefits. In case the female employees have paid the social insurance premiums for less than 6 months, then maternity allowance is calculated by the average of the monthly salary of the months that the employees have paid for social insurance. In addition, the female employees who giving birth or adopting a child under 06 months old are permitted one allowance for each child. this allowance is equal to double the base salary of the month when the female employees give birth or adopt a child (Murray & Nilsson, 2007; Chetty, 2006; Rickne, 2013).

Based on the protection of the implementation of the female workers rights principle which is suitable with the international commitments and unified with the Vietnamese legal system, the Social Insurance law 2014 has provided principle rights about enjoying maternity benefits of a surrogate mother and the mother asking for surrogacy in Article 35. This provision is also guided in detail in Articles 3.4 and 5 of Decree 115/2015 / ND-CP: Detailing some articles of the Social Insurance law on compulsory social insurance. These regulations not only ensure the motherhood right of the female worker but also has profound humanity which is suitable with the Law on Marriage and Family 2014. this matter was regulated from January 1st, 2015 which allowed the female workers to surrogacy for humanity's purpose.

Comparative studies and Vietnamese regulations on the maternity allowance for the female workers have created accord with the international practices in terms of "overview". For example, the International Convention No. C103 - Maternity

Protection Convention 1952 stipulates that (i) The maternity leave is at least 12 weeks including required dates after delivery; (ii) The financial support will be determined by national law to ensure the good standard of living of the mother and child (International Labor Standards Department, 2012). Especially, comparing with some developed countries in the world, the time of leave to enjoy maternity benefits of Vietnamese law has "priority" for the female workers. For example, the time for the female employees to take leave to enjoy maternity benefits in Singapore is 2 months, Russian Federation is 4 months and Germany is 2 months (Hai & Huong, 2011).

On the other hand, Vietnamese law has separated the population planning policy from the maternity allowance regime (Thu, 2019). In the past, Social insurance only allowed female workers to enjoy maternity benefits in the first and the second pregnancy. However, in the present, the number of birth did not impact the maternity allowance benefit of social insurance. It means that Vietnamese law is on the right way to harmonize with international regulations. For example, the 1976 Sozialgesetzbuch - SGB of the Federal Republic of Germany stipulates that from the second child, the period of maternity allowance will be corresponding increase. The maternity allowance is calculated by 100% total income after taxes of 3 months before taking leave. However, the maximum aid is 13 Euros per day. Therefore, if the female employee's income after-tax is higher than the maternity allowance, then the employers have to pay the differential (Zacher & Brooke-Ross, 1983).

Pension regime

The pension regime in the social security system has the main purpose is ensuring the income of employees who out of working age or no longer participate in labor relationships. This regulation has been acknowledged in International law. More specifically, the ILO Convention No. 102 on social security and the ILO Convention No. 128 on Invalidity, Old-Age and Survivors' Benefits Convention have established the age selection standard to determine the workers having the right to enjoy the pension regime. They must in the age of 60 to 65 years old and the minimum insurance premiums years are from 15 years and if this requirement is not met then the pension regime benefit must be lower (International Labor Standards Department, 2012). At the same time, the pension regime is a basic and important regulation in the social security legal system of the country. some people said that the pension insurance regime reflects the morality of the nation and the civilized level of society (Thanh, 2013).

From the view of social security law, the pension regime in the social insurance is interpreted as the allowance replacing the income of the people living older than a specified age when they participate in social insurance and they are eligible to receive the social insurance benefit (Mung, 2016). Because the values of social insurance depend on the economic and social conditions of each country, therefore there are differences in the social insurance value of each nation. The duration to periodically receive the allowance of the employees begins with the time that the employees meet the conditions to receive the benefit until the time of death. On the other hand, some countries also regulate to provide other benefits for pensioners. Such as providing health care services, housing, etc to ensure a

better and more comprehensive life for them. However, the provisions that regulate the allowance replace the income of the people living older than a specified is the most basic reflecting the nature of the society (United Nations Population Fund (UNFPA) & HelpAge International, 2012).

The reason why in Vietnam, pension insurance is the core regime in the social security legal system is that every employee will get old, out of working-age but still need their life to be guaranteed. In old age, their main income source of living comes from pension insurance. According to the existing laws, the most general requirements for the female workers to enjoy the monthly pension are: (1) are full 55 years old, (2) have fully paid for 20 years of social insurance or more. In some cases this requirement reduces to 4 to 5 years olds. The female workers who have fully paid for 15 years of social insurance can enjoy 45% of the average monthly salary have paid for social insurance, from that time for each year paying for social insurance they could earn 2% more. But the maximum benefit is 75% of the monthly salary as a basis for paying social insurance.

Thus, the existing Vietnamese legislation provides two foundations to determine the retirement regime of the female workers (i) Age; (ii) Time of social insurance payment. This regulation creates harmony between the Vietnamese legal framework and international practices. In most countries, the condition to receive retirement regime depends on two factors: (i) Age; (ii) the age (Trang, 2016), that marked the time at which the female workers can enjoy social insurance benefits is called Retirement age - the age at which workers decide to stop the full-time working or be forced to leave their jobs (ILO, Social Security Department, 2010). Because of the values of social insurance depend on the economic and social conditions of each country, therefore there are differences in the social insurance value of each nation. For example, Japanese law stipulates that female workers receive a basic pension when they turn 65 years old and have participated in social insurance for 25 years or more or; The Federal Republic of Germany law stipulates that female workers can receive monthly pension benefits when they are 67 years old or older and they must have at least 05 years pay for social insurance (Mung, 2015).

Generally, the regulations of the Vietnamese Government on female workers' pensions have shown certain preferences of the nation. However, there are many opposite opinions about the retirement age of male and female workers. some people said that the retirement age for female workers 5 years earlier than male workers for all types of work is unreasonable affecting the labor rights of the female workers. This also takes away the female workers' promotion opportunities in the work environment, increases the gender gap, and affects women's retirement salaries (Thom, 2016). However, according to the author, the female workers' physical is not as good as the male workers. It means that at the same moment, the woman can not do the work performing as productive as the man. Therefore, female workers need to retire earlier than men. Thus, the existing regulation on the retirement age for female workers is appropriate.

Practical law application of the female workers right to enjoy social insurance and recommendations for improvement

The leave regime to take care of sick children

The Social Insurance regulation on leave to take care of sick children of the female workers is suitable and practical. this law had made the female workers become a person who good at work and household work also. according to the report evaluating the implementation of Vietnamese Social Insurance law from 2015 to 2019, Vietnam has received and settled the benefits of over 20 million people enjoying sick leave, maternity, convalescence and health rehabilitation benefits. In 2015, 5,223,001 people were enjoying sick leave, maternity, and convalescence benefits and recovery. To 30th December 2016, the total debt of social insurance was 7,957 billion VND. In 2017, the country had about 4,000 enterprises to be in debt with social insurance up to 11,500 billion VND (Vietnam Social Insurance, 2019).

However, in recent years, the practice of applying the regulations on the leave to take care of sick children of the female workers in recent years has downsides that need to be completed. The amount of time for the female workers to take leave to look after their sick children is suitable with the reality. However, in the case of diseases that require long-term treatment, then the leave required by law will be too short. Thus, the law on Social Insurance 2014 is inflexible about the maximum duration to receive benefits for care for sick children. According to the author, in this circumstance of enjoying the sick child care leave, it is necessary to distinguish the situation with under 7 years old children have long-term diseases and the other common illnesses. Therefore, the law needs to regulate the leave for taking care of children have long-term diseases such as heart disease, tuberculosis, etc to ensure this regulation is truly having meaning for the female workers to ensure the right of motherhood in life (Jonsdottir et al., 2010; Currie & Madrian, 1999).

Maternity allowance

Practically, companies usually delay paying social insurance on time or use reasons to prolong the time to pay social insurance. In some cases, Enterprises also list the smaller number of employees than they actually have. or signs a 3-month contract with the employees to avoid the responsibility to pay social insurance for workers. According to the statistics of Vietnam Social Insurance, as of 2019, in the country, there were up to 50% of companies have not paid in social insurance for their employees (Dung, 2020). The representative of the ILO in Viet Nam said that the provisions on the maternity regime only applied to about 30% of the female labor and those who work in the informal sector (including agriculture). this means that the implementation of laws on maternity and social insurance of the female workers seem to be only in theory (Thom, 2016). This was a result of the problems in applying the regulations on the maternity allowance. Specifically:

Firstly, the Social Insurance Law does not stipulate insurance for maternity of premature birth for female workers. Usually, the pregnancy duration lasts for 9

months or more. However, many factors that affect the pregnancy make the pregnancy duration shorter and the baby is more difficult to raise in this case. In the author's opinion, in order better protect pregnancy the female workers and premature babies, it is necessary to stipulate in Clause 1 Article 34 of the Social Insurance law 2014 that in cases of premature birth the female employees can take leave until their child is 4 months old. This provision help mothers to have better conditions to take care of and breastfeed their children for 4 months. This is also considered as a practical investment of society for future generations. Comparative researches show that developed countries have long maternity leave. Denmark, Netherlands, and Sweden have 1- year maternity leave (Gao et al., 2012; Chetty & Finkelstein, 2013; Bergolo & Cruces, 2014)

Second, types of subsidies and insurance benefits for maternity benefits. There are two types of maternity benefits: (i) Maternity allowance (allowance replacing for salary); (ii) Lump-sum allowance. The allowance replacing for salary is calculated by 100% of the average monthly salary have paid for social insurance in 06 months before the female employees take leave to enjoy the maternity benefits. The lump-sum allowance is calculated by 2 times the basic salary in the birth month of the female employees. This money compensates for the cost suddenly increasing due to the necessary supplies for raising children and fostering the mother's health (Dung, 2006). To ensure fairness, the law needs to stipulate a reasonable subsidy, including raising newborn's allowances; losing milk allowance, additional milk for twins or more kids allowance and underweight or premature birth allowance. For example, Thailand's law on the maternity regime stipulates that the allowance is equal to 50% of the salary have paid for 90 days of each birth. Additionally, the employees also enjoy a 4000 baht one-time birth allowance to support the health care for mothers and babies (Phung & Phuong, 2010).

Pension regimen

According to statistics of Vietnam Social Security (VSS) since 2014, when the Social Insurance Law was established (from January 1, 2016), 10.4 million employees have taken part in Pension Social Insurance. There was an increase of 40.6% compared to the time of implementation of the Social Insurance law in 2006. Although individuals participating in Pension Social Insurance have increased constantly, however, the rate of that occupied only 20% of the workforce, mainly from the government sector (Vietnam Social Insurance, 2019). In the same period, a survey of Vietnam Social Security (VSS) illustrated the proportion of participation in social insurance of the private and public sectors has an uneven distribution. Specifically, the rate of participation in social insurance of the private sector is 14% and its contribution to Vietnam's State Social Insurance Fund is 27% (Vietnam Social Insurance, 2019).

Some of the experts predicted that with the current contribution and entitlement, Vietnam's State Social Insurance Fund will face the risk of serious imbalance. Accordingly, by 2023 the revenues will be equal to the expenditures. From 2024, it is necessary to use additional balances from the previous years' revenues to ensure sufficient expenditures and to ensure spending on the retirement regime. By 2037, if policy or measure still not be established to increase revenue or

decrease expenditure, then the social insurance revenues in the year and the outstanding amount will begin to fail to ensure solvency (Vietnam Social Insurance, 2019). Although the Law on Social Insurance 2014 has been amended and supplemented to harmonize and improve the legal provisions on the retirement regime for the female workers, the provisions of existing laws still have revealed certain shortcomings and limitations that need to be completed.

Firstly, the Law on Social Insurance 2014 does not have the regulation to explain the “retirement regime”, but has the explanation of “retirement”, which is one of the regimes of social insurance. The lack of explanation for the term “retirement regimen” would lead to disagreement about the content of this term, it can even be misinterpreted that the “retirement regime” is a privilege of employees, including the female workers working in the public sector where the law stipulates that employers take responsibility to pay social insurance for employees, while employees in the private sector do not have the right to participate and receive the “retirement regime” (Trang, 2016).

Meanwhile, Convention No. 102, 1952 of ILO, when providing for nine contingency cases in social security, there is a provision for the content of the contingency case, including the old age subsidize. According to articles 25 and 26 of this Convention, the old age subsidize is the guarantee of receiving subsidies for a person living longer than a specified age. If Vietnamese law has a clear explanation of the “retirement regime in social insurance”, it will give a unified understanding. Besides, it would show that the right to receive pension benefits in social insurance is one of the human rights for everyone, that is granted by the State. According to the author, Vietnamese law should supplement the following provisions: “Retirement regime” is a provision for the provision of a pension to replace income and other benefits for a person living longer than a specified age when joining social insurance and qualifying for the regime, subsidies under the provisions of social insurance regulations.

Secondly, Vietnamese law needs to define retirement as a right, not the female workers’ obligation. According to current regulations, 55 is the retirement age for female employees and this is an “obligation article”. Therefore, when reaching the age of 55, even though they still have enough "mind, strength" and enthusiasm to serve the work, the female employees still have to retire. In contrast, if “retirement” is the female workers’ right, then at the age of 55, the female workers can choose at any time: (i) retiring or; (ii) continue to work. Thus, it is possible to solve the problem of the relationship between the female workers' rights to work and retirement. These solutions contribute to the harmonization of Vietnam’s State Social Insurance Fund. Once identified the rights of the female workers is decided by them and do not necessarily give priority to pensions calculation. This approach meets the diverse needs of the female workers in different professions but can be complex in the implementation organization such as administrative and non-business, some types of intellectual work or with some people having degrees.

Conclusion

The right to enjoy social insurance of female workers is the basic right in the group right of workers when participating in labor relations. This scientific paper has analyzed the right of a female employee to enjoy social insurance through the following aspects: i) the medical Benefit (Health Insurance); ii) the maternity benefit; iii) the Old-age Benefit. These three groups of the issue have been systematized and analyzed through analyzing and evaluating some new points of the current legislation. On the basis of this analysis, the paper points out the shortcomings then suggest some recommendations and solutions to improve the legal provision on the right to enjoy social insurance of female employee.

The policy suggestions and legal solutions which are given in the article is to state the right to enjoy social insurance of female employee in the current legal framework and practice. The study has proposed solutions to improve the law on the rights of female employees enjoying social insurance to ensure the flexibility of labor relations in the labor market. In order to effectively guarantee this right in practice, along with improving legislation to create a solid legal corridor, the state also needs to consider about some breakthrough solutions which is suitable for some specific labors and set some specific requirements in nowadays business context.

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