

Guidelines for application of the provisions of the Criminal Code to crimes of social insurance fraud and evasion

On 15 August 2019, the Judges' Council of the Supreme People's Court (SPC) issued Resolution No. 05/2019/NQ-HDTP, providing guidelines for application of Article 214 on social insurance and unemployment insurance frauds, Article 215 on health insurance fraud, and Article 216 on evading payments of social, health and unemployment insurances for employees of the Criminal Code ("Resolution 05").

Background:

According to Vietnam Social Insurance Agency, over the time, acts of debt, evasion and fraud of social insurance (SI), health insurance (HI), and unemployment insurance (UI) have been increasing and sophisticated.

Criminal Code of 2015, as amended from time to time ("Criminal Code"), adds 3 offences, including SI and UI frauds; HI fraud; evading payments of social, health and unemployment insurances for employees. This supplement has created a legal basis for imposing criminal liability on violations, partly meeting the actual demands and requirements and helping the prevention of and fight against crimes in the insurance field. However, the Criminal Code still has many qualitative and general provisions with different interpretations, which require guidance to ensure uniform application of the law.

Following the Plan of implementation of the Criminal Code and Resolution No. 41 of the National Assembly at the People's

Courts, to promptly meet the requirements of the prevention of and fight against crimes in the insurance field, and to overcome certain inadequacy and limitation in judicial proceedings, the SPC Judges' Council has issued Resolution 05.

Contents:

The Resolution consists of 8 articles; clearly defining some terms used in the guidelines for application of Articles 214, 215 and 216 of the Criminal Code, such as: document falsification; medical record falsification; drug prescription forgery; increase or addition of medicines, medical supplies, technical services, hospitalisation days; HI document and card falsification; issuance of fake HI card; fake, revoked or altered HI card; evading payment of SI; cheat not to pay or pay fully SI, HI and UI; for 6 months or more; etc.

And at the same time, Resolution 05 also provides in Article 3 some details for determining the penalty framework, including:

(a) Having the nature of skilled crime as stipulated in Point b, Clause 2 of Articles 214 and 215 of the Criminal Code is the case where the offender commits any acts of SI, UI and HI frauds five or more times (regardless of whether the offender has been prosecuted for criminal liability or not, the statute of limitations for criminal prosecution has expired or not, criminal records have been removed or not) and the offender has taken illicit profits from the crime as income;

(b) Using sophisticated and cunning tricks as specified in Point d, Clause 2 of Articles 214 and 215 of the Criminal Code is the case where the offender uses high technologies and hooks up with persons having positions and powers in the State agencies, or uses deceitful tricks or other tricks to destroy evidence, conceal criminal acts, making it difficult to detect, investigate and deal with crimes;

(c) Committing a crime twice or more as provided for at Point a, Clause 2, Article 216 of the Criminal Code is the case where an offence of evading SI, HI and UI payment has been committed two or more times, but the offender has not yet been prosecuted for criminal liabilities and the statute of limitations for criminal liability has not yet expired;

(d) Failure to pay the insurance amount which has been deducted or collected from the employees as stipulated at Point d, Clause 2 and Point c, Clause 3, Article 216 of the Criminal Code is the case where the employer has collected or deducted insurance from the employees' monthly wages subject to insurance contribution, but does not submit it to insurance agencies.

This Resolution also specifies prosecution for criminal liability in some specific cases. Whereby:

(a) In the case where a person who has repeatedly committed the same act provided in Article 214 or Article 215 of the Criminal Code, causing damage to the SI, HI and UI fund and on which act any administrative sanction has not been imposed and the statute of limitations for administrative sanction or the statute of limitations for criminal liability has not yet expired; if the total amount of damages is equal to or above the minimum level for criminal liability in accordance with the Criminal Code; then such repeat offender must be prosecuted for criminal liability for the crimes corresponding to the total taken amounts if the offence are carried out continuously and successively.

(b) In the case where the person has committed certain offences and at the same time has taken SI, HI and UI money, causing damage, and the amount of the taken insurance and the amount of damages are within the basic penalty frame, the offender shall be prosecuted for criminal liability within that frame.

If the amount of the taken insurance and the amount of damage are within different penalty frames, the offender shall be prosecuted for criminal liabilities according to a higher penalty frame.

In the case the amount of taken insurance and the amount of damage are within heavier penalty frames, the offender shall be charged of criminal liability according to both such frames.

(c) For those who commit acts of falsifying SI, HI and UI documents, HI cards to take SI, HI and UI money or cause damage, in addition to being prosecuted for criminal liability for corresponding crimes provided in Articles 214 and 215 of the Criminal Code, the offenders will also be charged of criminal liability for falsifying the seals and documents of agencies and organizations; and simultaneously, for the crime of using fake seals or documents of agencies and organizations as provided in Article 341 of the Criminal Code if there are enough elements to constitute such crimes.

Resolution 05 also provides guidance on how to deal with acts of evading payment of SI, HI and UI for employees, which have been committed before 00:00 on 1 January 2018 according to the provisions of Article 216 of the Criminal Code, as follows on a case by case basis:

(a) If administrative sanction has not been imposed, and the statute of limitations for administrative sanction has not expired, the competent authority shall consider imposing administrative sanction.

(b) If administrative sanction has been imposed, but individuals or organizations deliberately evade and delay its enforcement, the time limit for such enforcement is determined according to the provisions of Clause 2, Article 74 of the Law on Dealing with Administrative Violations of 2012. The forced implementation and enforcement of such

administrative sanctions will comply with the law on forced implementation and enforcement of decisions of administrative sanctions.

(c) If any damage is caused to employees, SI agencies, or other organizations or individuals, the victims may initiate civil lawsuits requesting for compensation for non-contractual damages against violators.

The new Resolution also notes that the fact that an act of evading payments of SI, HI and UI premiums for employees committed before 00:00 on 1 January 2018 has been administratively sanctioned shall not be regarded as the ground for criminal prosecution in accordance with Article 216 of the Criminal Code.

Finally, Resolution 05 has determined the SI agency's status to initiate legal proceedings: According to the Criminal Code, not only SI agencies and trade unions, but also anyone who detects acts of evading SI, HI and UI payments has the right to send written denunciations to authorities to consider prosecution. As evasion of SI, HI and UI payments is no longer a civil action, if the trade union finds any sign of violation, it is entitled to send a document to the investigating agency for consideration and prosecution.

Effective date:

This Resolution was adopted by the SPC Judges' Council on 25 June 2019 and shall take effect on 1 September 2019.