

DISCUSS THE LEGAL INADEQUACIES THAT NEED TO BE REMOVED FOR CORPORATE GOVERNANCE TO PROMOTE PROFITABLE BUSINESS START-UPS FOR PEOPLE WITH DISABILITIES IN CURRENT PRACTICE IN VIETNAM

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ABSTRACT

Article 33 of the 2013 Constitution of the Socialist Republic of Vietnam states: "Everyone has the right to freely conduct business in professions not prohibited by law". From the perspective of starting businesses in general and businesses of people with disabilities in particular, the right to freedom of business through activities such as business administration, participation in the market, and responsibility within the enterprise of the industry as well as before the law. All of these issues are governed by business and commercial laws and other relevant legal documents.

This article focuses on analyzing the inadequacies in the provisions of the corporate law related to corporate governance issues for people with disabilities to participate in the market to increase economic benefits. From there, propose amendments and supplements to promote their effective business start-up in the business community in Vietnam.

Keywords: Corporate Governance with Disadvantaged People; Starting A Business For People With Disabilities; People With Disabilities With Business Administration Regulations.

Question

Policies to support people with disabilities are specified in Clause 2, Article 59, *"The State creates equal opportunities for citizens to enjoy social welfare, develops the social security system, and adopts policies to support people with disabilities. elderly people, people with disabilities, the poor, and people with other difficult circumstances"*. Also in Clause 3, Article 61 of the current Constitution stipulates: *"The State gives priority to the development of education in mountainous areas, islands, ethnic minority areas and areas with special socio-economic conditions. difficult; prioritizing the use and development of talents; create conditions for people with disabilities and the poor to learn the culture and vocational training"*. These regulations are aimed at ensuring equal rights for people with disabilities in line with the policy of protecting disadvantaged people to participate in community integration, self-study, work, and freely create in business. Of the Party and State in Vietnam.

From the perspective of community integration to participate in the supply chain of products and jobs in Vietnam's market economy, Clause 2, Article 33 of the Law on

People with Disabilities 2010 has defined "agencies, organizations, enterprises Individuals must not refuse to recruit people with disabilities who meet the recruitment criteria to work or set recruitment standards in contravention of the law to limit employment opportunities of persons with disabilities. But to properly ensure the right to freedom of business of people, including people with disabilities, it is necessary to consider two legal aspects for people with disabilities: they must have the right to set up businesses to do all kinds of business. Professions that are not prohibited by law and their business administration rights to create profitable values in practice. Encouraging people with disabilities to set up businesses to own themselves, and have the opportunity to help each other in life by being involved in business administration is one of the top issues. of all strata of society. Clearly defining legal norms to serve as a general code of conduct to regulate internal corporate governance, thereby supporting and encouraging the highly effective operation of the business community of people with disabilities is very important. Important and urgent.

The Legal Representative of the Enterprise Must Be Suitable For Each Object of the Enterprise Governed by the Law

In economic law in general and business and commercial law in particular, the concept of "legal representative" is understood as follows: The legal representative of an enterprise is an individual representing the enterprise. Exercise the rights and obligations arising from the transaction of the enterprise; represent the enterprise in the capacity of the requester for the settlement of civil matters, the plaintiff, the defendant, and the person with related interests and obligations before the Court. Jurisdiction, the Court, and other rights and obligations as prescribed by law. Considering the perspective of starting a business, including businesses of people with disabilities, the provisions of Clause 3, Article 12 of the current Law on Enterprises below are not consistent with the reality of the legal status of different types of people. The form of enterprises in our country is as follows: Enterprises must always have at least one legal representative residing in Vietnam. When only one legal representative is remaining in Vietnam, this person, upon exiting Vietnam, must authorize in writing another individual residing in Vietnam to exercise the rights and perform the obligations of the representative. legal. In this case, the legal representative is still responsible for the performance of the authorized rights and obligations. If so, it is clear that the legal representative of the enterprise in the market economy of our country is allowed to leave the place of residence and is authorized to represent other members (shareholders) in the company. companies with limited liability companies with two or more members, joint-stock companies, partnerships, and single-member limited liability companies are organizations with 3 to 7 members acting as owners' representatives. Because these types of businesses always comply with the mandatory law "to ensure that there is always at least one legal representative residing in Vietnam", the type of one-member limited liability company is an individual, and a one-member limited liability company is an organization authorized

by one person to act as the owner for the company and private enterprise. owned by an individual is construed as in the case of a limited liability company with two or more members, a joint-stock company, a partnership, and a one-member limited liability company that is an organization with three or more members. Up to 7 members act as the company owner's representative, leaving only one legal representative residing in Vietnam. If the representative of that organization wants to leave Vietnam, he/she must authorize in writing another individual residing in Vietnam to perform the rights and obligations of the legal representative. For example, Hoang Thong Trading and Service Joint Stock Company (which is company 1) authorizes Shareholder Nguyen Huu Thong (A person with Disabilities) to act as the owner's representative 10 billion VND to establish Thai Phuong Manufacturing and Trading Co., Ltd. (as company 2), Thai Phuong Manufacturing and Trading Co., Ltd (company 2) is a one-member limited liability company which is an organization with 1 authorized owner. Therefore, authorizing in writing another person (individual) residing in Vietnam to exercise the rights and obligations of the legal representative is completely inconsistent with the concept of characteristics of the type of company. One member LLC is an organization. This regulation is a huge restriction on starting a business for organizations with people with disabilities who choose a business model to start a business.

Or it can be argued according to the second example, as follows: Mai Hang One Member Limited Liability Company has a charter capital of 10 billion VND (this is company number 2, one member limited liability company is an organization) owned by Ms. Mai Thanh Hang. (A person with a disability) is appointed by Company No. 1, JSC A, as the authorized owner, and by default, Ms. Hang is the legal representative of Mai Hang Co., Ltd. In case Ms. Hang wants to go abroad, she is still allowed to authorize another person who is an individual to operate Mai Hang's company on her behalf. According to the provisions of Clause 3, Article 12, Ms. Hang is authorized to authorize another individual such as a one-member limited liability company who is an individual or a private business owner, which is completely contrary to the nature of the type of enterprise prescribed by the Law on Enterprises. The current industry is adjusting. It means that Ms. Mai Hang is not authorized to authorize her husband, children, father, mother, or another individual to act as the legal representative of Mai Hang One Member Limited Liability Company during the time she leaves the place of residence. Because Mai Hang One Member Limited Liability Company is a type of one-member limited liability company that is an organization, the charter capital of VND 10 billion belongs to the legal entity of JSC A, not to Ms. Mai Thi Hang personally. In practice, many types of one-member limited liability companies are very confused about the application of this regulation. That is, the provisions in Clause 3, Article 12 of the current Law on Enterprises are still very general, not distinguishing the authority and responsibility between the one-member limited liability company which is an organization, and an individual.

Thus, hinders business freedom and business governance principles of start-ups, including businesses for people with disabilities. Many specialized inspection teams are

performing the function of inspecting and inspecting enterprises to comply with the law, detecting these violations but there is no basis for handling. The post-business audit of the business registration offices of the province and city to check the observance of the provisions of law after business registration has detected many cases of authorization of the legal representative of the company. An enterprise being a one-member limited liability company is an organization where one owner acts as an authorized representative of the owner in contravention of regulations, but it is very difficult to handle.

According to the Author, it is necessary to make a clear distinction for the legal representative in a one-member limited liability company which is an organization authorized by the owner to act as an authorized representative residing in Vietnam. When this person exits Vietnam, he must obtain the written authorization of the organization that is the owner of that person to appoint another individual residing in Vietnam to perform the rights and obligations of the legal representative. Thus, the authorization between the legal representatives specified in Article 12 of the current Enterprise Law will be more scientific, overcome the legal inadequacies and create favorable conditions for equality and publicity in starting a business. of various types of enterprises in general and enterprises managed by people with disabilities in particular in Vietnam today.

Request: Firstly: To ensure the long-term interests of enterprises represented by people with disabilities, it is necessary to add content that is mandatory to authorize a legal representative for this type of company. One Member Limited Liability Company is an organization authorized by the owner for one member to be the owner as a separate clause in Article 12 of the Law on Enterprises 2020, as follows: In case the enterprise is a one-member limited liability company is an organization authorized by the owner to act as the owner's representative, it must obtain written consent to authorize another individual of that organization residing in Vietnam to exercise the rights and perform the obligations of the owner. Legal representative. In this case, the legal representative is still responsible for the performance of the authorized rights and obligations.

Second: Clause 4 into Clause 5; Clause 5 is changed to Clause 6; Clause 6 is changed to Clause 7 and Clause 7 is changed to Clause 8 to be logically compatible with the legislative technical order in amending and supplementing legal provisions.

Amending and supplementing the legal basis to create favorable conditions for People with disabilities to participate in administrative positions in one-member limited liability companies.

In a single-member limited liability company, the management structure is very different from the corporate governance models in the market economy in Vietnam. According to the provisions of Points a and b, Clause 1, Article 79 of the Enterprise Law 2020, a one-member limited liability company owned by an organization may be managed and operated under one of the following two models: i) The company president, director or general director; ii) Board of members, Director or General Director. On the other hand, for a single-member limited liability company owned by an individual, which is managed and operated by the same organization as point a, clause 1, article 79: the company's president, director, or general director.

In terms of labor relations in the type of one-member limited liability company in which people with disabilities are owners, it can be seen that management positions in the company include: Board of members, President of the company, General Director (Director). However, the current Enterprise Law stipulates the responsibilities of members of the Board of Members, the President of the company, the Director, the General Director, and other managers, and the Controller with 5 separate clauses and the following regimes: are entitled to salary, remuneration, bonus, and other benefits according to the company's business results and performance for the company's managers and Controllers.

Thus, other managers and Supervisors are also in management positions such as Chairman of the Members' Council, President of the Company, and General Director in a single-member limited liability company. From that, we can see that in this type of enterprise in Vietnam, the management position naturally has an employment relationship according to the adjusted Labor Code. But from the perspective of the labor contract, the Members' Council in a one-member liability company is an organization that is not governed by the labor contract. Because: The Members' Council has from 03 to 07 members. Members of the Members' Council are appointed or dismissed by the company owner for a term of not more than 5 years. The Members' Council shall, on behalf of the company owner, exercise the rights and obligations of the company owner; on behalf of the company to perform the rights and obligations of the company, except for the rights and obligations of the Director or General Director; take responsibility before the law and the company owner for the performance of assigned rights and obligations under the company's charter, this Law and other relevant laws. This means that all members of a one-member limited liability company which is an organization of people with disabilities coming from another legal entity can understand that they are representing the parent company's contributed capital in the subsidiary with the form of: is a one-member limited company. When the parent company appoints from 3 to 7 members as authorized owners, including disabled people, in that one-member limited company, the members' council will appear, but the labor relationship of the members in This board of members has appeared before. For example, Thanh Son Trading and Investment Joint Stock Company appoints 3 shareholders who are a group of people with disabilities as authorized owners to establish Xuan Manh One Member Limited Liability Company. All 3 members of the members' council of Xuan Manh company have had an employment relationship with the parent company, Thanh Son Trading and Investment Joint Stock Company, so they are all subject to appointment and dismissal. of the employer is the parent company with a term of membership of 5 years. According to Clause 1, Article 80 of the Law on Enterprises, the management position is the Chairman of the Members' Council of Xuan Manh Company, appointed by the owner of Thanh Son Trading and Investment Joint Stock Company or by the members of the Board of Directors. Members are elected on the principle of a majority by the order and procedures specified in the company's charter. If the position of Chairman of the Members' Council is appointed or elected, the labor relationship by labor contract is also established by the owner who is the parent company (Thanh Son Trading and Investment Joint Stock Company) with the Chairman. Chairman of the Members' Council of Xuan Manh One Member Limited Liability Company. Thus, the employment contract for the position of Chairman of the Members' Council in a one-member limited liability company that is organization appears in two separate situations, either by the owner's appointment or after Xuan Xuan Co., Ltd. Meng was elected by all members of the member council.

The subject of this labor contract is under the provisions that one side of the employer is the owner and the other side of the employee is the chairman of the Members' Council. However, the current Enterprise Law does not specifically stipulate the authority to sign and terminate labor contracts in case the company authorizes to act as the owner's representative in a one-member limited liability company, although the term of office of the Chairman is not specified. member council is 5 years according to the type of labor contract with a term of 24 months and 36 months. This is a huge limitation, and lack of consistency in the understanding and implementation of the provisions of the law on enterprises related to labor relations by contract in practice so far. Assuming that the labor contract can be signed with the type of contract of 24 months and 36 months to complete 5 years of a term as Chairman of the Members' Council, this labor contract will also be invalidated by the right to sign the contract. labor is an unclear employer, not following the provisions of the law. Practice shows that many labor contracts or commercial business contracts in general and of the disabled group, in particular, have been signed but the legal risks are very high. The judicial protection agencies also do not have enough grounds to protect this contract when there are actual disputes related to the rights and obligations of the parties in the labor contract relationship. Obstructing business activities, causing great difficulties that directly affect the economic interests of business entities, including people with disabilities.

For the position of General Director (Director) specified in Clause 1, Article 82 of the Enterprise Law 2020, it is understood that in the private enterprise sector, there are two types of one-member limited liability companies. That is, one member limited liability company is an organization, and one member limited company is an individual, both having the position of managing the General Director (Director). The labor relationship in a one-member limited liability company with the General Director is also very specific and flexible in terms of appointment authority. Director with a term of not more than 5 years to run the company's day-to-day business operations". However, the Board of Members appointing the General Director from a total of 3 to 7 members as authorized representatives is by regulations, especially the case of the President of the company appointing the General Director is not appropriate for the company. with the type of one-member limited liability company, which is an organization and an individual. According to the provisions of Point a, Clause 1, Article 79 of the Law on Enterprises 2020, the company president only, in the case of a one-member limited liability company, which is an organization defined as the parent company, appoints only one person to act as the representative of the authorized owner. rights only. As such, this authorized person will have an employment relationship as the sole President of the company without a second person for the President of the company to appoint as the General Director of the company. For example, Sao Mai Tourism - Service Co., Ltd., whose parent company is a limited liability company with 2 or more members, appoints Anh Song Minh, a disabled person, as an authorized owner with a charter capital of 10 billion. So according to point a, clause 1, article 82 of the Law on Enterprises, Mr. Song Minh will be appointed by the parent company, a limited company with 2 or more members, Minh Phuong, as the company's president, for the position of General Director of DL Co., Ltd. – DV Sao Mai does not have a second person for Anh Song Minh to appoint as the company's President. In this situation, the position of General Director in Sao Mai DL - DV Co., Ltd. will be hired by the company's President, Anh Song Minh, but cannot be appointed. In business and commercial activities from the time the General Director is hired, the labor relations in the company will be established by a labor contract, at this time the General

Director is the employee and the Chairman of the company. you will be the employer. Clause 3, Article 79 of the Enterprise Law 2020 stipulates: The company must have at least one legal representative who holds one of the following titles: Chairman of the Members' Council, President of the company or Director or General manager. Unless otherwise provided in the company's charter, the chairman of the Members' Council or the company's president shall be the legal representative of the company. In case the General Director is a disabled person, the authority to sign the labor contract will be the President of the company, who is authorized by law to be the legal representative of the one-member limited liability company. For other managerial positions and controllers in a one-member limited liability company, the determination of the labor relationship using a labor contract legally between them and the General Director of the company based on regulations at point e, point k, clause 2, article 82 of the Enterprise Law 2020, on the rights and obligations of the General Director, is to have the right to "recruit labor" and "to appoint, relieve from duty and remove the company manager, except for the titles within the competence of the Members' Council or the company's president".

Request: One is. For a labor contract to be effective in practice, with high legal value, and to absolutely protect the legitimate rights and interests of people with disabilities when participating in the market, it is necessary to supplement the authority to sign and terminate the contract. The employee for the position of a company manager is the President of the one-member limited liability company to ensure the validity of the labor contract in Article 81 of the Enterprise Law 2020.

Two is. To adjust the labor relationship by labor contract according to the Labor Code following legal science as well as practice to enhance the preeminence of the unified legal policy to facilitate integration. The best community for people with disabilities in today's modern society, it is necessary to remove the regulation "Chairman of the company appoints the General Director" in Clause 1, Article 82 of the Enterprise Law 2020 to be suitable for management positions. The president of the company, for a one-member limited liability company, is an individual or an organization represented by one owner, not from 3 to 7 members who are the owner.

It is necessary to clearly define the governance rights and obligations of private business owners to ensure the right of people with disabilities to start a business in the practice of private economic development in Vietnam.

From the perspective of starting a business for people with disabilities, the Enterprise Law has contributed to increasing the confidence and will to start a business for disadvantaged groups in society such as people with disabilities. That is, the Enterprise Law recognizes the legal status of private enterprises; the legislators have established the rights and obligations of business owners with 6 separate articles, clear independent governance, and appropriate science. With business subjects who initially have a start-up idea, including members of the group of people with disabilities who need to be protected by society.

Regarding the right to sell their private enterprises, Clause 1, Article 192 of the Enterprise Law 2020 provides the following: "Private business owners have the right to sell their private businesses to other individuals or organizations.". This regulation seems to be very favorable to the open economic mechanism of the "supply-demand" market in buying and selling private enterprises. But in general, it is illogical and very inadequate in the practice of enterprise law and the right to sell private enterprises in particular. In particular, this regulation causes

difficulties and greatly restricts the right to buy and sell private businesses of people with disabilities. According to legal science, the nature of a private enterprise is a natural person, not a legal person. In Clause 1, Article 188 of the Enterprise Law 2020, it is recognized that "A private enterprise is an enterprise owned by an individual and is solely responsible with all his assets for all activities of the enterprise". That is, owned by an individual, this type of business does not have a second owner, which means that this business does not have a strict organizational structure nor does it have assets to contribute capital to the owner's business. second and leads to the fact that the individual who is the owner of the business registers his capital and is responsible for the entire investment capital. That shows private enterprises do not converge the factors of tight organizational structure and separate assets when contributing to enterprises such as joint stock companies, limited companies, and partnerships that the Civil Code has not mentioned. Existence defines a juridical person. Suppose the Hong Nuong computer training private enterprise of Ms. Bui Hong Nuong, based in District 5, Ho Chi Minh City, wants to acquire the Thai Hung handicrafts training private enterprise of Mr. Nguyen Thai Hung based in Can district. Ho Chi Minh City time. According to the provisions of Clause 1, Article 192 of the Enterprise Law 2020, Ms. Hong Nuong has the right to buy back Mr. Thai Hung's private enterprise and vice versa Mr. Thai Hung has the right to sell his business to Ms. Hong Nuong in the capacity of Mr. is a private business owner. We identify both of these people with disabilities as owners of businesses that "private enterprise is an enterprise" Meanwhile, in Clause 10, Article 4 of the Enterprise Law 2020, it is recognized that "Enterprise is an organization with its name, has assets, has a transaction office, is established or registered for establishment by the law for business purposes.". Thus, Mr. Thai Hung has the right to sell to Ms. Hong Nuong her private enterprise, and Ms. Hong Nuong, who is the owner of a private enterprise "as an organization", still has the right to buy back Mr. Thai Hung's private enterprise. However, Clause 3, Article 188 of the Enterprise Law in 2020, limits the rights of the owner of a private business owned by an individual. That is, the law does not allow a business owner to have the right to own two private businesses at the same time to organize business activities. This restriction is suitable for the legal status of small private enterprises in terms of capital, business lines, and business administration structure. The problem here is, the sale of a private enterprise is a natural right in business and commerce, but the acquisition of a private enterprise only belongs to "individuals" and is legal for "organizations". The acquisition of a private enterprise violates Clause 3, Article 188 of the Law on Enterprises 2020. On the other hand, in Clause 4, Article 192 of the Enterprise Law 2020, this provision is as follows: "The buyer of a private enterprise must register to change the owner of the business. private sector under this Law (LDN 2020)". That is, this content only complies with the stipulation that a private business owner can only sell his business to "civil individuals" but not to "organizations that are businesses". It is only allowed to change the owner from Mr. Thai Hung to Mr. Hoang Van Hanh, provided that Mr. Hanh is not the owner of another private business or a shareholder in a joint-stock company or a capital contributor to the company. Limited liability company, partnership company.

In practice, the application of this regulation in Ho Chi Minh City is very difficult due to the inadequacies and contradictions in the internal provisions of the law as analyzed above. From the perspective of assets and finance, the purchase and sale of enterprises are not only directed to the tangible assets of the private enterprise, but the assets in that enterprise can be tangible such as corporate brands, intellectual property, etc. Patents are patented inventions. Meanwhile, the law on private enterprises has not been directed to protect the right to buy and sell businesses for

business entities, including business owners who are disabled. It can be said that this deficiency of the law has invisibly hindered the creativity and strict observance of business standards and principles to make a profit in the form of private enterprises of the disabled group. The author disagrees with some scholars and researchers when he thinks that, in addition to stipulating the obligations of the private enterprise acquirer in Clause 4, Article 192 of the Enterprise Law 2020, a separate clause should be specified in the Law on Enterprises. Article 1992 for the case where the business entity is an organization (enterprise) that has the right to purchase a private enterprise of a person with a disability to convert it into a company. That is, adding the regulation "A buyer of a private enterprise being an organization must register to change to another type of enterprise other than a private enterprise by the provisions of this Law". According to the author, the addition of this provision is contrary to the conversion of a private enterprise into a limited liability company, a joint stock company, or a partnership as provided for in article 205 of the Enterprise Law 2020. Because, Article 205 of the Enterprise Law 2020 only allows business entities that are private enterprises to convert their private enterprises into limited liability companies, joint stock companies, or partnerships, but not regulated. sell the business as if it were selling its assets as a sole proprietorship. Legislators use the terms "conversion of a private enterprise" and "sale of a private enterprise" to refer to two different forms of a business entity as a sole proprietorship. Therefore, to ensure consistency in regulations on the rights to sell and buy private businesses that bring legitimate benefits to business owners, including people with disabilities, it is necessary to consider amending and supplementing. This regulation is more appropriate in practice and is an extremely urgent and necessary issue.

Request: Regarding the right to sell their private businesses, the law needs to adjust the legal regulations and match the law with reality to increase management rights and protect startups in general and people with disabilities in general. Private. The National Assembly should agree to remove the phrase "other organization" in the regulations related to the sale of its private enterprise to another individual, but not add the phrase "other organization". Specifically, in Clause 1, Article 192 of the Enterprise Law 2020, there will be provisions more suitable to science, as follows: "Private business owners have the right to sell their private businesses to other individuals".

CONCLUSION

Ensuring the right to freedom of business for citizens, including people with disabilities, is a matter of great concern of the whole political system. This is one of the important undertakings and policies to attract creative labor resources of economic entities together with agencies in the state apparatus to promote internal resources and self-reliance to promote international economic development. family. The right to freedom of business has been institutionalized into legal institutions of the rule of law state, consistent with economic, cultural, and social rights and international conventions to which Vietnam is a signatory. The article has focused on solving and clarifying corporate governance issues such as The legal representative of the enterprise must be suitable for each object of the enterprise as regulated by the law. Timely response to the compatibility of legal regulations when identifying business entities in the multi-sector socialist market economy in Vietnam, including enterprises operated by people with disabilities. motion. The article also makes recommendations to amend and supplement the legal basis to create favorable conditions for People with disabilities to participate in

administrative positions in one-member limited liability companies in reality. Helping disadvantaged groups in society have the opportunity to realize their legitimate aspirations, making small contributions to create jobs for social needs. The article also affirms the high scientific value of in-depth analysis of the inadequacies in practice and recommendations to amend the legal regulations to clearly define the management rights and obligations of private business owners in the sale of private enterprises. to ensure the right to the start-up of people with disabilities in the practice of private economic development in Vietnam.

REFERENCES

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Civil Code 2015

Enterprise Law 2005; 2014; 2020

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Received: 03-Nov-2022, Manuscript No. AEJ-22-12914; **Editor assigned:** 07-Nov-2022, PreQC No. AEJ-22-12914(PQ); **Reviewed:** 21-Nov-2022, QC No. AEJ-22-12914; **Revised:** 23-Nov-2022, Manuscript No. AEJ-22-12914(R); **Published:** 25-Nov-2022