

TEMPORARY CESSATION OF OPERATIONS: AN OPTION TO WEATHER THE DOWNTURN

Under the current global economic circumstances of a decline in consumption and a reduction in purchasing, many businesses are faced with evaluating how best to handle the drop in production and an idle workforce. One option is whether or not to cease business operations temporarily because when employers adopt this measure in Thailand, they can legally pay wages at a reduced rate to the affected employees. Nevertheless, many employers lack a good understanding of the laws which results in them facing court proceedings and a possible court order revoking the measure of temporary cessation of operations. This article hopes to clarify the law for ceasing business operations temporarily.

Under Section 75 of the Labour Protection Act (LPA), an employer is entitled to apply for the measure subject to the following conditions:

1. There is a necessary and significant cause for the employer to invoke such a measure, such as the employer's business cannot operate as usual.

2. The necessity is not considered to

be force majeure under Thai law. (Note that if an event is deemed to have arisen due to a force majeure event, an employer is able to withhold all wages as described below as opposed to withholding up to 25% of wages for situations warranting a temporary cessation of operations.)

3. The employer has to elect whether to seek temporary cessation of operations on a whole or partial basis.

4. The employer has to inform a labour inspection officer and the employees three business days in advance of the intended cessation of operations.

5. The employer has to pay its employees at least 75% of the working day wages received by the employees prior to the cessation of operations.

6. The employer has to pay its employees throughout the entire period of cessation.

The LPA does not indicate what qualifies as a necessity in order for employers to invoke the measure; therefore, Supreme Court precedent must be reviewed for guidance. Supreme Court precedent indicates that the following circumstances are viewed as amounting to a situation of necessity:



(a) a reduction in customer purchase orders, and (b) financial difficulties faced by the employer. However, the situation has to be significant and must seriously affect the employer's business (Supreme Court Case No. 8193/2000). Furthermore, the situation cannot be a result of the employers own failure to conduct business efficiently.

As mentioned above, situations arising from events deemed as force majeure which result in the employer not being able to operate will enable the employer to withhold all wages from employees. Force majeure is defined under Thai law as any event the happening or pernicious results of which could not be prevented even though a person against whom it happened or threatened to happen were to take such appropriate

care as might be expected from him in his situation and in such condition. Earthquakes and tsunamis are examples of force majeure. The collapse of a factory due to an earthquake that results in the employer being unable to operate will justify withholding of wages.

Interestingly, the Supreme Court has ruled that the following events do not qualify as force majeure events:

- ◆ Flooding of a factory's premises (Supreme Court Case No. 118/1982).
- ◆ A factory fire (Supreme Court Case No. 2560/1986).
- ◆ A violent storm that usually occurs every season (Supreme Court Case No. 2140/1977).
- ◆ A seasonal wildfire where the party does not undertake any preventive action (Supreme Court Case No. 830/1976).

However, if the above incidents result in the shutdown of a factory, the employer would still be entitled to apply for the temporary cessation of operations under LPA Section 75.

As for the requirement for the employer to elect whether to seek temporary cessation of operations wholly or partially, the employer has to fix the

cessation period. However, the employer can designate separate cessation periods based on necessity.

If the employer has in place a Collective Bargaining Agreement (CBA) with a labour union or the employees regarding temporary cessation of operations, the employer also has to abide by the procedures therein. Failure to do so could result in the employees claiming violation of the CBA. If the employer's business has a labour union, it is likely that the union will challenge the measures taken by the employer. Therefore, employers should act cautiously when considering measures such as the temporary cessation of operations.

Although a temporary cessation of business operations may not be the answer to all employers problems, it could well be an alternative worth considering.

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