A measured approach

A strong manufacturing sector and low rate of unionisation are two of the reasons foreign investors have been attracted to Thailand's shores, says Chusert Supasitthumrong of *Tilleke & Gibbins*. But with labour unrest a threat in any economy these days, companies seeking to renegotiate employment conditions with unionised employees would be wise to first acquaint themselves with the country's legislative framework.

Thailand has long been viewed as an attractive option for foreign investors in the manufacturing sector. The country has already positioned itself as a regional leader in automotive assembly and parts production, while the electronics and textile industries are also well-established strengths. These areas, along with other manufacturing industries, are expected to see continued growth in the years to come as the Thai government has shown a strong commitment to eliminating barriers to trade. The recent implementation of the ASEAN Free Trade Area and the China-ASEAN Free Trade Agreement are likely to bring about further growth in Thailand's already strong manufacturing sector.

One of the reasons for Thailand's competitiveness in this area is the country's relatively low rate of unionisation, which currently stands at less than 10 percent. But as the recent wave of labour unrest in China has shown, the level of labour militancy can shift quickly, especially as investment continues to pour into a growing economy. For this reason, companies that are investing in Thailand need to familiarise themselves with the legislative framework for dealing with unionised employees. This article will introduce and address some of the most common issues that arise between employers and employees or unions under the *Labour Relations Act*.

Overview of the statutory framework

The *Labour Relations Act* (the Act) is the primary statute that governs relationships between employers and employees operating collectively as a union or other group. Under the Act, employers are not permitted to change the conditions of employment unilaterally if doing so will result in a reduction of the employees' employment benefits, unless the employer obtains the employees' informed consent. If consent is not forthcoming, the employer must retain existing conditions of employment or proceed to change them in accordance with the procedures specified in the Act. One of the key reasons for labour unrest in Thailand is that employers sometimes try to implement changes in the workplace unilaterally without realising that their actions result in unlawful changes to legally protected conditions of employment.

"Conditions of employment" is a broad concept under Thai law, and includes everything from the obvious – such as wages, welfare, working days and hours – to less obvious items including rules about the submission of employee

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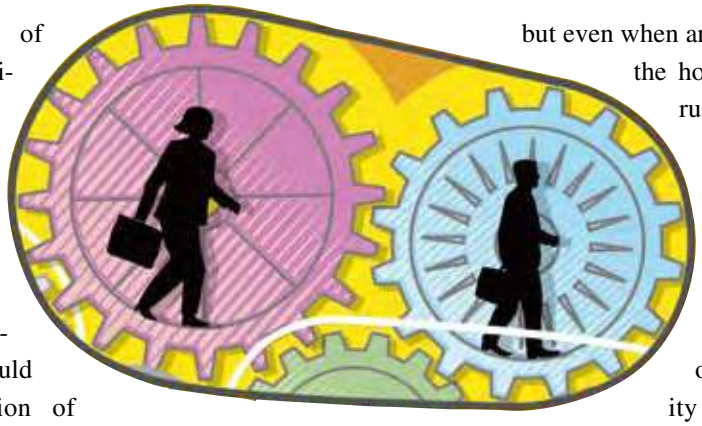

complaints, termination of employment and other disciplinary measures, amendment of work rules, and all other conditions in the workplace that have become obligatory by contract or practice. For example, the criteria underlying a variable bonus could be considered a condition of employment and may be difficult to modify if the employer has not expressly reserved the right to do so in writing. Additionally, certain soft perks like a shuttle service, for example, can become conditions of employment over time.

In Thailand, most employers are required by law to have written work rules (registered with the Labour Ministry), and many employers have collective bargaining agreements (CBAs) with their workforce. Besides setting forth all of the conditions of employment, work rules and CBAs can govern certain aspects of an employee's personal behaviour outside the employer's premises or outside of the employee's normal working hours. For example, they may state that employees cannot be involved in narcotics inside or outside the employer's premises, and such requirement will be enforceable under Thai law.

Even well-meaning employers can be surprised by the fallout from a unilateral change in conditions of employment. For example, with some exceptions the maximum lawful number of work hours per week in Thailand is 48, but even when an employer wishes to reduce the hours to 40 per week, it can run into colorable objections from the workforce if it also reduces compensation accordingly. The employer needs to consider the net impact of a change in conditions of employment in order minimise the possibility of labour unrest and/or legal proceedings.

How to change employment conditions legally

When a CBA reaches expiration and/or the employer or its employees want to negotiate new conditions of employment, each party must proceed under procedures specified in the Act. For example, employer or employee demands for new conditions of employment or a new CBA (Labour Demands) must be submitted to the other party in writing. If submitted by the employer, the Labour Demand must include the names of the persons who will negotiate on the employer's behalf. If submitted by employees, the Labour Demand must include the names and signatures of each employee involved in the Demand, and must include the support of at least 15 percent of all employees in the company. If a labour union submits a Labour Demand on behalf of its members, the union's membership must total at least 20 percent of the employer's total employees, but the employees who are involved in the demand do not need to be named.

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Of course, employee requests often involve an increase in wages or bonus, or welfare items such as transportation and medical treatment, and the Labour Demands are almost always inflated in order to leave room for negotiation. By similar token, many companies submit hard-line counter-demands after receiving the employees' Labour Demand. This is often a positioning tactic to force employees to reduce or withdraw their demand sooner, since employees are aware that a lockout is one possibility if the parties cannot reach agreement.

Once a formal Labour Demand is received from the employer or employees, the law requires the parties to begin negotiations within three days. If they can reach settlement, they may enter into a new CBA signed by their representatives. Within three days after signing that agreement, the employer must display it at the workplace for at least thirty days, and must register the CBA with the Ministry of Labour within fifteen days.

The new CBA binds the employer and all employees named in the Labour Demand, plus all employees who participated in elections for the employee representatives. If the Labour Demand was submitted by at least two-thirds of the employees with the same or similar job, or by a labour union representing at least two-thirds of the employer's total employees, then the new CBA binds all employees working in the same or similar job.

Settlement of Labour Disputes

If the parties fail to reach an agreement after negotiation, or if no negotiation takes place within the prescribed three-day period, the Labour Demand will become a "Labour Dispute" by law. In this event, the party who submitted the Labour Demand must inform a conciliation officer appointed by the Labour Ministry in writing within 24 hours after the negotiations break down, or within 24 hours after the three-day statutory negotiation period expires. The conciliation officer is then obligated to conduct a mediation and try to effect settlement within five days. If settlement is reached, the employer must proceed with the same notice requirements discussed above. If the parties cannot reach settlement, the Labour Dispute becomes an "Unsettled Labour Dispute" and the parties may agree to appoint a Labour Dispute arbitrator, or the employer may begin a lockout of the employees and/or the employees may go on formal strike.

Unsettled Labour Disputes involving ports, rail transport, telecommunications, utilities, energy and health care, along with Unsettled Labour Disputes which might affect the economy or public order, must be referred to the Labour Relations Committee. Likewise, if the government has declared martial law or a state of emergency, the Labour Ministry is authorised to announce in the *Government Gazette* that Unsettled Labour Disputes must be considered by persons appointed by the Ministry, whose orders are final and require compliance by the employer and employees.

If the employer and employees refer the dispute to arbitration, they will each be afforded an opportunity to submit arguments and evidence to support their positions. The arbitration award shall include a discussion of the issues, the facts as determined by the arbitrators, the reasons for their decisions, and the requirements to be performed by the parties.

Employers and employees are prohibited from engaging in a lockout or a strike until the above preliminary

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procedures are completed. In other words, a Labour Demand must be formally submitted by one party to the other, and it must have evolved into an Unsettled Labour Dispute. In addition, the parties may not strike or engage in a lockout while waiting for an award by a Labour Dispute arbitrator, or without giving prior notice to the conciliation officer and 24 hour notice to the other party.

Guidelines for employer actions

It is extremely difficult for an employer to terminate or transfer employees once a formal Labour Demand has been submitted. By law, if the Labour Demand is under negotiation, settlement or arbitration, the employer cannot terminate or transfer employees, employee representatives, committee members or members of the labour union. Employers who violate this rule are subject to criminal charges and possible imprisonment of up to six months. The only exceptions allowing for termination are if an employee commits one of the following acts:

- Performs dishonestly or intentionally commits a criminal offence against the employer;
- Intentionally causes damage to the employer;
- Violates the employer's work rules, regulations or lawful orders, after a written warning by the employer for matters not deemed serious; or
- Neglects his or her duties for a period of three consecutive work days without reasonable cause.

Moreover, if the affected employee is a member of an employee committee, the employer must petition the Labour Court for permission to terminate the employee.

In cases where an employer violates the above rules regarding termination during a Labour Dispute, the employee is entitled to submit a complaint to the Labour Relations Committee (the Committee) within sixty days after the violation. The Committee will then ask both parties to explain the matter, and will issue an order within ninety days after receiving the employee's complaint. If the Committee cannot issue the order within that deadline, it may obtain an extension from the Labour Minister.

Also note that employers are not permitted to interfere with an employee's right to unionise. This means that employers may not terminate an employee or take any other action that would make an employee unable to continue work merely because the employee is a member of a labour union, or calls a rally, files a complaint, submits a Labour Demand or engages in other lawful related activities. Nor may employers induce or prevent an employee from becoming a member of a labour union, or cause or induce an employee to resign from a labour union. Violations are subject to possible criminal prosecution and imprisonment of up to six months. These provisions apply whether or not a Labour Demand is in process, but they come into play especially often when employers anticipate a strike, because they need to encourage some employees to cross the picket line without running afoul of a law that sanctions discrimination against union members, membership and lawful union activities.

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Employers must be mindful of these prohibitions in all of their dealings with their employees, and particularly when a Labour Demand has been submitted. This will ensure that employers are able to minimise the risk of sanctions, including criminal liability, which could result from unwitting or overly aggressive actions.

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