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A recent amendment to Thai labour law relating to outsourcing

Outsourcing has long been an alternative option for businesses in Thailand seeking to avoid the financial burden placed upon them by Thai labour law, particularly the Labour Protection Act B E 2541 (1998) (LPA), which provides employees with minimum rights. As this law is considered to be a law relating to public order and good morals, it is not possible for employers to provide any less than the minimum standard, even with the employees’ consent. Many Thai subsidiary companies are also subject to controls on headcount of employees imposed by the parent company, and they use outsourced employees as a solution to the problem of workforce shortages.

Outsourcing

Outsourcing allows a business to avoid the employer/employee relationship with its workers. The outsourcing company will recruit the employee, pay salary to the employee, and send the employee to work with the business operator. Normally these outsourced employees will receive different benefits and welfare from the directly hired employees of the company, even though they carry out the same work. The difference will be even greater if the business operator is a large organisation which provides a very generous package of benefits and welfare to its directly hired employees, whereas the outsourced employee will not normally receive any benefits or welfare. This is because benefits and welfare are not stated as a minimum requirement of the LPA. For example, the directly hired employees may be provided with a company uniform and transportation to and from work, whereas outsourced employees would have to buy their own uniform and pay for their own transportation.

Outsourced employees are often seen as second class employees, who receive less benefit for doing the same job as the directly hired. Outsourcing companies frequently enter into one year fixed term contracts with the outsourced employees, which are

not renewed on expiry. The outsourced employee then has to find employment via another outsourcing company, but may end up working for the same business operator. As many outsourcing companies are small, it may be difficult for the outsourced employees to enforce them to comply with labour laws.

Legal amendment

It is for these reasons that the law relating to outsourcing was amended to give greater protection to outsourced employees. Thailand recently enacted the Second Amendment of the Labour Protection Act, B E 2551 (2008), which amended many sections of the LPA, including Section 11/1 relating to outsourcing. Section 11/1 provides:

‘In the case the business operator assigns any person to recruit a worker whereby it is not a job procurement business operation, and such work is a part in the manufacturing process or the business under the responsibility of the business operator, and whether or not such person may supervise the work or be responsible for payment of wages to the said worker; it shall be regarded that the business operator is the employer of the said worker.

The business operator shall arrange for the contracted employee who works in the same description as an employee under a direct contract of employment to receive fair benefits and welfare without discrimination.’

The main principles of the above section are as follows:

- the employee is the employee of the outsourcing company, provided that the outsourcing company is not in the headhunting business;
- the work is part of the manufacturing process or the business under the responsibility of the business operator;
- the work is carried out with or without the supervision of the outsourcing company and no matter who pays the wages;



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- the business operator shall also be regarded as the employer of the worker in addition to the outsourcing company; and
- if the direct-hired and outsourced employees have the same job descriptions, the business operator shall arrange fair benefits and welfare without discrimination.

Any work which is not part of the manufacturing process or the business under the responsibility of the business operator shall not fall within this section, such as maid service.

To identify whether it is 'work in the same description', the position, job grade and job description must be considered. If the job grade, title, description and the required qualifications and skills for the position are different, the benefits and welfare can be different even though the employees work in the same department. The court should interpret this section precisely by finding that the job description and/or the job title must be the same in order for the outsourced employee to be able to claim fair benefits and welfare without discrimination.

'Fair benefits and welfare without discrimination' should include the right to annual leave according to length of service, lunch provided by the employer, transportation, uniform, accommodation and so on.

Consequences and options for employers

When this amendment of the LPA came into effect on 27 May 2008, it caused some concern among business operators who use outsourced workers, as they had not previously allocated a budget to provide fair benefits and welfare to outsourced

employees and the new law seemed to impose a greater financial burden on them. In addition, Section 144/1 of the LPA states that 'Any business operator who fails to comply with Section 11/1 shall be punished by a fine not exceeding THB100,000.' There was therefore additional reason for business operators to be concerned about the likely penalties for noncompliance.

However, there are methods for business operators to avoid the application of Section 11/1. If the business operator organises the workforce such that directly hired employees hold supervisory or senior positions and outsourced employees work in subordinate positions, there can be no comparison between the two types of employee. Accordingly, the business operator has no obligation to provide the outsourced employee with the same welfare and benefits as the directly hired employees and will not be considered to be the employer of the outsourced employees. Another option is to outsource an entire department, and equally there will be no directly hired employee in a comparable position with the outsourced employee. Section 11/1 will not apply if there is no directly hired employee in a comparable position with the outsourced employee.

Nevertheless, as this is a relatively new amendment to the law, it has not yet been tested in the Supreme Court and there can be no certainty as to how the Court will interpret the amendment. The legal status of the new section warrants close monitoring in the months ahead.