

## In times of calamity, Laws governing labour get tricky

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Given the present flooding in Thailand, many people have concerns about employment issues. Put simply, "If my factory is flooded, must I keep paying my employees?" As with most legal questions, the answer is not so simple.

The Labour Protection Act (LPA), the primary labour law in Thailand, contains a provision (Section 75) dealing with temporary shutdown of business operations.

If a significant event, other than force majeure, affects the employer's operations and causes the employer to be unable to operate its business as usual, and the employer needs to temporarily halt its operations wholly or partially, the employer must pay each employee at least 75% of the working-day wages an employee received before such cessation, for the entire duration of the period during which the employer does not allow each employee to work.

In such situations, the employer must give prior written notice to both the employee and the labour inspection official at least three business days before the halt of operations.

Note that LPA Section 75 refers to a significant event other than force majeure. What is force majeure? In Thailand, force majeure is defined much as it is in many other jurisdictions. This is addressed in the Civil and Commercial Code (CCC), which is a source of law of general application.

According to the CCC (Section 8), force majeure is defined 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. As a general matter, if an employer ceases operations because of force majeure, the employer need not pay wages to employees.

Thus, met with these sorts of events, the typical issue is whether a factory can shut down, and if so, whether the shutdown is really due to force majeure, or due to an event other than force majeure, which is nonetheless significant and prevents the employer from operating as normal.

In any case, it would not be sufficient to simply observe that there is flooding. Rather, one must look to the reason for the flood, the effect of the flood on the factory, and the extent to which the factory's management attempted to mitigate the damage.

For example, a flood due to a burst water pipe in a factory, which the management negligently failed to maintain, would not qualify as force majeure.

Similarly, if a certain level of flooding happens on approximately the same month every year due to heavy rain, damage suffered by a factory that failed to take appropriate measures would not likely constitute force majeure, unless the flooding was far greater than was reasonably expected, or possibly in the case of breach of a dam operated by the state.

Likewise, a lack of raw materials due to the management's failure to reasonably source them would not constitute force majeure, unless there were a global shortage beyond the employer's control.

There is not yet a Supreme Court decision that addresses employment in the context of flooding of this nature. Generally, however, it is important to bear in mind that the courts take a conservative approach to force majeure, and thus construe it quite narrowly.

If a factory's situation does not constitute force majeure, then LPA Section 75 is a possibility. Employers have used many different reasons to justify a temporary cessation under this section, such as cancellation of orders by customers, or flooding within the employer's control.

It is important to note that poor management decisions or the lack of a proper management plan will not constitute an acceptable reason. This means that the section is not available to an employer who lacks raw materials because of a failure to plan ahead in ordering them, even from a different supplier.

Aside from determining whether the section can be used in particular circumstances, calculation of an employee's wages, which form the basis for determining the 75% payment under LPA Section 75, can also be a complex exercise, particularly with respect to employees paid on an hourly or daily basis, and who receive various "extras", such as shift premiums and meal allowances, included in their regular pay.

Improperly categorising the reason for a temporary shutdown could result in claims by employees for back wages, or unpaid 75% payments, depending on the circumstances. As noted above, many factors must be taken into consideration, and circumstances may vary from factory to factory. Met with the same peril, one factory might be able to legitimately claim force majeure, while another with different circumstances might not qualify.

In addition to the statutory issues outlined above, it would be necessary to consider provisions in work rules and regulations, employment agreements, and collective bargaining agreements, any of which might contain provisions addressing temporary shutdowns. As such, assistance of counsel is most important in making a correct determination.

The flooding will eventually subside, and most factories will return to their normal operations, though some sooner than others. Thus, aside from purely legal considerations, employers should give thought to treating their valued employees well and maintaining relationships with them. This will be of considerable benefit when business resumes.

In addition, employers who suffered preventable losses should take this opportunity to reassess and consider how the situation might be better handled next time.