

Potential liability for termination: An employer's perspective

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Many employers are unaware that terminations of employees, if not carefully considered and conducted, could not only lead to claims of civil liability for unfair termination but also potentially impose criminal liability on the company and its directors as an unfair act. It is extremely important to clearly understand what constitutes unfair termination and an unfair act, and their differences.

Under Thai law, unfair termination typically applies to situations in which the employee is terminated without cause, with insufficient cause, by grounds that are not stated in the employment contract or in conflict with penalties stated in the work rules. Relief granted for unfair termination is typically in the form of compensation or can even extend to reinstatement of the employee.

The Labour Relations Act (LRA) clearly states what constitutes an unfair act and the procedures to take legal action against the employer. An aggrieved employee can submit a complaint to the Labour Relations Committee (LRC) within 60 days of the violation. The LRC has to consider and issue an order within 90 days upon receipt of the complaint. It is entitled to issue an order to the employer to reinstate the employee, to pay compensation or to order the violator to carry out or not to carry out any act.

If the violator does not comply with the LRC's order within the deadline, it will face criminal penalties such as imprisonment up to six months and/or a fine up to 10,000 baht. If the violator disagrees with the order, it can petition to the court to revoke the order.

Given the potential criminal penalties involved in an unfair act, employers must be vigilant about conducting terminations in a legal and safe manner. They can do this by ensuring they have full knowledge of the circumstances in which termination could be claimed to fall under the rules governing an unfair act, as is explained below.

Under the LRA, unfair acts are grouped into three distinct categories.

- Category one states the prohibitions on employers. Some of these are related to insufficient or wrongful cause to terminate. Employers are not allowed to terminate an employee only because, for example, the employee calls a rally, files a complaint or is a member of a labour union. Other prohibitions include preventing the employee from joining a labour union through various means or inducing the employee to quit if he is already a member. Also, employers cannot prevent labour unions from conducting their affairs or operations without lawful authority.

- Category two states general prohibitions not limited to employers. This means anyone could potentially be criminally liable for acts committed under this section. In general, an action can be brought against anyone who coerces or threatens, either directly or indirectly, an employee to become a member of a labour union or to resign from a labour union or who takes any action causing the employer to carry out any unfair act in the first category.

- Category three prohibits the employer from terminating an employee while the collective bargaining agreement (CBA) remains in effect. However, there are certain exceptional circumstances, which generally involve bad behaviour on the part of the employee. These include but are not limited to when the employee is dishonest in his duties or intentionally commits a criminal act against the employer; intentionally causes the employer to suffer losses; violates the employer's work rules, regulations or orders that are legal and fair; and when the employer has already given a written warning. Other situations include those in which the employee neglects his duties for three consecutive work days without reasonable cause or performs any act that incites, encourages or persuades others to violate the CBA or decision of award.

However, the Supreme Court has ruled that the employer may raise other reasons to terminate the employment contract during the period when the CBA is in effect, should the employer be able to prove the necessity of termination.

Because of the pitfalls that could arise after termination and the risk of incurring criminal liability, employers need to consider more complex cases of termination and tread carefully. A forward-thinking and careful approach will go a long way towards reducing cases of litigation. When in doubt, it is always wise to seek legal advice before taking action to terminate employees.