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Minimising employer liability for subcontracted employees

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Many companies, for a number of sound reasons, use workers employed through subcontractor agreements with third-party employers. Such agreements can allow a company to meet short-term needs without the burden of actually employing the workers.

However, if companies do not fully understand the applicable Thai law, they may unwittingly submit themselves to increased liabilities including the possibility they could be considered the actual employer of the subcontracted employees. This could result in a significant negative financial impact on operations. This article provides guidance on how to minimise potential liabilities arising from subcontractor relationships.

When it comes to potential liabilities for subcontracted employees, the primary consideration is whether to class an entity as the actual employer of the subcontracted employees. In an effort to address a consistent problem of inequality in wages and benefits between company employees and subcontracted employees at the same work sites, parliament enacted Section 5(3) of the Labour Protection Act (LPA) in 1998 to define clearly what constitutes an employer. Section 5(3) provides as follows:

"Where the business operator has engaged an employment by a lump-sum payment and has assigned a person to supervise the work and to be responsible for payment of wages to the employee, or has assigned a person to procure employment to work, which is not a business operation for the procurement of employment, and such work is a part or the whole of the production process or the business within the business operator's responsibility, the business operator shall also be deemed an employer of such employee."

The purpose of this section was to protect subcontracted employees who perform the same work and duties as a company's regular employees, where such jobs are part of the production process or business of the company.

Take the following example to illustrate the point: Company A is a mobile manufacturer. There are many steps in the production of one phone. Any one of these steps forms a part of the production or business of Company A. Therefore, if Company A hires a subcontractor to provide employees to work in a department for any stage of the production of the phone, and the work is the same as that performed by Company A's regular employees, then the subcontracted employees will be deemed employees of Company A.

While Section 5(3) was effective in defining an employee and eliminating some historical inequalities, there remained a persistent issue of concern over the continued treatment of some subcontracted employees performing the same work as regular company employees, especially regarding benefits. For example, subcontracted employees would perform the same work as regular employees but with unequal benefits.

Another example is where annual leave allowances, while in accordance with the work rules of the subcontractor, were less than those provided to Company A's regular employees. If the subcontractor's employees then sued Company A for equal annual leave as provided to regular employees, Company A only had to provide the lower annual leave provided in the subcontractors' work rules. This is because the Supreme Court ruled that while the company is responsible for the subcontractor's employees, such responsibility is limited to the terms of the contract between the employee and the subcontractor.

To address the continued inequalities and the result of the Supreme Court ruling, in 2008, the LPA was amended by revising the language in Section 5(3) and moving it to an entirely new Section 11/1. The new language of Section 11/1 reads as follows:

"Where an operator authorises a person to provide personnel to work, which is not a job placement business, and such work is part of the production process or business under the responsibility of the operator, whether or not such person will supervise the performance of work or be responsible for payment of wages to those who do such work, the operator shall be deemed the employer of those engaged to do such work. The operator shall arrange for an employee hired for wages, who works in the same manner as an employee under a direct employment contract to, without discrimination, receive fair rights, benefits and welfare."

The 2008 amendments to the LPA, by eliminating some of the historical loopholes used by employers, have created some important new issues and concerns for employers in Thailand. Not only must companies be adequately aware of the exact classifications of all employees _ whether those of the company or of a subcontractor _ but they must now also provide fair welfare and benefits to many subcontracted employees without discrimination. Failure to do so, or failure to monitor and control company operations with its subcontractors adequately, could lead to civil and/or criminal liability for the company and its management.

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