

Employment Issues on a Transfer of Business in Asia





THAILAND

Frequently asked questions by seller

1. *Is there a difference in the treatment of employees in an asset transfer as opposed to sale of shares in the employing company?*

Yes. In the case of an acquisition by shares, the employment relationship remains intact; from the standpoint of the employer, nothing changes. This is also the case in amalgamation. However, with respect to an acquisition of assets, if the purchaser wishes to employ the employees, it would be necessary to procure consent from each employee, in order to transfer their employment to the acquiring entity. If an employee refuses consent, such employee would remain employed by the original employer; this may put the original employer in the position of having to terminate such employees, if the seller will cease operations after the sale of assets.

The remainder of this FAQ deals with transfer of employment in the context of a transfer of assets.

2. *Is there any legislation providing for the automatic “transfer” of employees from the seller to buyer in an asset sale situation? If so, please explain how it works.*

As explained above, employee transfer is not automatic. Rather, employee consent is required. Nevertheless, transferred employees have certain rights with respect to their new employers. Pursuant to Section 13 of the Labour Protection Act B.E. 2541 (1998) (as amended) (“LPA”):

If an employee’s employer changes due to transfer, inheritance, or any other cause, or if an employer is a juristic person and undergoes a change in registration, transfer, or merger with another juristic person, all rights an employee had against the previous employer, and the new employer shall accept all rights and duties relating to such employee.

In practical terms, this means that the buyer must treat the employees as well as they were treated when employed by the seller; this would include continuing at least the same compensation and benefits as the employees experienced under the seller.

3. *What are the seller's legal obligations on "transferring" its employees?*

Whilst there is no statutory obligation on the seller to consult with its employees prior to transfer, such obligations might exist in other terms of employment, such as a collective bargaining agreement. In any case, an employee may not be transferred without the employee's consent. If the employee objects to the transfer, then the employment relationship with the seller would continue, thus putting the seller in the position of having to terminate the employee. In such case, the seller would have to meet all legal entitlements with respect to such employee, e.g., payment of severance.

4. *What documentation is required to effect the transfer of employees from the seller to the buyer?*

It is advisable to document employee consent to transfer, in writing, and for both buyer and seller to maintain this in HR files. Aside from this, paperwork will need to be filed with the Social Security Office, and work permits for foreign staff will need to be updated with the Ministry of Labour.

5. *Are there any particular types of employees whose employment may not be transferred by the seller?*

Statute contains no such prohibitions.

6. *What steps can a seller take to reduce its obligations to an employee who "transfers" to the buyer?*

If an employee amicably agrees to transfer to the buyer, the seller would have no obligations to the employee, post

transfer, save for liabilities which accrued prior to the transfer. If an employee rejects the opportunity to transfer, then the seller would have to continue employing that employee, or terminate the employee and pay severance. Employees are typically aware of their rights to severance, and may refuse to transfer, so as to put the seller in a position to have to terminate them and pay severance. As such, in order to avoid the expense of severance, sellers could try to incentivise employees to agree to transfer. This could involve a one-time bonus, or negotiation with the buyer so as to offer improved terms of employment.

7. *Does the seller's employee have a right to object to a transfer to the buyer?*

Yes; an employee can refuse consent.

8. *What are the consequences if the seller gets it wrong?*

This would depend on the specifics of the seller's mistake. Generally, violations of the LPA can attract fines and/or imprisonment for the employer. Aside from this, an employee may claim for unfair termination; this is explained further in **Appendix 1**. In addition, if there is a collective bargaining agreement, or if there is a trade union or an employee committee, employer violations of the Labour Relations Act (discussed further in **Appendix 1**) can attract other fines and/or imprisonment.

Frequently asked questions by buyer

9. *For what information should a buyer ask from the seller in relation to the seller's employees?*

Please see checklist in **Appendix A**.

10. *Is the buyer required to recognise the continuity of service of the seller's employees and if so, for what purpose?*

Yes; employee tenure must be recognised by the new employer for all purposes with respect to the employment relationship.

11. *Are there any pitfalls specific to your jurisdiction of which the buyer will need to be aware?*

Buyers should bear in mind that they cannot reduce an employee's compensation or benefits without the employee's consent. Given that compensation and benefits are usually not identical between the buyer and seller, it is questionable whether particular differences in benefits are reductions or improvements. As such, from a practical standpoint, it is necessary to go through a consent exercise, in order to record each employee's consent to the compensation and benefit package they will experience as employees of the buyer. In addition, buyers should be aware of employer's obligations when terminating employees. If/when they later terminate employees, the severance would be calculated on the basis of each employee's tenure, which will include their total tenure, as worked with the buyer and as transferred to the buyer.

12. *Do the same or similar laws apply to outsourcings? If so, are there any key differences in the way the law operates from those that apply to the transfer of businesses?*

Additional requirements are applicable to outsourcing. Among these, when a business operator authorises a person to provide personnel to work, and such work is part of the

production process or the business under the responsibility of the operator, the operator is deemed the employer of those engaged to do such work, and this carries with it the full responsibilities of being an employer. In addition, the operator must arrange for employees hired for wages who work in the same manner as employees under direct employment contracts to, without discrimination, receive fair rights, benefits, and welfare. In more complex subcontracting structures, all subcontractors of every level, together with the primary contractor, can be held jointly liable with the subcontractor who is the contractual employer, for the payment of wages, overtime pay, holiday pay, holiday overtime pay, severance pay, special severance pay, accumulated funds, contributions, and additional payments to which employees are entitled, or which are made for employees, though the primary contractor and/or subcontractors (as applicable) have recourse against the subcontractor who is the contractual employer, in respect of such payments they must make.

THAILAND

Appendix 1 – Thailand

Statutory requirements regarding termination of employment

1. *Termination of a contract by giving notice*

In a situation of termination for cause, an employee would not be entitled to severance or advance notice, but can be simply be given notice of immediate termination. As detailed in Section 119 of the LPA, the circumstances constituting termination for cause are very narrow and specific. As such, most terminations constitute termination without cause. Pursuant to Section 17 of the LPA, the employer or the employee may terminate an open-ended employment contract without cause, in routine cases, by notifying the other party with time sufficient for at least one entire pay cycle to pass, unless a longer period of time was agreed in the terms of employment.

Note that different/additional provisions apply in the event of termination due to reorganisation in connection with the deployment of new technology or machinery. The information which follows is applicable to termination without cause in more common, routine situations.

2. *Termination by giving payment in lieu of notice*

Pursuant to Section 17 of the LPA, an employer may opt to terminate an employee with immediate effect, but must pay wages in lieu of advance notice, based on the wages the employee would have earned during the required notice period.

3. *Employee's entitlement upon termination*

- Unpaid wages and unused annual leave

The employer must pay all unpaid wages and make payment in respect of unused annual leave.

- Bonuses

An employee may be entitled to fixed bonuses as described in the applicable terms of employment, possibly on a *pro rata* basis, unless the terms of employment provide otherwise.

- Severance payments

Pursuant to Section 118 of the LPA, severance pay is calculated as follows:

Tenure	Amount
≥120 days, <1 year	30 days' wages at the last wage rate, or actual wages received for the last 30 days for an employee paid on a piece-rate basis
≥1 year, <3 years	90 days' wages at the last wage rate, or actual wages received for the last 90 days for an employee paid on a piece-rate basis
≥3 years, <6 years	180 days' wages at the last wage rate, or actual wages received for the last 180 days for an employee paid on a piece-rate basis
≥6 years, <10 years	240 days' wages at the last wage rate, or actual wages received for the last 240 days for an employee paid on a piece-rate basis
≥10 years	300 days' wages at the last wage rate, or actual wages received for the last 300 days for an employee paid on a piece-rate basis

In certain circumstances, an employee employed for a fixed term of up to two years, for seasonal work or, temporary work, or for a project that is outside the scope of the employer's regular business, would not be entitled to severance pay.

- Other compensation, such as tenure-based awards

Many employers offer benefits beyond the minimum requirements of the law. In this regard, employers are obligated to honour the terms of employment applicable to their employees, whether these exist in employment agreements, work rules, other policies, or the practices of the parties. For example, tenure based awards are not mandated by statute, but are quite commonly provided by Thai employers. Depending on the applicable terms, employees may have some right to such compensation/awards/benefits, when terminated.

4. *Organised Labour*

The Labour Relations Act B.E. 2518 (1975) (as amended) provides the framework for collective bargaining agreements, and recognition of trade unions and employee committees. Trade unions must register with the registrar of the Ministry of Labour, and may only operate after issuance of a license, accordingly. The law addresses procedures for labour negotiations, settlement of disputes, and restrictions on actions of employers and employees, including with respect to such matters as strikes and termination of employees who are members of unions or employee committees.

5. *Compensation for unfair dismissal*

Pursuant to the Labour Court Establishment and Procedure Act B.E. 2522 (1979) (as amended), a terminated employee is entitled to bring suit against his or her employer for damages arising from unfair termination. Such suits are brought before

the Labour Court. The Court is not limited by statute with respect to damages it may award, but is to make a decision based on the circumstances of each case. When the Court finds a termination unfair, it can order reinstatement of an employee, but it would more likely award monetary damages, based the terminated employee's length of service and last wage rate. Typically, the Court would be expected to award one to two months of wages for the first year of service, and an additional month of wages for each additional year of service.

Contributed by Tilleke & Gibbins

