

Termination of employees: Counting the cost

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In the face of the weak global economy, businesses in Thailand have suffered an additional burden caused by local factors such as catastrophic flooding and political unrest. These combined stresses have tested many businesses to the breaking point, and restructuring of operations has become commonplace for businesses seeking to survive the harsh economic climate.

Any restructuring inevitably raises the question of termination of employees. Employers therefore need to understand the principles for termination in accordance with Thai law, enabling them to estimate the likely cost to the business of such measures and to avoid costly complaints of unfair termination being lodged with the Labour Ministry or the Labour Court.

Severance: The Labour Protection Act requires an employer to pay severance to an employee for termination unless the employee has committed one of the following acts:

1. Conducts his or her duties dishonestly or intentionally commits a criminal offence against the employer.
2. Intentionally causes damage against the employer.
3. Performs an act of negligence that causes the employer to suffer severe losses.
4. Repeatedly violates the employer's work rules or regulations or orders that are legal and fair, where the employer has already given a written warning (except for serious violations of work rules for which the employer is not required to give warning). Note that the written warning shall be effective for a period of one year from the date of the commission of the violation by the employee.
5. Neglects his or her duties for a period of three consecutive workdays without reasonable cause regardless of whether there is an intervening holiday during such period.
6. Is imprisoned by a final judgement unless the offences arise out of negligent acts or are considered petty.

Among these, the fourth option allows the termination of an employee without payment of severance and without issuance of a warning letter in instances where there is a serious violation of an employer's work rules, which is a matter to be determined by the courts.

Examples of violations the Supreme Court has found to be "serious" in the past include gambling on the employer's premises in or out of working time and using the employer's property to work for the employee's personal business during working time. Conversely, tearing up or refusing to sign or acknowledge a warning letter issued by the employer has been found not to be a serious violation.

In most cases of termination due to restructuring, severance pay will be due, in an amount determined by statute, which varies from 30-300 days' pay, depending on length of service.

Pay in lieu of advance notice: The Labour Protection Act requires an employer who wishes to terminate an employee (where there is no fixed period of employment) to provide advance notice of at least one payment cycle before any termination is to take effect. If the employer fails to provide notice as required, the employer must pay remuneration in lieu of advance notice.

However, an employer is exempt from paying remuneration if the employee:

- disobeys or habitually neglects the lawful commands of the employer;
- is absent from service; or
- is guilty of gross misconduct or otherwise acts in a manner incompatible with the due and faithful discharge of his or her duties _ for example, by operating a business in competition with the employer.

Again, in cases of termination due to business restructuring, advance notice or payment in lieu thereof will therefore normally be due.

Compensation for unfair termination: An employee who has been terminated unfairly may claim compensation or seek an order for reinstatement from the court. There is no statutory definition for unfair termination, and the court will consider the grounds for termination of the employee on a case-by-case basis. But if an employer has justifiable grounds, the termination will generally be considered fair.

Examples of circumstances determined in the past by the court to be justifiable grounds for fair termination include where the employer has suffered loss and where the employer faces financial crisis. In many cases, the court will likely view termination due to restructuring as a justifiable ground, in which case no liability for unfair termination compensation should arise.

Accordingly, in most terminations arising from business restructuring, employers will not have to pay compensation for unfair termination but should budget for the costs of severance pay and pay in lieu of advance notice (unless the exceptions listed above apply).

Nonetheless, employees may still attempt to bring claims in the Labour Court seeking additional compensation, so employers should consider carefully whether they can substantiate their reasons for the termination, and ensure that the correct legal procedures are followed before taking any action.