

## Options for Employers in Thailand During the COVID-19 Outbreak

As Thailand, and the world, face the growing COVID-19 crisis, the impact has begun to spread beyond people's health and into the economy as a whole. While some businesses may be able to move to remote working practices to minimize economic distress, others may require a physical presence that becomes difficult or impossible to maintain, or may face substantial changes to their operations, resulting in hardship or emergency measures.

In this rapidly developing situation, employers may thus find themselves faced with unforeseeable events that require them to take drastic actions related to their workforce. In such instances, it is important that employers know their options. This article identifies some of the more common scenarios that are arising, and what employers in Thailand can do under Thai labor laws when faced with them.

### **1. An employee is quarantined by authorities for being in a risk group**

The employer does not need to pay wages to the employee during the quarantine period, under the principle of "no work no pay."

### **2. An employee falls ill with COVID-19 and needs to take sick leave**

The employer is required by law to pay wages to the employee, but not exceeding 30 days in a year.

### **3. Authorities issue an order requiring the employer's business to temporarily close down**

The employer is not required to pay wages during the closure period ordered by the authorities—again under the principle of "no work no pay."

### **4. The employer decides to temporarily cease operations**

If the COVID-19 outbreak critically impacts the employer's business, for example by causing a greatly reduced number of customers or a greatly decreased amount of purchase orders, and the employer needs to close down the business temporarily or stop production, the employer may apply for a temporary cessation of operations. An example of this would be where an employer has to reduce production by 50 percent and needs to ask employees to work for only three days a week, rather than the normal five. Another example would be where the employer separates employees into groups and assigns each group to work for a certain time and then take time off on a rotating basis.

Under section 75 of the Labor Protection Act (LPA), an employer is entitled to temporarily cease operations, during which time they must pay employees at least 75% of their regular working-day wages, subject to the following conditions:

- ▶ There is a necessity and a significant cause for the employer to take this step, such as the employer's business being unable to operate as usual.
- ▶ The necessity is not considered to be *force majeure* under Thai law. If an event is deemed to have arisen due to a *force majeure* event, the employer is entitled to forgo paying wages to employees—this is discussed in more detail below.
- ▶ The employer has to elect whether to seek a temporary cessation of operations on a whole or partial basis.
- ▶ The employer has to inform a labor inspection officer, and the employees, three business days in advance of the intended cessation of operations.
- ▶ The employer has to pay employees throughout the entire period of cessation.
- ▶ The cessation period depends on the situation on a case-by-case basis. Once the previously cited reason for cessation of operations has subsided, making the measure no longer necessary, the employer has to cancel the cessation measure.

The LPA does not indicate what qualifies as a “necessity” for employers to invoke the measure. Thai Supreme Court precedent, however, does offer some guidance, indicating that both (1) a reduction in customer purchase orders and (2) financial difficulties faced by the employer are viewed as situations of necessity. Furthermore, the situation has to be significant and must seriously impact the employer's business. It cannot be a result of the employer's own failure to conduct business efficiently.

## 5. The employer decides to lay off employees

Under Thai labor law, if the COVID-19 virus impacts the employer's business to the point that the business cannot operate, the employer may terminate or lay off employees, taking care to observe the following conditions:

- ▶ Employees must be informed of the planned layoffs at least one pay period in advance, in accordance with the LPA. Otherwise, the employer is required to pay remuneration in lieu of advance notice. If relevant employment contracts, collective bargaining agreements (CBA), or work rules state a longer period for informing the employee of layoffs, the employer must comply with the contract or CBA.
- ▶ Statutory severance depends on each employee's length of service, from 30 days' pay at the employee's most recent wage rate for those who have worked with the employer for at least 120 days consecutively, but less than one year; up to 400 days' pay for employees who have worked with the employer for at least 20 consecutive years.
- ▶ Employers must make necessary remuneration for other benefits under the employment contract, work rules, and laws, such as unused annual leave and so on.

In addition, if the employer has a CBA with a labor union or the employees regarding temporary cessation of operations or layoffs, the employer must abide by the procedures stated in the CBA. Failure to do so could result in the employees claiming violation of the CBA.

## 6. Force majeure prevents the employer from paying wages

At present, the court has not taken a clear position on whether the COVID-19 situation is or can result in a *force majeure* event, and it is likely to be addressed by the court on a case-by-case basis. Situations arising from events deemed as *force majeure*, resulting in the employer not being able to operate, enable the employer to withhold all wages from employees.

*Force majeure* is described under Thai law as referring to events that a person is not able to protect against, despite taking the appropriate care that should be reasonably expected from him or her in such a situation. Earthquakes and tsunamis are examples of *force majeure*—for example, the collapse of a factory due to an earthquake, resulting in the employer being unable to operate, would justify withholding of wages.

Interestingly, the Supreme Court has ruled that the following events do not qualify as *force majeure*:

- ▶ A seasonal wildfire where the party does not undertake any preventive action;
- ▶ A violent storm that usually occurs every season;
- ▶ Flooding of a factory's premises; and,
- ▶ A factory fire.

However, if the above incidents result in the shutdown of a factory, the employer would still be entitled to apply for temporary cessation of operations under LPA section 75.

While it remains unclear what situations, if any, will constitute *force majeure* during the COVID-19 crisis, this is sure to be a topic of dispute between employers and employees in the coming months.

### **Business Survival Strategies**

Although the measures described in this article, such as temporary cessation of business operations and layoffs, may not be the answer to all of an employer's problems in this current economic crisis, for some it may be a question of survival. Acting prudently to handle these challenges is of utmost importance, which in this case means being fully informed of each potential action before implementing one course or another.

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