

LAYOFFS: ANY FIRM'S FINAL CHOICE

In the current climate of the global economic crisis and with Thailand's economy in recession, many businesses are desperately searching for ways to survive.

In our *Bangkok Post* article published on March 13, entitled "The temporary cessation of operation", we described one such measure available to employers attempting to ride out the storm.

However, if this measure is not effective and the employer is still operating at a loss, a layoff of employees may be considered as a last resort. If the decision has been taken that it is necessary to lay off a number of employees, it is important that the correct procedures are adhered to, and that the appropriate severance pay and other benefits are paid to employees.

Under various Thai laws, if an employer terminates an employee without cause, the employer has an obligation to pay severance pay, remuneration in lieu of advance notice and compensation for unfair termination.

Severance Pay: An employer must pay the employee severance pay in accordance with section 118 of Labour Protection Act (LPA) ranging from 30 days to 300 days, depending on the employee's length of service. However, Section 119 provides that the employer is not required to pay severance pay if, inter alia, the employee: (1) Is dishonest in his duties or intentionally commits a criminal act against the employer. (2) Intentionally causes the employer to suffer loss.

For further details, please refer to the article published on March 13, 2009.

Remuneration: If an employer wishes to terminate an employee (where there is no fixed period of employment), they must give advance written notice thereof at or before any time of payment in order to take effect on the next payment date. If advance notice is not given, the employer must pay remuneration in lieu of advance notice, unless the employee (i) disobeys or habitually neglects the lawful commands of his employer, (ii) is absent from service, or (iii) is guilty of gross misconduct or otherwise acts in a manner incompatible with the due and faithful discharge of his duty.

Compensation: If an employer terminates an employee without sufficient grounds, the employer will be liable to pay compensation for the unfair termination. If the Labour Court determines that a termination is unfair, it may issue an order forcing the employer to reinstate the employee instead of paying compensation.

Accrued annual leave: If the employer terminates the employee without having



cause under section 119 of the LPA, the employer must pay the employee in respect of any accrued annual leave for previous years and annual leave for the year of termination on a pro-rata basis.

Layoff: If the employer lays off employees, advance notice of one payment cycle must be given, or payment in lieu of advance notice, together with severance pay and the accrued annual leave. However, provided the employer can prove that it has a justifiable reason for the termination, i.e. the employer is suffering loss and this is a necessary measure for survival, the termination will be a fair one and there will be no compensation due to the employees.

Therefore, if the employer would like to lay off employees, the employer should first consider the reasons for the need to lay off and ensure that there is evidence available to support it.

Factors to be considered include timing, the labour environment of the employer's business, the country's economy, the financial status of competitors' businesses, etc. In addition, once the decision to lay off employees has been taken, the employer must ensure that the process of selecting the employees who will be laid off is transparent and fair. If not, the court may still consider that the termination of a particular employee is unfair due to an unfair selection process, even though there may be an underlying justifiable reason.

There is no legal requirement to inform the labour officer before laying off employees. However, in practice, it may be worth doing so as a courtesy where there is likely to be a backlash by employees, in order that the labour officer is fully apprised of the matter and can deal with any complaints by employees.

This is advisable where there is a strong labour union. The employer should try to minimise the impact on the employees by issuing an announcement regarding pending layoffs in advance, to enable employees to prepare themselves for possible unemployment.

Written by Chusert Supasitthumrong, Litigator, and Sally Mouhim, Consultant, Dispute Resolution Department, Tilleke & Gibbins International Ltd. Please send comments or suggestions to Marilyn Tinnakul at marilyn.t@tillekeandgibbins.com