

COVID-19 AND THAILAND (PART 2) – KEY EMPLOYMENT LAW ISSUES TO CONSIDER

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This is the second issue of our coronavirus (COVID-19) articles in which we consider some of the key regulations that companies and businesses based in Thailand should consider during the spread of coronavirus.

For the reasons set out in this article, companies should carefully consider attempts to use the current situation and its immediate and anticipated economic impact to deal with pre-existing financial difficulties. This includes reducing headcount and employment terms and conditions to address pre-existing difficulties.

"The operation of the Labour Protection Act has not been suspended."

COVID-19 AND THAI LABOUR LAW

In adjusting their operations to the regulations and orders and to address the immediate and longer term impact of the restrictions, companies will need to make changes to their operations to ensure their survival. Dealing with employees will be a critical aspect of adapting to the economic impact.

Companies should take into consideration the following:

- Thai labour law will consider employees working from home as working and the rights of employees and duties of employers are not affected by an employee working remotely;
- Changes to company policies and procedures affecting employment terms and conditions must be notified and communicated in accordance with the requirements of the applicable labour laws;
- Any reduction in working hours or salary and other monetary entitlements will continue to constitute a change in working conditions requiring employee consent;
- Companies can partially or completely temporarily suspend their commercial operations, where they are unable to continue to operate as usual, provided the grounds for doing so do not constitute force majeure. This requires three working days' written notice to affected employees and the Labour Inspector. Employee consent is not required and employees must be paid 75% of their salaries for the duration of the suspension. If this is challenged by employees, the employer must be able to demonstrate how and why the company was unable to continue to operate as usual;

- On the other hand, where a company temporarily suspends its commercial operations due to a force majeure event, it is relieved of its obligation to pay its employees their salaries during this period on the basis of the 'no-work-no-pay' doctrine. Thai law has a specific definition of force majeure and whether COVID-19 and the related bans/restrictions would amount to a force majeure event remains to be determined on a case-by-case basis. The decided cases provide little insight into how the Thai law concept of force majeure would be interpreted in the context of employer obligations under COVID-19. Given the broader impact on employees and the economy, if employers are able to rely on force majeure, companies should carefully consider whether their current circumstances meet the requirements of force majeure as Labour Courts are likely to closely scrutinise such claims in proceedings brought by affected employees. Force majeure would also have an impact on the broader commercial operations of the company and its contractual relationships and obligations to and with customers, suppliers and service providers;
- Where employees are required to travel as part of their duties, companies will need to exercise some care in requiring employees to do so, particularly where this can raise the risk of exposure to the virus. Where the travel restrictions affect an employee's ability to meet their contractual obligations and discharge their duties, companies will need to consider how to address this in a responsive and flexible way. Where this results in termination, companies should expect a thorough investigation by the Labour Courts and the likelihood of unfavourable outcomes;

"The rights of employees and duties of employers are not affected by an employee working remotely."

- There is no statutory requirement to reimburse electricity, internet and other expenses incurred by employees working from home. Employers should check their employment terms to determine if there is a contractual obligation to meet such costs;
- Where employees are required to quarantine themselves for 14 days to comply with government or health authority orders, they are relieved of their duty to work and the employer is also excused from paying their salaries for this period on the basis of the 'no-work-no-pay' doctrine;

- This does not apply to employees who self-quarantine in the absence of an order that they do so. Affected employees, who self-quarantine, must apply for sick leave, otherwise they would be deemed to have abandoned their work. If an employee exhausts their sick leave when self-quarantined, employers will need to consider whether to require these employees to take unpaid sick leave or use their annual leave entitlements;

- Where a company is required to remain closed until 30 April 2020 and a new employee is due to commence employment prior to that date, companies may decide to defer their intended start date. For companies considering termination of the contract of such employees, it is important to assess the date from which employment commences as this may not always be the first working day. If the contract is cancelled once employment has commenced, companies may still face some risk of claims for unfair dismissal;
- For new employees who are currently on probation, as the operation of the Labour Protection Act has not been suspended, any extension of their probation beyond 120 days will trigger the obligation to pay severance if their employment is not confirmed at the end of their probation;
- Although a foreign employee with a work permit can travel to Thailand, if they are unable to obtain the necessary medical certificate before travelling to Thailand, they may not be able to commence employment in accordance with their contractual obligations and may be in breach of the pre-conditions to commence employment. Companies may need to adopt a pragmatic and flexible approach; and

- For foreign employees who are required to leave Thailand to obtain their new visas but cannot do so because of the travel restrictions, the position is unclear, particularly where this results in the employee breaching the Immigration Act by overstaying.

COVID-19 AND INSURANCE

- Companies should check their employee insurance policies to understand if and how these policies will apply to employees working from home. This would include an employee injured at home whilst working from home; and
- Companies should also ensure that they understand their exposure to claims by employees infected during company travel and company meetings and events and whether existing health and travel insurance policies will provide cover for such claims.

PDPA

Companies must fully comply with the Personal Data Privacy Act (the "PDPA") from 27 May 2019. In the absence of government orders or regulations to the contrary, compliance with the PDPA should not be affected by the regulations in response to COVID-19 and companies must continue to prepare for full compliance. Requests by government agencies and departments for information on and records of employees and third-party individuals who enter a company's premises will likely fall within an exemption to the PDPA provided the requests are in the public interest or pursuant to an official request. Companies should nevertheless ensure that all such requests are properly made and that only personal data necessary to comply with the official request are disclosed.

"Affected employees, who self-quarantine, must apply for sick leave, otherwise they would be deemed to have abandoned their work."

DIRECTORS AND MANAGEMENT: DUTIES AND RESPONSIBILITIES

Directors have a statutory duty to act in the best interests of the company and not cause harm to the company. Although levels of shareholder scrutiny in Thailand are lower than in other countries, directors and boards will need to be prepared to address poor financial performance resulting from the impact of COVID-19. This is likely to require some explanation of the steps they have taken to protect the company and its financial position.

This should include:

- Remaining up-to-date on all government announcements, orders and regulations;
- Ensuring that the company complies with all government announcements, orders and regulations and any changes are promptly implemented and communicated in accordance with applicable law;
- Taking all steps to minimise the impact on the company, including dealing with customers, creditors, debtors, landlords and employees; and
- Dealing proactively and objectively with employees whilst minimising the risk of exposure to claims of unfair dismissal and breaches of the labour laws.

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To see how these changes may affect business closures in Thailand, especially in Bangkok, click [here](#).

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