

Effective written warnings

Most employers, at one time or another, are faced with problem employees who act in violation of company policies. Most of these employers are also aware of the importance of documenting such behaviour and warning the employee.

The means of warning an employee varies depending on the wrongdoing and individual company policies, with some employers opting for verbal warnings or regular written warnings for relatively minor violations of company work rules, such as tardiness and absences.

While these policies may be prudent internal measures of documenting employee wrongdoing, they may not be enough to be taken seriously by the employee and, most importantly, may not legally support the later termination of employment without severance pay. This article addresses the requirements for written warnings under Thai law.

Thai law recognises that, except for the most serious of actions, an employer may not terminate the employment of a member of staff for violations of company work rules, policies, or its legal and fair orders without first providing a written warning. Otherwise, the employer has to provide severance pay and also risks charges of unfair termination.

In fact, Section 119(4) of the Labour Protection Act (LPA) provides that if an effective written warning has been issued to an employee and he or she refuses to correct the behaviour, then the employer may terminate the contract without providing statutory severance pay.

However, this provision does not apply to terminations due to unsatisfactory

performance. So, where an employee has been warned in writing about their job performance and he or she does not improve, the employer can terminate employment but must pay the employee statutory severance pay.

What constitutes an adequate written warning under Thai law? Interestingly, the LPA does not specifically address this matter. Rather, the definition and specific requirements are extracted from Supreme Court precedent and are followed by the Thai labour courts. With these requirements in mind, the following should be considered by an employer when drafting warning letters:

- ◆ A written warning should provide the facts relating to the employee's wrongdoing or misconduct.
- ◆ Wrongdoings must be described clearly.
- ◆ The written warning should refer to the specific provision in the employer's work rules or codes of conduct so that the employee is adequately informed of what provision applies to his or her case.
- ◆ The written warning must contain a sentence warning the employee not to repeat the same wrongdoing and that ignoring such warning and repeating the conduct may result in termination.
- ◆ The warning must be issued by the employer or an authorised representative.

It is important to note that there is no requirement that the warning notice should actually contain a caption or heading stating that it is a "warning notice". It is the content of the notice that is determinative, and the warning notice will be considered valid as long as it contains the information defined above.

The Supreme Court precedent offers

further explanation of the strict burden of written notification placed upon the employer. For example, it has ruled that even in cases where a terminated employee has offered a written confession of wrongdoing with promises not to repeat the wrongdoing, and has acknowledged having received verbal warnings from his employer prior to termination, there must be an actual written warning from the employer before terminating employment. So, while the facts point to actual notice being served on an employee, the courts have been quite strict in interpreting the written warning requirement.

Thai law prescribes a strict time requirement in the use of written warnings to justify later termination of contract. A written warning is effective for only one year from the date of the wrongdoing. So, if the employee receives a written warning for late attendance on Dec 31, 2005, he may be dismissed without severance pay for a second late attendance, only if it is before Dec 31, 2006.

We hope the foregoing provides some background and clarification of the importance and legal implications of written warning notices under Thai law. It is vital that before issuing any warning notices to employees, an employer takes time to prepare the notice, makes sure that its contents are adequate, and ensures it is issued by an authorised party.

Written by Sasirum B. Chunnakasikarn and Noppramart Prasitmonthon, litigators, Dispute Resolution Department, Tilleke & Gibbins International Ltd. Please send comments and suggestions to Marilyn Tinnakul at marilun@tillkeandgibbins.com