

Temporary cessation of operations

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Most employers facing a financial crisis will seek to apply measures to help their businesses, including taking steps to reduce the cost of production, negotiating with banks for extension of debt repayment periods and downsizing their operations.

In the case of downsizing, many employers mistakenly think that by laying off employees, they will save money. In actuality, the employer may end up expending more money to lay off employees than to retain them during the temporary crisis period. This is because under the Labour Protection Act (LPA), the employer is obliged to pay severance pay proportional to each employee's period of employment, and that amount can range from wages of 30 days to 300 days, not to mention payment of other remuneration.

Additionally, during a financial crisis, the employer may have great difficulty obtaining the large sum of money required to lay off employees in accordance with the LPA. In such situations, the layoffs will benefit neither the employer nor the employee. However, the LPA does provide an option that may help both parties: the temporary

cessation of operations.

Under Section 75 of the LPA, if an employer needs to temporarily cease operations wholly or partially for any reason other than *force majeure*, the employer is obliged to pay the affected employees 50% of their normal wages prior to the cessation of operations. Section 75 further stipulates that "the employer shall give notice to the employee and the labour inspection officer in advance prior to the cessation of operations." An employer is therefore entitled to apply Section 75 only if:

1. There is a necessity for the employer;
2. The necessity is not considered to be force majeure under Thai law;
3. The employer informs a labour inspection officer in advance;
4. The employer pays at least 50% of the wages that the employee received before the cessation of operations; and
5. The employer pays the requisite sums during the period of cessation.

In addition, the employer has to fix the period of time for the cessation of

operations. Because the LPA does not include a definition of what qualifies as a necessity for the employer, Supreme Court precedent must be used for guidance. For example, whether or not an employer facing a marketing problem resulting in a reduction of purchase orders was a situation that could be considered a necessity under Section 75, the Supreme Court ruled that the necessity has to be a significant one that would seriously affect the employer's business (Supreme Court Precedent Case No. 8193/2000). Consequently, if the reduction of purchase orders was simply the result of the employer's failure to conduct his business efficiently, the employer cannot apply Section 75.

It is also important to note that if an employer is required to cease operations due to force majeure, Section 75 does not apply and the employer is not required to pay any wages to any employee during the temporary cessation of operations. Force majeure is defined under Thai law as "any event the

happening or pernicious results of which could not be prevented even though a person against whom it happened or threatened to happen were to take such appropriate care as might be expected from him in his situation and in such condition." In evaluating whether an event is force majeure, it is also helpful to look at Supreme Court precedent. The court has ruled that the following events do not qualify as force majeure:

- ◆ A violent storm that usually occurs every season (Precedent Case No. 2140/1977).
- ◆ A seasonal wildfire where the party does not undertake any preventive action (No. 830/1976).
- ◆ An electric pillar falling on a pedestrian because of burning grass around such pillar (No. 179/1979).
- ◆ An electric shock sustained due to a tree falling on an electrical line (No. 529/1980).
- ◆ Flooding of a factory's premises (No. 118/1982).
- ◆ A factory fire (No. 2560/1986).

Note that in reviewing precedent, one must take into account that Thailand is a civil law country and therefore does not recognise Supreme Court rulings as binding although they are considered persuasive.

The above rulings were made prior to the enactment of the LPA and therefore at such time, not only did those employers, finding themselves in the circumstances described above, not have the option of avoiding paying wages altogether, they also did not have the option under Section 75 of paying 50% of the wages to affected employees. Naturally, today the latter option would be available.

Although the option under Section 75 for temporary cessation of operations may not be the answer to all employers' problems, it is nevertheless an alternative available for consideration.

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