

COVID-19 & Employment Issues in Thailand

Introduction

On 25 March 2020, the Prime Minister announced a state of emergency under the Emergency Decree, which gives authority to the Prime Minister to announce further implementing notifications and measures to combat the COVID-19 outbreak in Thailand. Such notifications and measures will affect entrepreneurs or employers directly and indirectly. In light of the COVID-19 situation, we set out below our legal comments concerning employment issues affecting employers and employees. Thailand's response to COVID-19 must be monitored on a daily basis; however, we have set out below the status as at 31 March 2020.

Can the employer temporarily cease its operations and stop paying wages to employees?

This issue must be considered separately in 2 scenarios: (1) the employer intends to temporarily cease its operations wholly or partly due to necessity; or (2) the employer is compelled to temporarily cease its operations wholly or partly due to the government's order(s).

(1) The employer intends to temporarily cease the operation wholly or partly due to necessity

Section 75 of the Labour Protection Act B.E. 2541 (as amended) ("**Labour Protection Act**") provides the criteria concerning the cessation of operations as follows:

"Where it is necessary for an employer to temporarily cease the business operation, wholly or partly, for whatever important reason affecting the business operation of the employer to the extent that the employer is unable to carry on the normal operation, which is not due to force majeure, an employer shall make a payment to an employee in the amount not less than seventy five percent of wages for a working day that the employee has received before the employer ceases the business operation for an entire period in which the employer does not require the employee to work at a payment place under Section 55 and within the prescribed time period for payment under Section 70(1).

An employer shall give advance written notice to the employee and the labour inspector for a period of not less than 3 working days prior to the date of business cessation under paragraph one."

This Section allows the employer to temporarily cease its operations and pay employees at least 75 percent of wages due to a necessity which is not a *force majeure* event. However, such necessity must be sufficiently serious such that it affects the operation of the employer's business to the extent that the business is unable to operate as usual.

If the employer exercises its right to cease operations under this Section of the Labour Protection Act, the employer shall give a notice to the employee and a labour inspector not less than 3 working days prior to the date on which the business operation is ceased. Nevertheless, the employer is still required to pay 75 percent of wages to the employees and the employer cannot claim such cessation of operation as the basis on which to temporarily deny payment to the employees.

In the current COVID-19 situation, some employers who are not compelled to temporarily close their establishment (which we will describe further in clause (2) below) but which are significantly affected by this situation, may exercise the right under Section 75 of the Labour Protection Act in order to reduce employees' wages.

However, we view that if purchase orders or work volumes do not decrease drastically and the employer can still continue its business operations while some changes may occur (for example, the employees may change to do the same work from home as the Government strongly encourages people to stay home) it should not be considered as an important necessity affecting the operation of the employer's business to the extent that the business cannot operate normally. Therefore, in this case, the employer cannot claim its rights under Section 75 of the Labor Protection Act.

As the nature of each business and condition of each employer vary, the level of necessity must be considered on a case by case basis.

(2) The employer is compelled to temporarily cease the operation wholly or partly due to the government's order.

Currently, the government has released a notification closing down some types of businesses temporarily in various provinces as a preventive measure to control the spread of COVID-19. The temporary cessation or closure is neither the employer's nor the employee's fault and may be considered as an unavoidable force majeure event. Furthermore, when considered with the principle of the employment contract - which is a reciprocal contract - since the employer has no work to assign, the employee could not work for the employer during the cessation period as well; therefore, the employer has no duty to pay wages (i.e. no work no pay).

However, in case the employer, whose business is ordered to close down by the government, still requests any employee to work on certain functions (e.g. accounting or office administration by working

from home), the employer is required to pay the wages normally paid and the case does not fall under Section 75 of the Labor Protection Act.

Can the employer order employees to use their annual leave?

In the case of annual leave, the employer may determine the date(s) on which employees are required to take annual leave as Section 30 of the Labor Protection Act provides that the employer can specify the annual leave dates for employees or such annual holiday is mutually agreed by both the employer and the employee.

In any event, this issue needs to be considered together with the employment contract, work rules and the existing guidelines of the employer concerning annual leave on a case by case basis. During the period of annual leave, according to Section 56 of the Labor Protection Act, the employer shall pay the employee equal to his/her working day's wages.

Can the employer order the employees to take leave without pay or reduce the employee's wages or other benefits?

The employer and the employee may mutually agree on leave without pay. Therefore, if the employer prefers that the employee takes leave without pay due to the impact of the COVID-19 pandemic, the employer must request the consent/agreement of the employee to do so, and if such leave is agreed, there should be written evidence to record such agreement.

Prior consent of the employee is also required where the employer plans to reduce the employee's wage and/or other benefits in order to manage company costs.

Failure to obtain the prior consent of the employee may lead to unfair treatment claims and legal sanction under the law, which include fine and/or imprisonment.

Can the employer terminate employment due to the situation caused by the COVID-19 pandemic?

Although the employer may be severely affected by the COVID-19 crisis, the termination of employment due to the impact of the COVID-19 pandemic does not fall within a ground specified under Section 119 of the Labor Protection Act which exempts the statutory severance pay as it is not the employee's fault.

However, even if the employer terminates employment and pays full severance to the employee as provided in Section 118 of the Labor Protection Act, an aggressive employee may still lodge a complaint

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against the employer for unfair termination under the Act on the Establishment of and Procedure for Labor Court 1979 (B.E. 2522).

Currently, this situation is untested as there is no specific court's decision concerning the termination of an employment due to the COVID-19 issue. Therefore, this issue should be considered on a case by case basis, i.e. if business profitability appears to be at a critical stage and the employer is likely to struggle to recover by any other methods, the termination of an employment with full severance pay may be considered as a lawful and fair termination. However, if the employer's business is still carried on in any way (e.g. requesting employees to work from home), it is likely that a termination with full severance pay would still be considered by the court as an unfair termination.

It is advisable that the employer should plan ahead concerning the strategy to survive this crisis. A well explained and reasonable step-by-step strategy would greatly help the employer on an unfair termination case.

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Contacts



Sui Lin Teoh
Partner

D (66) 2656 1991
F (66) 2656 0833
sui.lin.teoh@rajahtann.com



Piroon Saengpakdee
Partner

D (66) 2656 1991
F (66) 2656 0833
piroon.s@rajahtann.com



Krida Phoonwathu
Partner

D (66) 2656 1991
F (66) 2656 0833
krida.phoonwathu@rajahtann.com



Supawat Srirungruang
Partner

D (66) 2656 1991
F (66) 2656 0833
supawat.s@rajahtann.com



Saroj Jongsaritwang
Partner

D (66) 2656 1991
F (66) 2656 0833
saroj.jongsariwang@rajahtann.com



Ittichai Prasongprasit
Partner

D (66) 2656 1991
F (66) 2656 0833
ittichai.prasongprasit@rajahtann.com



Yingrak Treesaranuwattana
Senior Associate

D (66) 2656 1991
F (66) 2656 0833
yingrak.t@rajahtann.com



Pasiri Tayponsak
Senior Associate

D (66) 2656 1991
F (66) 2656 0833
pasiri.t@rajahtann.com

Our Regional Contacts

RAJAH & TANN | *Singapore*

Rajah & Tann Singapore LLP

T +65 6535 3600
sg.rajahtannasia.com

CHRISTOPHER & LEE ONG | *Malaysia*

Christopher & Lee Ong

T +60 3 2273 1919
F +60 3 2273 8310
www.christopherleeong.com

R&T SOK & HENG | *Cambodia*

R&T Sok & Heng Law Office

T +855 23 963 112 / 113
F +855 23 963 116
kh.rajahtannasia.com

RAJAH & TANN | *Myanmar*

Rajah & Tann Myanmar Company Limited

T +95 1 9345 343 / +95 1 9345 346
F +95 1 9345 348
mm.rajahtannasia.com

RAJAH & TANN 立杰上海

SHANGHAI REPRESENTATIVE OFFICE | *China*

**Rajah & Tann Singapore LLP
Shanghai Representative Office**

T +86 21 6120 8818
F +86 21 6120 8820
cn.rajahtannasia.com

GATMAYTAN YAP PATACSIL

GUTIERREZ & PROTACIO (C&G LAW) | *Philippines*

Gatmaytan Yap Patacsil Gutierrez & Protacio (C&G Law)

T +632 8894 0377 to 79 / +632 8894 4931 to 32
F +632 8552 1977 to 78
www.cagatlaw.com

ASSEGAF HAMZAH & PARTNERS | *Indonesia*

Assegaf Hamzah & Partners

Jakarta Office

T +62 21 2555 7800
F +62 21 2555 7899

Surabaya Office

T +62 31 5116 4550
F +62 31 5116 4560
www.ahp.co.id

RAJAH & TANN | *Thailand*

R&T Asia (Thailand) Limited

T +66 2 656 1991
F +66 2 656 0833
th.rajahtannasia.com

RAJAH & TANN LCT LAWYERS | *Vietnam*

Rajah & Tann LCT Lawyers

Ho Chi Minh City Office

T +84 28 3821 2382 / +84 28 3821 2673
F +84 28 3520 8206

RAJAH & TANN | *Lao PDR*

Rajah & Tann (Laos) Co., Ltd.

T +856 21 454 239
F +856 21 285 261
la.rajahtannasia.com

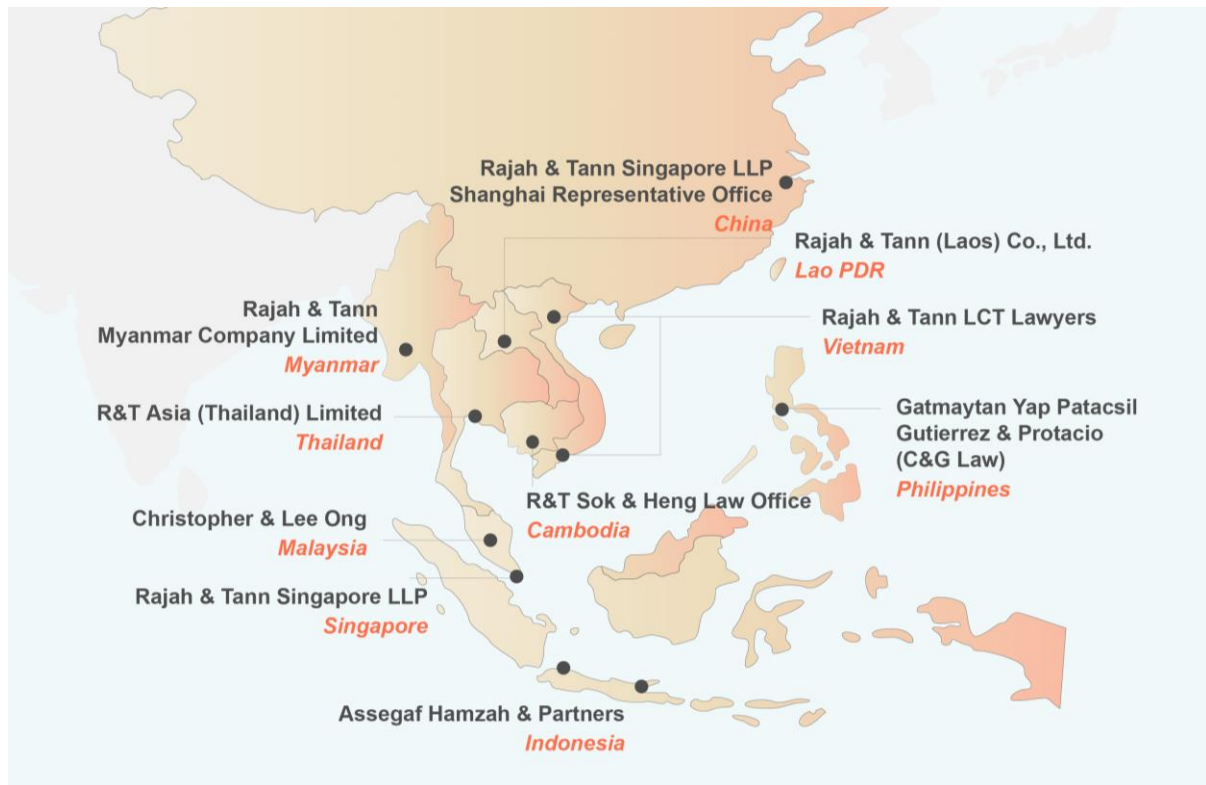
Hanoi Office

T +84 24 3267 6127
F +84 24 3267 6128
www.rajahtannlct.com

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