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**Thailand: Practical HR Management during  
COVID-19 Outbreak (As of April 17, 2020)**

**\*This article is based on the information as of April 17, 2020.**

## 1. Overview

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Thailand has now implemented three regulations issued by the Prime Minister under the Emergency Decree on Public Administration in Emergency Situations 2005 to cope with the COVID 19 outbreak in Thailand. Under Regulation (No. 1) effective from 26 March 2020, several measures were set out to prevent the COVID 19 outbreak in Thailand. It includes, for instance, a prohibition against entering risk areas, shutting-down certain places which are risk-prone to the transmission of disease, closing points of entry into Thailand, banning the assembly of persons, and other disease prevention measures, etc. Most importantly, Regulation (No. 1) allows the Bangkok Governor and provincial Governors to issue orders to temporarily shut down places other than those provided in Regulation (No.1) if they are considered at risk of spreading COVID 19 due to high numbers of people conducting activities together. Currently, Bangkok, including other provinces, has ordered department stores to shut down; restaurants are allowed to remain open only for takeaway. Other places which have been ordered to temporarily shut-down are for example boxing stadiums, fitness centres, pubs, schools and all types of academic institutes, spas, theatres, etc. What's more, Regulation (No. 2), which came into force on 3 April 2020, imposed a nationwide night curfew during the period from 22.00 to 04.00. Since then, all exemptions to the curfew under Regulation (No. 2) were repealed and replaced by Regulation (No. 3) which recently came into force on 10 April 2020. For example, the curfew may not be applicable to public officials, medical personnel or night-shift workers performing their duties, depending on the actual facts of the case. These restrictions affect many employees in Thailand: many people have been ordered to stop work due to the temporary shutdown of businesses as per the governors' orders; some were ordered to stop work due to being diagnosed with COVID 19 or because their workplaces have been closed down upon finding a person with COVID 19; there were also concerns that night shift workers would be affected by the curfew issued under Regulation (No. 2). What are the legal implications of these circumstances - what can and can't employers do and what are employees' entitlements under these circumstances.

## 2. Business Closure

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As a result of the aforesaid regulations and the governors' orders several businesses have been forced to shut down. Should employees still be entitled to wages in full or should the employer not be obliged to pay wages to employees at all since they are not working following the said shut-down of the business?

Section 75 of the Labour Protection Act BE 2541 (1998) (the "LPA") states in essence that if an employer finds it is necessary for important reasons, **which are not events of force majeure**, and which affect the employer's business operations to the extent that he/she can no longer operate his/her business normally, the employer must suspend his/her business either wholly or partly for a temporary period. In those circumstances, the employer is allowed to pay wages to employees - at a rate of **not less than 75%** of the employee's usual rate of wages for a usual working day which the employee would have received prior to the employer suspending operations - throughout the period the employer must stand-down the said employee - by the same method of payment and on the same pay day - as prior to the said temporary shutdown.

The context of this Section 75 of the LPA does not cover *force majeure*, and does not indicate whether or not an employer will have to pay wages to employees during a force majeure event. There are no court decisions affirming this point. According to the Civil and Commercial Code ("CCC"), *force majeure*

is defined as any event the pernicious results of which could not be prevented even though the person to whom the event occurred or threatened to occur took precautions that would be considered appropriate or expected in that situation and under those circumstances. Based on Section 8 of the CCC and Supreme Court decisions, it could be concluded that **if the result of an event is preventable, it will not be considered to be force majeure**. Discussions were held in Thailand as to whether or not COVID 19 or the Government's shutdown order could be construed as '*force majeure*'.

In order to ease employers and employees concerns regarding how Section 75 of the LPA will be implemented during the COVID 19 situation, the Department of Labour Protection and Welfare issued an announcement dated 18 March 2020 seeking cooperation from employers to postpone traditional holidays during the Songkran festival, i.e. 13-15 April 2020 until further notice and providing guidelines regarding the traditional holiday postponement and temporary shutdown of business (the "Announcement"). Even though the Announcement issued by the Department of Labour Protection and Welfare is not law and thus does not have a legal effect, since it was issued by responsible authorities, employers and employees are urged to comply with the Announcement unless and until there is a law or final court judgement specifying otherwise.

**For the business closures due to Government order**, in light of the guidance provided by the Department of Labour Protection, it has become clear that the employer does not need to pay employees wages at all if the employer has to shutdown its business in order to comply with the order. The Department of Labour Protection and Welfare treats such circumstances as '*force majeure*', where the shutdown is not the employers' or employees' fault. As a result, according to the guidelines provided in the Announcement, since it is impossible for the employer to allow an employee to work, and the employee is also unable to work for the employer due to the business shutdown following the governors orders; the employee is therefore not entitled to receive wages under the principle of reciprocity (no work, no pay). However, if the employer is still able to pay wages or provide financial support to employees, the Department of Labour Protection and Welfare encourages the employer to do so since this will enhance the relationship between employer and employee.

Nonetheless, if the employer still requires the employees to work – irrespective of whether it is because the shutdown orders generally apply to customers, or other people who receive the services, but do not strictly prohibit an employee from working or the employee can work from home ☒ '*no work no pay*' will not apply. Since the employee can still perform work for the employer, the employees are entitled to their full wages.

**If the business shutdown is for any reason other than the governors orders**, the Department of Labour Protection and Welfare views that this is not a case where the employer can apply '*no work no pay*' as well. Therefore, according to the guidelines provided in the Announcement, if the employer closes down their business at their own discretion, irrespective of whether it is because the employer is concerned about the COVID 19 situation and would like to take precautions or one of its employees is affected by COVID 19, or the building is closed for cleaning or 14 day's quarantine because someone was found to be diagnosed with COVID 19, the employer may need to consider applying for a temporary business closure under **Section 75 of the Labour Protection Act BE 2541 (1998)** instead. In order to apply Section 75 of the LPA, the employer should take into account the following points:

*First*, Section 75 of the LPA covers in essence the situation where it is necessary for an employer to temporarily cease his/her business operations, wholly or partly, **for whatever cause of significance**, but not a *force majeure*, affecting his/her business activities to the extent that the employer is unable to carry on his/her normal operation. It should be noted that the employer's reason for business closure must be significant, not a force majeure, and not arising from the employer's own fault.

*Second*, unlike the case of the Government shutdown orders, the employer must pay wages to an

employee in an amount not less than **75% of the wages** for a working day that the employee was receiving before the cessation of business operations for the entire period in which **the employer does not require the employee to work**.

*Third*, the employer is required to give advance notice to the employee and the Labour Inspector **at least three business days prior to such business closure**. The Department of Labour Protection has launched a website to facilitate the reporting process; [https://s97.labour.go.th/pub\\_m75/M75Form.php](https://s97.labour.go.th/pub_m75/M75Form.php). The employer may also apply for a temporary business suspension with the Labour Inspector in person or via letter.

It is noteworthy that, according to the aforementioned website, an employer who wishes to temporarily cease their business on the ground of ‘force majeure’ (which is not the case for Section 75 of the LPA) is also required to inform the Labour Inspector as well.

### **3. Preventive Measures: Quarantine, Self-Isolation or Work at Home**

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In Thailand, the Department of Disease Control issues guidelines/recommendations for both general individuals and business operators with respect to social distancing and self-isolation to help prevent the spread of COVID 19. For an operator, where an employee has tested positive for COVID 19, that employee must immediately stop working and be put in isolation for 14 days, even if his/her symptoms are mild. The employer should also contact local public health agencies to assist in the disease investigation and to identify employees who have been in close contact with the patient. ‘Close contact’ in the workplace is defined relatively broadly as coworkers who have met the COVID 19 patient while he/she had symptoms and is at risk of being exposed to respiratory droplets. Taking these guidelines into consideration, other employees who are in close contact with the employee who was diagnosed with COVID 19 must also be put in isolation for 14 days from the last time he/she met the employee who tested positive for COVID 19.

It should be noted that the employer cannot apply ‘no work no pay’ to this scenario since this is not the case of an a business shutdown due to the governor’s order according to the Announcement as stated above. Therefore, if the employer does not apply for Section 75 of the LPA (i.e. the employer’s business still operates), the employer may order those specific employees to not come to work, but they will be entitled to normal wages in full (according to Supreme Court decisions, the employer has a right to assign work or not assign work to any employee so long as the said employee is entitled to normal pay). Alternatively, to cope with this situation, the employer may set criteria or guidelines for employees to take the following leave (so that if they utilise all their leave with pay, the employer will not be obliged to pay them thereafter if they request leave):

- Allow the employees who are diagnosed with COVID 19 or who are in close contact with a COVID 19 patient to take sick leave with pay (according to section 32 of the LPA, the employer is obliged to pay wages to the employee during sick leave but not exceeding 30 working days per year).
- If the employee is diagnosed with COVID 19 and has used up his/her entitlements to sick leave with pay, or if there are other employees who are required to be put in isolation but they were not diagnosed with COVID 19 – the employer may allow the employees to use annual leave with pay – if the work rules or employment contract does not stipulate otherwise; the law allows the employer to designate any particular days for an employee to use annual leave. According to Section 30 of the LPA, the employee is entitled to at least 6 working days of annual leave per year. However, if the work rules or employment contract provide for more annual leave with pay; the

work rules/employment contract shall apply.

- If the employee's entitlement to sick leave with pay and/or annual leave with pay has been used up - the employer may consider granting business leave with pay (according to the LPA, the employee shall be entitled to at least 3 business leave days with pay; however, if the work rules or employment contract provides for more business leave with pay; the work rules/employment contract shall apply).
- If all the said leave has been used, the employer may allow the employee to take leave without pay, provided that the employee's consent must be obtained. If the employee does not agree to take leave without pay, but the employer does not want the employee to come to work, the employer may order the employee to stay home provided that the employee must still be entitled to normal pay.

#### **4. Work Hours and Wages Reduction**

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Should the employer need to adjust employees' working hours, this will be subject to Section 20 of the Labour Relation Act BE 2518 (1975) (the "LRA"). Working hours and wages as already agreed between the employer and the employee (irrespective of whether stipulated in the work rules, employment contracts, schedule on shift works, etc.), is considered to be 'an agreement relating to employment conditions', under the LRA. According to Section 20 of the LRA, the employer cannot change an agreement relating to conditions of employment which is already in force unless the change is **more favourable** to the employee. According to Supreme Court decisions, changing working days and working hours are not considered to be more favourable to the employees. Therefore, an employer is prohibited from arbitrarily changing the working days and working hours of the employees unless the employees consent has been obtained.

If working hours are reduced, so long as the employee's wages and other entitlements are not affected, such change is considered to be more favourable to the employee. Consequently, the employer can order that employees' working hours can be reduced without the need to obtain consent in advance. Nonetheless, if an employee's wages are going to be reduced proportionately to the reduced working hours, this will not be considered to be more favourable to the employee and the employee's consent will be required.

#### **5. Night shift vs. night curfew**

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As stated above, Regulation (No. 2) issued under the Emergency Decree on Public Administration in Emergency Situations 2005 came into force as from 3 April 2020, and imposed a nationwide night curfew during between the hours of 22.00 and 04.00. One of the questions among business operators is therefore, can they still have their workers perform night shifts during that time. Despite the night curfew imposed by Regulation (No. 2), exceptions had also been granted to cover, inter alia, regular night shifts. Subsequently, all exemptions to the curfew under the said Regulation (No. 2) were repealed and replaced by Regulation (No. 3) coming into force on 10 April 2020. Regulation (No. 3) provides more exemptions, with more details, to the night curfew imposed by Regulation (No.2). One of the exemptions provided by Regulation (No. 3) is '*occupations where work must be performed during special times, e.g. shift work, including travelling to and from such work, as normally designated by the government or private sectors, factories or security services*'. In order to qualify for the said exemption, a person is required to present his/her national identity card or other proof of identity and documents

to certify such necessity. Moreover, he/she must comply with disease prevention measures as designated and announced by the government. Therefore, by virtue of Regulation (No. 3), night shift employees are still allowed to work as normal. In that regard, it is recommended that a certified letter should be issued by an employer for employees to carry with them in case they are investigated by relevant officers during that time. The certified letter should include, at the least, detailed information about the employer, the required working hours of the employee and a description of the work of the employee. It should be noted that among other exceptions to the night curfew under Regulation (No. 3), the government has placed particular importance on medical practitioners, transportation of consumer goods, agricultural products, medicines, medical supplies and equipment, newspapers, fuel, parcel post, transportation of goods for import or export, transporting persons to isolated areas in accordance with the law relating to contagious diseases or transportation to or from airports, etc. Therefore, if an employee's work includes or involves any of the aforementioned, it should be specifically specified in the certified letter.

## **6. Unilateral termination of employment**

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An employer may unilaterally terminate employment contracts due to the COVID 19 outbreak, but should bare in mind that they are subject to certain liabilities under labour laws (in other words, a termination during COVID 19 is not entitled to any special exceptions). Potential liabilities in the event of termination include (i) severance pay under Section 118 the LPA; (ii) advance notice of termination or payment in lieu of such advance notice under section 17 the LPA; (iii) payment for unused annual holiday and/or unused accumulated annual holiday under Section 67 the LPA; (iv) rights and benefits arising from the employment agreement; and (iv) most importantly, the employee may file a lawsuit at court to claim additional compensation for unfair dismissal under Section 49 of The Act on the Establishment of and Procedure for Labour Court BE 2522 (1979) (even if the payments in (i)-(iv) have been made to the employees). Since there is no statutory definition of 'unfair dismissal', the court will determine the grounds of the termination on a case-by-case basis, taking into consideration all the facts and relevant evidence submitted by the concerned parties.

Generally, if the employee is terminated because he/she tested positive for COVID 19, it is likely that it would be an unfair dismissal because an employee who is sick shall be entitled to sick leave with pay for at least 30 working days per year, not termination of employment. If the reason is because of financial difficulties being experienced by the employer during the COVID 19 situation, the employer still needs to prove, inter alia, that it is truly necessary and there is no other choice than to terminate the employees. Moreover, such financial difficulties should not be simply a temporary impact from COVID 19; otherwise the court is likely to view the dismissal as unjustified and unnecessary.

## **7. Can an employee still initiate a lawsuit against the employer during the COVID 19 outbreak, or vice versa?**

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Interestingly, at present, the courts in Thailand, including the labour courts, are still operative, thus an employee or employer is able to attend court to file their complaints and other court documents, until further notice by the relevant court(s). Some courts allow the parties to submit documents via an e-filing system, and seek cooperation from relevant parties to avoid the journey to court.

## **8. Other Government Measures to Assist Employers**

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The Ministry of Finance has recently issued a Notification to postpone deadlines for tax payments and tax return filings, as follows:

- For personal income tax for the tax year 2019 (normally filed by 31 March 2020) – extended to 31 August 2020
- For company or juristic partnerships not listed on a stock exchange – the deadline for tax payments and filing Income Tax Returns for Companies or Juristic Partnerships for the year 2019, i.e. PND 50 and PND 55, (normally filed by April-August 2020) is extended to 31 August 2020 and for filing Income Tax Returns for Companies or Juristic Partnerships for the first half of 2020, i.e. PND 51 (normally filed by April-September 2020) is extended until 30 September 2020.
- In particular, for businesses which are closed by government order, tax payments and deadlines for filing tax returns have been postponed, as follows:
  - o Withholding Tax (for March 2020 which shall be normally filed by April 2020, and for April 2020 which shall be normally filed by May 2020) – extended to 15 May 2020;
  - o Value Added Tax – for domestic sales and services (Por.Por.30) (for March 2020 which shall be normally filed by April 2020 and for April 2020 which shall be normally filed by May 2020) extended to 23 May 2020, and for payments for services to foreign suppliers (Por.Por.36.) (for March 2020 which shall be normally filed by April 2020 and for April 2020 which shall be normally filed by May 2020) extended to 15 May 2020;
  - o Specific Business Tax (for March 2020 which shall be normally filed by April 2020 and for April 2020 which shall be normally filed by May 2020) - extended to 23 May 2020 except for commercial sales of property; and
  - o Stamp duty (normally filed by 1 April – 15 May 2020) - extended to 15 May 2020.

