



TMI EYES No. 8: Kickbacks, Undue Remuneration

Recently, TMI has been asked on multiple occasions whether or not it is illegal for employees of the companies to receive kickbacks from suppliers or third parties to facilitate a transaction. In this article, TMI will discuss the nature of kickbacks and related provisions of laws.

Kickbacks, an Undue Remuneration?

Readers may be familiar with the term “kickback”. Generally, the term "kickback" refers to a case where an individual who is in a position of power or influence receives a payment or benefits from someone (usually suppliers) as a result of his/her facilitation of a transaction or appointment. For example, a person responsible for purchasing goods/services, or having the authority to choose a winning bidder, who receives a remuneration or “kickback” in return for such facilitation of the transaction. And, kickbacks can be in the form of money, gifts, entertainment, meal treats, privileges, etc.

Kickbacks in Private Sectors

While kickbacks to government officials are expressly treated as bribery, a criminal offense under the Penal Code, kickbacks in the private sector under the Thai legal system are not necessarily a criminal offense. This is unlike legal systems in some countries where a kickback in the private sector is considered a criminal offense, e.g., Australia, India, Italy, and the UK. This is unless where such kickback involves hiding/misrepresenting, such kickbacks can be treated as fraud which is a criminal offense under the Thai Penal Code.

In any case, although a kickback in the private sector is generally not treated as a criminal offense, such directors or employees of companies can be exposed to fine or other civil transactions and liabilities as follows:

First, Section 41 of Determining Offence Relating to Registered Partnership, Limited Partnership, Limited Company, Association and Foundation Act B.E. 2499 (the “Act”) provides that a person, who is responsible for the operation of a company, undertakes or omits to undertake any actions to seek for undue benefits for him/herself that cause damages to the company is subject to a fine of not exceeding THB 50,000.

Secondly, an employee of a private company may be deemed to have breached his/her employment agreement provided that his/her employment agreement expressly prohibits any actions that may be in conflict of interest with the employer. Or even in the absence of such express employment conditions, the employees may be accused of a breach of a common duty of employees, i.e., duty of loyalty.

It is also important to note that the employer can terminate employment agreements with an employee who receives kickbacks from suppliers, which creates damage to the company under Section 119 of the Labor Protection Act B.E. 2541 (1998). This is on the ground that the employee performs any dishonest actions against the employer, or intentionally acts to damage the employer. And, in such cases, the employer can terminate the employee immediately without having to serve an advance notice or make a severance pay to the employee.

TMI's note to employer

To avoid any unclear situation and prevent any undesirable acts of employees, all employers are encouraged to create and announce clear policies regarding good corporate governance and conflict of interest. The company must make it clear what can or cannot be done by the employees, particularly those who are in charge of purchasing. The employer should also insert standard terms and conditions in the employment agreement as regards conflict of interest duty of loyalty or fiduciary duty. Further, the company may also have a whistle-blowing system that allows employees to report any suspicious actions to the management of a designated committee/person of the company.

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