MARCH 2026

TMI EYES

TMI Associates (Thailand) Co., Ltd.

TMI Eyes No. 36: Underperforming Employees and Termination

In this article, TMI addresses a number of common questions, particularly those arising at fiscal year-end regarding whether companies can terminate underperforming employees and, if so, what the implications may be. The article highlights key principles under labor protection law, as well as important considerations and precautions for employers.

Can Employer Terminate Underperforming Employees?

Employment is fundamentally an agreement between an employer and an employee, and, in principle, either party may terminate such agreement. However, it is important to note that labor protection laws impose certain obligations and consequences upon termination. These laws are designed to protect employees from arbitrary or unfair dismissal, ensure financial security upon termination, and promote fair treatment in employment practices.

Severance Pay

Employers may terminate underperforming employees, but not without implications. The Thai Labor Protection Act B.E. 2541 (1998) (LPA) requires employers to pay statutory severance based on the employee's length of service. Termination without severance is permitted only in limited circumstances as set out in Section 119 of the LPA, including:

- Dishonest performance of duties or intentional criminal acts against the employer
- Willful misconduct causing damage to the employer
- Gross negligence causing serious damage to the employer
- Violation of lawful work rules, regulations, or orders, following a written warning
- Unjustified absence for three consecutive working days
- Final court judgment resulting in imprisonment

And readers should note that underperformance is not a ground that allows an employer to terminate employment without paying statutory severance.

Unfair Termination and Compensation

Employers should be mindful that a termination on the grounds of underperformance may raise the issue of whether it is considered unfair, and may expose the employer to additional liability in the form of unfair termination compensation.

Section 49 of the Labor Court Establishment and Labor Court Procedure Act B.E. 2522 (1979) grants the Labor Court broad discretion to determine whether a termination is unfair. If so, the Court may order appropriate remedies, including reinstatement or compensation in lieu thereof, assessed on a case-by-case basis.

In practice, the Court more commonly awards compensation (in addition to statutory severance), taking into account factors such as the employee's length of service, position, salary, and the reasons for termination.

When A Termination Is Considered "Unfair", Underperforming?

The Thai labor laws do not prescribe specific criteria for determining whether a termination is fair or unfair. In practice, the Court will consider the overall circumstances and whether there is sufficient justification for the termination.

In Supreme Court Decision No. 6840/2544, the Court held that termination was justified where the employee was unable to cooperate with subordinates, performed substandard quality control inspections, and failed to improve despite warnings, resulting in customer complaints and damage to the employer.

Accordingly, no unfair termination compensation was awarded. In any case, employers remain obligated to pay statutory severance, as underperformance is not a ground for termination without severance.

TMI's Notes

Underperforming employees may be terminated; however, the employer must pay statutory severance (and payment in lieu of notice, if applicable) and should be aware of the risk that such termination may be considered unfair and result in additional compensation beyond statutory entitlements, as well as potential reputational impact.

Whether a termination is considered unfair depends on the reasons for termination and the overall fairness of the process. Employers are therefore advised to establish clear, objective, and consistently applied performance evaluation standards, conduct periodic assessments, communicate results in writing, and provide employees with a genuine opportunity to improve.

Ultimately, each case will be assessed based on its specific facts and circumstances. This article is for general informational purposes only and does not constitute legal advice, nor should it be relied upon as a basis for making termination decisions.

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