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LEADING THE WAY

Know the legal consequences of firing an employee

Is there a risk-free way to fire an employee? It's a question we're often asked. Our response is: no, it's impossible to terminate or fire an employee in a totally risk-free way. But there are ways to protect yourself from legal exposure.

There's always a chance that a former employee will go to court. At that point, the Labour Court will decide if you have legally fired the employee, or how much you'll need to pay if the termination is ruled unlawful.

Is voluntary resignation 100% safe for employers? No. We often handle labour disputes. For example, an employee tendered his resignation letter to Human Resources after being told about his poor performance. Then, the employee took the letter back while the HR manager was away from her desk. When the HR manager returned to find the letter missing, she called the employee. He told her that he no longer wanted to resign without severance pay and other compensation. As a result of his late demands, both parties ended up in court.

In another case, an employee didn't fulfil his job duties. He submitted a resignation letter to an HR employee. In court, he asserted that he was intimidated by the HR employee and security guards to write and sign the letter. He stated that he didn't want to resign and asked for a large sum of compensation.

Those are voluntary resignation cases that were settled in the Labour Court. Luckily for the employers, there was supporting evidence in each case to establish that the resignation was at the employee's will.

What's the main risk of firing an employee? An ex-employee might claim for unfair dismissal due to discrimination, false reasons, lack of investigation, etc. In other words, those cases have huge potential to be settled at the court level by way of either in-court negotiations without the need of proof of guilt, or by court proceedings which require the taking of evidence.

If you've read up to this point, you might be planning to terminate an employee soon. You should proceed with due care and precaution, backed by solid reasons and evidence. Most importantly, make sure you've promptly given the ex-employee all the advance notice and compensation as required by law to minimise legal exposure. Immediate firing without compensation is something that should be avoided entirely unless it is a serious case.

Consider whether the Labour Court would view that you had solid or sufficient grounds for termination. Companies commonly fire employees for reasons such as company restructuring, an economic downturn and poor performance. But sometimes, no explanation is provided or the reasons provided are not the actual grounds for termination.

To protect yourself from being sued, you should include in the termination letter as many realistic and relevant reasons as possible with supporting evidence as the court will accept only those stated therein into consideration and nothing else. If, in the court's view, the reasons aren't solid enough, indicating the grounds for discrimination or termination are not valid, your chance of winning the trial would be remote.

The fired employee typically asks for damages equivalent to what he would earn if he had continued to work with the employer until he reached retirement age, which could be several million baht in some cases.

In fact, damages are determined based on the number of years of employment with the employer. Nonetheless, damages will be awarded only if the court believes that the termination is unfair to the employee, while the amount is at the Labour Court's sole authority and discretion.

What payments are required by laws? The payments required are typically outstanding wages, payment in lieu of advance notice, severance pay, payment for unused annual leave, special severance pay (in some cases), and other benefits as agreed in the employment agreement.

If the severance pay is intentionally delayed, there will be an interest penalty at the rate of 15% per year plus a 15% surcharge applied every seven days until all payments are fully made.

The basis for calculating required compensation is base wages for which a court interpretation may be needed. Wages as defined by the law, in a nutshell, are the money which both parties agreed as remuneration for the performance of the job under the employment agreement.

Welfare and benefits paid to employees every month as a fixed amount along with wages, but not in return for doing the job, are not considered wages.

It takes time to prepare to fire someone legally. Some steps to take in advance are: reviewing the benefits and conditions in the employment agreement; calculating the amount payable; seeing whether the employee is eligible for a special tax calculation; and evaluating your reasons and investigating them with the employee and any other relevant people.

As well, you will need to establish grounds to counter claims in case of legal action taken against the employer, or take legal action against the employee if he or she is believed to be guilty and causing damage to the employer.

HR staff will need to prepare paperwork to give to the employee on the dismissal date, e.g. the withholding tax certificate, employment certificate, and applications for reporting the termination to the proper authority and provident fund manager.

You'll need attentive HR managers who can prepare all documents for firing the employee and any potential court proceedings. And if you're unsure about any details, it's better to find help than lose money because of firing someone.

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