

Date: March 25, 2008

MEMORANDUM

Re: New Labour Protection Act

This memorandum is made in order to clarify the difference between provisions in the Labour Protection Act B.E. 2541 ("LPA 1998") and the new Labour Protection Law ("New LPA") has been promulgated in the Royal Gazette on 27 February 2008 and it will be effective on 28 May 2008. Below are several differences that shall be taken into consideration.

1) Definition of Employer

In accordance with the New LPA, a provision stated in Section 5 (3) for definition of "Employer" is deleted and "Employer" is defined only as follows:

"Employer means the person who agrees to accept an employee for employment by paying wages, and shall also include:

- (1) the person designated by the employer to act on his behalf;*
- (2) in the case where the employer is a juristic person, the term also includes the person authorized to act on behalf of such juristic person, and the person designated to act on behalf of such authorized person of said juristic person"*

Comment: Employment by a lump sum payment is removed.

2) Security Deposit

Section 10 of LPA 1998 the employer is prohibited from demanding or receiving from the employees a security deposit for the performance of work or security deposit for damage in the performance of work, whether it is money, other property or personal guarantee. However, the employer is allowed to demand or receive "guarantee money" from employees for performance of work or for damage in the performance of work if the nature or conditions of the work require that the employee be responsible for money or property belonging to the employer which may cause the employer to suffer losses.

"Guarantee Money" as stated in Section 10 of LPA 1998 is defined by Clause 3 of the Notification of the Ministry of Labour and Social Welfare re Rules and Procedures with respect to Request for and Acceptance of Guarantee Money for Work or Guarantee Money for Damages from Employees dated 19 August 1998 (the "Notification") as *"money that the employer requests or accepts from the employee as a guarantee against working performance of the employee or against damages that the employee might cause"*

Comment: Pursuant to the New LPA, the concept of Guarantee Money is changed to "Security Deposit or Guarantee by Person". This new definition is broader than the definition of Guarantee Money in that the Security Deposit is not limited only to money but any other property or asset can also be considered. In addition the employer is not allowed to ask guarantee by person from the employee.

3) Preferential Rights

Section 11 of LPA 1998 specifically mentioned a number of debts arising from employer's non-payment, such as, wages, overtime pay, severance pay, etc., given that such debts shall have preferential right over all assets of the employer who is a debtor, in the same rank as the preferential rights of taxes and duties under the Civil and Commercial Code.

Comment: The revised Section 11 is more comprehensive as it does not specify the type of debt. All debts owing by the employer shall be repaid according to the New LPA and shall have the preferential rights. Additionally, money payable to "Employee Welfare Fund" under Section 135 is added therein.

4) Employment by a Lump Sum Payment

The following provisions are added into the New LPA as the new Section 11/1.

"In the case where the business operator has assigned any person to procure employee to work, which is not a business operation for the procurement of employment, and such work is a part or the whole of the production process or the business within the business operator's responsibility, regardless of whether such person is responsible for supervising the work and payment of wages to the employee or not, the business operator shall also be deemed an employer of such employee.

The business operator shall allow the employee, whose employment being engaged by a lump sum payment but works in the same manner as the employee being employed under the employment agreement, to enjoy fair rights benefits and welfare without discrimination"

Comment: In this case, if the employees being engaged by lump sum payment work in the same manner as the employees under the normal employment agreement, given that such work is considered as a part or the whole of the employer's production process or business operation, the former shall be deemed the employees of the employer and entitled to enjoy fair rights benefits and welfare without discrimination.

5) Unfair Contract Term

The following provisions are added into New LPA as the new Section 14/1.

"If the employment agreement, working regulation, rule or order of the employer result in the employer being in an excessively advantageous position, the Court shall have the authority to order such employment agreement, working regulation, rule or order of the employer to be enforceable only to the extent it is fair and appropriate"

Comment: For example, if there is a case brought to the Court and it is found by the Court that unfair terms and conditions are stipulated in the employment agreement, the Court may exercise its authority under this Section 14/1 to order that such terms and conditions shall be enforceable only as it is fair and appropriate to such case.

6) Sexual Harassment

Provision of Section 16 of the LPA is revised as follows:

"It is prohibited for the employer or a person who is the chief of staff, supervisor, or inspector to commit sexual harassment against employees"

Comment: Under Section 16 of LPA 1998, only female and child employees were protected from sexual harassment but Section 16 of New LPA also provides the same protection to male employees.

7) Termination of Employment

Provision of Section 17 of the LPA is revised as follows:

"The employment agreement shall expire at the end of the agreed period without any requirement for advance notice.

In case that no term is provided for in the employment agreement, the employer or the employee may terminate the employment agreement by giving advance notice thereof at or before any time of payment in order for a termination to become effective as of the following time of payment. However, not more than three months notice need to be given. In addition, a probationary employment agreement shall be deemed as an indefinite period employment agreement.

In terminating the employment agreement under paragraph two, the employer may pay the wages in an amount which must be paid up until the time of termination of the agreement as specified in the notice and dismiss the employee immediately.

The advance notice under this Section shall not apply to the termination of employment under Section 119 of this Act and Section 583 of the Civil and Commercial Code”

Comment: 7.1 Paragraph 3 of Section 17 has been removed

“In the case where the employer gives a notice to terminate the employment agreement, if the employer does not specify the reason therefor in the notice of termination of employment, the employer cannot thereafter raise the causes under Section 119”

7.2 Under the revised Section 17, the probationary employment agreement is also considered as the employment agreement with the indefinite period. Consequently, even though the probationary period is definitely prescribed, i.e. 3 or 6 months, the advance notice is also required and the delivery thereof shall be made at or before any time of payment in order for the termination of the probationary employment to be effective on the following time of payment.

8) **Notification Method**

Below is the revised Section 18.

“In the case where this Act requires the employer to deliver any document to or to notify the Director-General or any person designated by the Director-General or the labour inspection official of any act, the employer shall deliver or notify the same in person, by post, telephone, facsimile, via electronic communication or any other kinds of information technology, according to rules and procedures prescribed by the Director-General”

Comment: 8.1 other forms of delivery of documents and employer notification other than post and facsimile are allowed.

8.2 The ministerial regulation regarding rules and procedures of the delivery of documents and employer notifications is going to be promulgated.

9) **Normal Working Hours**

Below is the revised Section 23 in which paragraph two has been added.

“The employer shall announce the normal working hours for the information of the employees, by specifying the time of commencement and the ending time of work for each work day of the employee, which shall not exceed the working hours for each type of work as prescribed in the ministerial regulations, provided that the working hours on one day shall not exceed eight hours. in the case where the working hours of any day are less than eight hours, the employer and the employee may agree to bring such remaining working hours combining with the working hours of other normal working day, however the total working hours in one day

shall not exceed nine hours, and the total working hours in one week shall not exceed forty-eight hours, except for the work which may be harmful to health or safety of the employees as prescribed in ministerial regulations for which the normal working hours in one day shall not exceed seven hours, but the total working hours in one week shall not exceed forty-two hours.

In case that the employer and the employee agree to combine such remaining working hours with the working hours of other normal working day according to the paragraph one, but its total working hours in one day exceed eight hours, the employer shall pay a remuneration at the rate of not less than one and a half times the rate of hourly wage on the working day according to a number of exceeding hours for daily and hourly employees, or not less than one and a half times the rate for each work unit performed on the working day according to a number of exceeding hours for employees who receive wages calculated on a work unit performed basis.

In case the employer cannot specify the time of commencement and ending time of work on each work day due to the nature or condition of the work, the employer and the employees shall agree to fix the working hours on each day not to exceed eight hours, and the total working hours in one week not to exceed forty-eight hours”

- Comment:
- 9.1 The total working hours of any day which are less than eight hours are allowed to be combined with the working hours of other normal working day, on condition that the total working hours in one day shall not exceed 9 hours.
- 9.2 If the total combined working hours exceed 8 hours, the exceeding hour shall be subject to remuneration at the rate of not less than 1½ times the rate of hourly wage on the working day according to a number of exceeding hours.

10) **Restricted Work for Female Employees**

The revised Section 38 is as follows:

“The employer shall not allow a female employee to perform any of the following work:

- (1) mining or construction which must be performed underground, underwater, in a cave, in a tunnel or passage in the mountain, except where the conditions of work are not hazardous to the employee’s health or body;*
- (2) working on scaffolding which is 10 meters or more above the ground;*
- (3) producing or transporting explosives or inflammable materials, except for the work which its conditions of work are not hazardous to health or body of the employee;*
- (4) other work as to be prescribed by the ministerial regulations”*

Comment: The work which its conditions of work are not hazardous to health or body of the employee is allowed to be performed by female employees.

11) **Restricted Work for Pregnant Employees**

11.1 The revised Section 39 is as follows:

“The employer shall not allow a female employee who is pregnant to work with any of the following:

- (1) work concerning vibrating machinery or engines;*

- (2) *the driving, moving, or going on vehicles;*
- (3) *the lifting, carrying or bearing on the shoulders or head, or pulling or pushing of loads that weigh more than fifteen kilograms;*
- (4) *working on vessels;*
- (5) *other work as to be prescribed by the ministerial regulations”*

Comment: Under LPA 1998, pregnant employees are protected from the above-mentioned works only between 10.00 p.m. to 6.00 a.m. However, the time period is cancelled in order for pregnant employees to be fully protected.

11.2 Section 39/1 is added.

“The employer shall not allow a female employee who is pregnant to work between 10.00 p.m. to 6.00 a.m., to work overtime or to work on holidays.

In the event a pregnant employee works in a position of management, or perform in an academic work, administrative work, or any work relating to finance and accounting, the employer may allow such pregnant employee to work overtime in the working day if it does not affect to health of the pregnant employee with prior consent of such employee each time”

Comment: Working overtime and on holidays is not allowed for pregnant employees. However, for certain works which do not affect the pregnant employee's health, the employer shall obtain the prior consent of the pregnant employee if overtime work is required.

12) Restricted Work for Child Employees

12.1 The revised Section 50 is as follows:

“No employer shall have an employee aged under eighteen years perform work in the following establishments:

- (1) *slaughterhouses;*
- (2) *gambling houses;*
- (3) *servicing houses according to the law of servicing houses;*
- (4) *other establishments as to be prescribed by the ministerial regulations”*

Comment: Provisions of (3) and (4) under Section 50 of LPA 1998 are combined and become the new Section 50 (3) of New LPA with broader interpretation.

12.2 Section 51 is revised as follows:

“It is prohibited for an employer to demand or receive for any reason a security deposit, from a child employee.

It is prohibited for an employer to pay wages of a child employee to another person.

In case the employer pays money or any benefit to a child employee, parents or guardian of the child employee, or other person before or at the commencement of employment or before payment of wages to the child employee is due for each period, it shall not be regarded as a payment or receipt of wages for the child employee. The employer shall not deduct the aforementioned money or benefit from the wages payable to the child employee on the due date.”

12.2.1 There is an alternation between Paragraph 1 and 2.

12.2.2 “Guarantee Money” is replaced by “Security Deposit”.

13) Disallowance of Overtime Payment

Section 65 is revised by adding a new (2) as follows:

“Peddling or persuading of goods which the employer pays a commission from the sale of goods to the employee”

14) Payment after Termination of Employment

Below is the revised Section 67.

“In case the employer terminates employment which is not caused by any of the cases under Section 119, the employer shall pay to the employee wages for the annual vacation for the year in which employment was terminated, in proportion to the number of days of annual vacation to which the employee is entitled under Section 30

In case the employee terminates the employment himself or the employer terminates the employment regardless of whether it is the case under Section 119 or not, the employer shall pay to the employee wages for the accumulated annual vacation which the employee is entitled under Section 30”

Comment: The accumulated annual vacation is allowed to be paid to the employee whose employment is terminated in all and whatsoever cases.

15) Temporally Cessation of the Employer’s Business Operation

Section 75 is revised as follows:

“In the case that it is necessary for the employer, for any of significant circumstances other than force majeure which affects the employer’s business operation and causes the employer being incapable to operate its normal business, to temporarily halt its operations wholly or partially, the employer shall pay the employee at least 75 per cent of the normal working day’s wages that the employee received before the cessation of operations for the entire duration of the period during which the employer does not allow the employee to work.

The employer shall give written notice to the employee and the labour inspection official in advance prior to the cessation of operations under paragraph one for not less than 3 working days”

Comment: 15.1 Wages paid to the employee during a period of the cessation of the employer’s business operation is increased from 50% to 75%.

15.2 Before the cessation of the employer’s business operation, the notification made in writing to the employee and the labour

inspection official is required, provided that it shall be delivered not less than 3 working days in advance.

16) Authorities of the Labour Welfare Committee

16.1 The following provisions are added into Section 93 as the new (5), provided that the labour welfare committee shall have the power and duty to:

“order the employer to pay special severance pay or special severance pay in lieu of advance notice under Section 120”

16.2 A number of authorities under the following Sections 85 and 86 are added into Section 94 in order for the Labour Welfare Committee to have more authority:

Section 85 *“In carrying out its duties, the Wages Committee or Sub-committee or the person assigned by the Wages Committee or Sub-committee shall have the power as follows:*

(1) *To summon any person to give a statement or send any document or items as supporting evidence for its consideration.*

(2) *To request any organization or person to co-ordinate with an inspection of any business that may impact the economy.*

(3) *To enter into a place of business or the office of the employer during working hours in order to study, survey, research, inspect, or make inquiries about facts so as to obtain information for use as supporting evidence in the consideration under Section 79. In this connection, the employer or related persons shall provide convenience, send or present documents, or give facts and not obstruct the carrying out of the duties of such person”*

Section 86 *“In carrying out the duties under Section 85, the Wages Committee, Sub-committee, or the person assigned by the Wages Committee or Sub-committee shall present the identity card or letter of assignment, as the case may be, to the person concerned.*

The identity card of the Wages Committee and Sub-committee under paragraph one shall be in the form as prescribed by the Minister”

17) Form of Conditions of Employment and Conditions of Work

The new Section 115/1 is added into New LPA.

“For sake of the labour inspection official’s performance according to Section 139, the employer having ten or more employees shall submit a form stating conditions of employment and conditions of work to the Director-General or any person designated by the Director-General within January of each year, given that the labour inspection official shall provide the form as prescribed by the Director-General to the employer within December of each year

In the case where there is a change in the facts relating to conditions of employment and conditions of work submitted under the paragraph one, the employer shall inform the Director-General or any person designated by the Director-General in writing of such change within the month following the month of such change”

Comment: In this case, the labour inspection official is able to update the current conditions of employment and conditions of work which are provided to employees. However, the employer is assigned more duties in doing so.

18) Termination of Employment with Cause

18.1 Provision of Section 119 (6) is revised as follows:

“(6) Having been imprisoned by a final judgment”

18.2 In addition, the following provisions are added into Section 119 as its last paragraph.

“In case of (6), if it is the offenses arising out of negligent acts or for petty offenses, it shall cause the employer to suffer severe losses”

Upon termination of employment without severance pay under the paragraph one, if the employer does not specify the facts which are the cause of termination in the notice of termination of employment or the employer does not inform the employee of the cause of termination upon termination of employment, the employer cannot thereafter raise such causes”

19) Relocation of the Employer’s Place of Business

Section 120 is revised as follows:

“In case the employer relocates the place of business which relocation materially affects the ordinary course of living of the employees or their families, the employer shall notify the employees not less than thirty days prior to the date of relocation of the place of business. If any employee does not want to go to work for the employer, such employee shall have the right to terminate the employment contract within thirty days from the date of the notification or from the date of relocation of the place of business, as the case may be, and be entitled to a special severance pay at the rate of severance pay which the employee shall be entitled to under Section 118.

In the case where the employer fails to give advance notice of relocation of the place of business to the employees pursuant to paragraph one, the employer shall also pay a special severance pay in lieu of such advance notice in an amount equal to thirty-days pay at the latest wage rate, or the wages received for the last thirty days for employees who receive wage based on work units performed.

The employer shall pay the special severance pay or the special severance pay in lieu of advance notice to the employee within seven days from the date that the employee terminates the employment.

In the case where the employer does not pay the special severance pay or the special severance pay in lieu of advance notice according to the paragraph 3, the employee shall be entitled to submit a request asking the Labour Welfare Committee to consider within thirty days from the date that a payment of the special severance pay or the special severance pay in lieu of advance notice becomes due.

The Labour Welfare Committee shall consider and issue an order within sixty days from the date of receipt of the request.

After consideration of the Labour Welfare Committee, if it is found that the employee is entitled to the special severance pay or the special severance pay in lieu of advance notice, the Labour Welfare Committee shall order, in writing, the employer to pay the special severance pay or the special severance pay in lieu of advance notice, as the case may be, to the employee within thirty days from the date that the employer is aware of or deemed to be aware of such order.

In the case where the Labour Welfare Committee considers and finds that the employee is not entitled to the special severance pay or the special severance pay in lieu of advance notice, as the case may be, the Labour Welfare Committee shall issue the order in writing and notice the same to the employer and the employee.

The order of the Labour Welfare Committee shall be final, unless the employer or the employee shall appeal against such order to the court within thirty days from the date of notification of such order. In the case where the employer is the party bringing a lawsuit to the court, the employer must place a deposit with the court in accordance with the amount which must be paid according to such order, in order to proceed with the case'

- Comment:
- 19.1 The rate of special severance pay is increased from 50% to 100% of the normal rate of severance pay under Section 118.
 - 19.2 Payment of the special severance pay or the special severance pay in lieu of advance notice shall be made within 7 days after the date of termination of employment.
 - 19.3 If the employer does not pay the special severance pay or the special severance pay in lieu of advance notice, the employee's request shall be submitted to the Labour Welfare Committee for their consideration within 30 days from the date that the payment thereof becomes due.
 - 19.4 Order issued in connection with 20.3 shall be made within 60 days from the date of receipt of such order.
 - 19.5 Status of the Labour Welfare Committee's decision is changed to the order.

20) Period of Payment under New LPA

Section 124 Paragraph 3 is revised as follows:

"When the labour inspection official has investigated and finds that the employee is entitled to any sum of money which the employer is obligated to pay under this Act, the labour inspection official shall issue an order requiring the employer to pay such money to the employee or a statutory heir of the employee who died in the form prescribed by the Director-General within thirty days from the date such order is acknowledged or deemed to be acknowledged"

Comment: Payment period is expanded from 15 to 30 days.

21) Extinguishment of Criminal Offence

The new Section 124/1 is added into New LPA.

"In the case where the employer has complied with an order of the labour inspection official under Section 124 within a period as prescribed or has complied with the court's judgment or order, criminal prosecutions against the employer shall be extinguished"

Comment: There will be no consideration of criminal offence if the employer has complied with the order of the labour inspection official within the period prescribed therein, the court's judgment or order.

22) Authority of the Court upon Payment of the Employer's Deposit

Section 125 Paragraph 4 is revised as follows:

"When a final decision is rendered on the case and the employer is obligated to pay any money to the employee or a statutory heir of the employee who died, the court shall have the power to pay the deposit which the employer has placed with the court to the employee or a

statutory heir of the employee who died or Employee Welfare Fund in case that money under Section 134 is paid, as the case may be

Comment: Other than the employee or a statutory heir of the employee who is able to receive the employer's deposit from the Court, the Employee Welfare Fund is also specified in Section 125 Paragraph 4.

23) Right of Recourse

Section 135 is revised as follows:

"In case the Department of Labour Protection and Welfare has paid money out of the Employee Welfare Fund either in whole or in part to an employee according to Section 134, the Department of Labour Protection and Welfare shall have the right of recourse against the person having the duty according to law to pay such money to the employee, together with interest at the rate of fifteen per cent per annum from the date that the Department of Labour Protection and Welfare has paid money out of the Employee Welfare Fund to the employee, regardless of whether the person having the duty according to law has paid such money to the employee again or not.

The prescription period of the right of recourse according to paragraph one shall be ten years from the date the Employee Welfare Fund makes payment"

Comment: The right of recourse is granted to the Department of Labour Protection and Welfare upon the payment made from the Employee Welfare Fund.

24) Labour Inspection Official

Section 141 is revised as follows:

"An order of the labour inspection official under Section 139 (3) shall be appealed to the Director-General or any person designated by the Director-General within a period prescribed in the order. The Director-General or person designated by the Director-General shall consider such appeal and notice the appellant without delay but no longer than thirty days from the date of receipt of the appeal. A decision of the Director-General or any person designated by the Director-General shall be final.

The appeal according to the paragraph one shall not respite a compliance with the order of the labour inspection official, except for the Director-General or any person designated by the Director-General issue any order otherwise or a deposit as prescribed by the Director-General or any person designated by the Director-General is placed.

In case the employer or the employee has complied with the order of the labour inspection official under Section 139 (3) or has complied with the decision of the Director-General or any person designated by the Director-General according to the paragraph one within the prescribed period of time, any criminal prosecutions against the employer or the employee shall be extinguished"

Comment:

- 24.1 An order of the labour inspection official can be appealed and the appeal has to be considered and notice thereof shall be given to the appellant within 30 days from the date of the receipt thereof.
- 24.2 No respite of compliance with order of the labour inspection official is allowed during consideration of the appeal except if ordered otherwise.
- 24.3 Criminal prosecutions against the employer or the employee will be extinguished if the employer or the employee has complied with the

order of the labour inspection official or the decision of the Director-General or any person designated by the Director-General.

25) Penalties

25.1 Section 144 is revised as follows:

“Any employer who violates or fails to comply with Section 10, Section 22, Section 24, Section 25, Section 26, Section 37, Section 38, Section 39, Section 39/1, Section 40, Section 42, Section 43, Section 46, Section 47, Section 48, Section 49, Section 50, Section 51, Section 61, Section 62, Section 63, Section 64, Section 67, Section 70, Section 71, Section 72, Section 76, paragraph one of Section 90, ministerial regulations issued under Section 95, Section 107, paragraph one of Section 118 or fails to pay a special severance pay in lieu of advance notice or a special severance pay under Section 120, Section 121 or Section 122, shall be punished with imprisonment not exceeding six months or a fine not exceeding one hundred thousand baht, or both.

In case the employer violates or fails to comply with Section 37, Section 38, Section 39, Section 39/1, Section 42, Section 47, Section 48, Section 49 or Section 50 thereby causing an employee to suffer bodily or mental injury or to die, the employer shall be punished with imprisonment not exceeding one year or a fine not exceeding two hundred thousand baht, or both’

Comment: Penalties are prescribed for the employer who allows a pregnant employee to work between 10.00 p.m. to 6.00 a.m., to work overtime or to work on holidays, and an employer who does not obtain consent from a pregnant employee if such pregnant employee is required to work overtime for management or academic or administrative work, or any work relating to finance and accounting.

25.2 The new Section 144/1 is added into New LPA.

“the business operator who fails to comply with Section 11/1 shall be punished with a fine not exceeding one hundred thousand baht”

Comment: A fine of not exceeding Baht 100,000 will be considered if the employer fails to provide the same benefits, which are enjoyed by the employees under the normal employment agreement, to the employees being engaged by lump sum payment but their work is considered as a part or the whole of the employer’s production process or business operation.

25.3 Section 150 is revised as follows:

“Any person who fails to facilitate, or give a statement, or send documents or any materials according to a written summons of the Wage Committee, the Employee Welfare Committee, Sub-committee of such Committee or person entrusted by the said Committee or Sub-committee, or fails to facilitate the labour inspection official, physician, social welfare official or expert under Section 142 shall be punished with imprisonment not exceeding one month or a fine not exceeding two thousand baht, or both”

25.4 Section 151 is revised as follows:

“Any person who obstructs the performance of duties of the Wage Committee, the Employee Welfare Committee, Sub-committee of such Committee or person entrusted by the said Committee or Sub-committee, as the case may be, or obstruct a performance of the labour inspection official or physician, social welfare official or

expert under Section 142 shall be punished with imprisonment not exceeding one year or a fine not exceeding twenty thousand baht, or both.

Any person who fails to comply with an order of the Employee Welfare Committee issued under Section 120 or an order of the labour inspection official issued under Section 104, Section 105 or Section 124 shall be punished with imprisonment not exceeding one year or a fine not exceeding twenty thousand baht, or both'

25.5 The new Section 155/1 is added into New LPA.

"The employer who fails to submit or notice a form stating conditions of employment and conditions of work under Section 115/1 and, after the employer has already received a warning notice from the labour inspection official but yet to submit or to notice the same within fifteen days from the date of a receipt of the warning notice shall be punished with a fine not exceeding twenty thousand baht"

With courtesy from

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