

TERMINATING EMPLOYEES IN TAIWAN

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The Taiwan Labor Standards Law (LSA) provides strict measures protecting dismissed employees, and Taiwan employers are required to fully comply with these termination requirements when dismissing their employees. Unlike jurisdictions such as the United States, there is no 'at-will' employment in Taiwan. According to the LSA, employers can only terminate their employees when at least one of the statutory situations set forth in Article 11 or Article 12 has been met. Therefore, employers need to first determine whether the intended termination fits within any of the following statutory termination causes. If so, then a termination can be categorized as being one without notice or with notice, depending on the circumstance.

- Termination without notice, criteria for which are set forth in Article 12 of the LSA. Generally, if an employee has committed a material misconduct or gross violation of their employment contracts, their employment may be terminated in accordance with Article 12. The statutory applicable causes include:
 - a) at the time of entering into the employment agreement, the employee made a false or misleading representation that is likely to cause harm to the employer
 - b) the employee commits a violent act or an act of gross insult against the employer, the family members or agents of the employer or fellow employee;
 - c) the employee has been sentenced to imprisonment in a confirmed judgment, unless the employee otherwise receives a suspended sentence or a decree allowing payment of a fine in lieu of imprisonment
 - d) the employee commits a material breach of the employment agreement or a serious violation of work rules
 - e) the employee intentionally damages machinery, tools, raw materials, products or other property of the employer; or intentionally discloses any technological or confidential business information of the employer, thereby causing harm to the employer
 - f) the employee is, without justifiable reason, absent from work for three consecutive days, or six days in a month.

- Termination with notice, criteria for which are set forth in Article 11 of the LSA. Other than the above situations stipulated in Article 12 of the LSA, employers are only allowed to dismiss employees in the following situations stipulated in Article 11 of the LSA:
 - a) where the employers' business is suspended or has been transferred

- b) where the employers' business suffers operating losses or business contractions
- c) where force majeure necessitates the suspension of business for more than one month.
- d) where a change in the nature of business necessitates the reduction of workforce and the terminated employees cannot be reassigned to other suitable positions
- e) a particular worker is clearly not able to perform satisfactorily the duties required of the position held.

However, Taiwanese courts generally treat unilateral termination by the employer as a last resort, which makes it very difficult to terminate an employee without a compelling case and solid evidence. The jurisdiction in this respect, is an employee friendly one. Accordingly, employers should consider the following criteria set by the courts in the wrongful termination litigations:

- Dismissing employees due to the business suffering operating losses or contractions usually will require evidence to show the accumulated losses. A 'business contraction' means an obvious decrease in the production or sales amount compared to the total original business. In addition, "operating losses" requires showing a "net loss" in previous financial reports. If a company's total business revenue shrinks over several years, it may assert that it has suffered from operating losses or a business contraction; in this case the company will be permitted to reduce its operation costs by laying-off employees. If only one division will be shut down but others are operating normally and still require workers, the courts would usually deem that there was no reasonable necessity for the company to terminate the employees.
- For "a change in the nature of business necessitates the reduction of workforce and the terminated employees cannot be reassigned to other suitable positions," the company must possess sufficient evidence to prove the following in the event of a challenge being made:
 - there was a substantial change in the nature of the company's business that required a reduction of employees; for example, if a part of a business in Taiwan was shut down resulting in the company terminating an entire section of employees
 - the particular employees cannot be assigned to another suitable position
 - even then it is incumbent on the employer to ensure that if employees can be re-trained to fill other positions, or if other similar divisions still operate normally and even expand their business and require more workers in the same position, they consider the surplus employees, as the courts would usually deem that there was no reasonable justification to terminate any employees in such a case.
- In the case of "a particular worker is clearly not able to perform satisfactorily the duties required of the position held," employers will be asked by courts to provide sufficient evidence to show the employee's inadequate performance, such as the records of a relevant Performance Improvement Plan (PIP). On the PIP, employers shall list all the criteria for evaluating the employee's performance and collect evidence showing the employee's incompetence. The employer is advised to implement a PIP evaluation at least two to three times to collect sufficient evidence depending on the matters for improvements, and must give reasonable period for improvement. Once the employee fails to accomplish tasks or achieve performance targets owing to deficiency in his or her professional capability, academic qualification, skills, physical capacity, or mental state, and he or she is found to have repeatedly neglected to carry out his or her duties, than his or her empowerment contract can be terminated based on this cause.

We are seeing an increase in the number of employee complaints either with the labor bureau or the courts for wrongful terminations. If an employee wins the wrongful termination litigation, he or she may be reinstated and receive back pay for the compensation lost. Therefore, it is important to seek legal assessment of the strength of the termination and collect sufficient evidence to defend a claim if any before the court. If the termination case is not strong as assessed, then a mutual termination with a higher severance pay may be considered to avoid future disputes.

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