**Chapter Twelve**

**Law of Employment**

**Suggested answers to the review questions and case problems**

**1. Define the terms “employer” and “employee.”**

**Answer:** The term “employer**”** has a well-established meaning. As defined in Section 5 of the Labor Protection Act, it indicates a natural or juristic person who hires an employee for monetary remuneration. It also includes a person designated by an employer to act and enter into contracts on his behalf.

If a subcontract is made between a contractor and a subcontractor, the subcontractor is considered as the employer for the purposes of payment of basic pay, overtime pay, holiday pay, holiday overtime pay, severance pay, special severance pay, employee and employer contributions, or additional payments (Section 12, Labor Protection Act). In this case, however, the primary contractor is jointly liable with the subcontractor.

With regard to the notion of employee, Section 5 of the Labor Protection Act defines “employee” as any natural person who renders services to an employer for remuneration, regardless of the title given to describe his status. It must be noted that these definitions do not apply to government administrations and state enterprises which are governed by different regulations (Section 4, Labor Protection Act). Similarly, employees who work in certain specific occupations—agricultural work, marine fishing, the loading or unloading of goods on and from maritime vessels, work to be performed at home, transportation, and other work prescribed by Royal Decree—are subject to a different form of employment protection (Section 22, Labor Protection Act).

**2. List and briefly explain the main regulations of employment relations.**

**Answer:** Thai employment relations are governed by a complex system of different legal sources tied to both private and public law. The private law character of employment law is apparent in the provisions of the Civil and Commercial Code governing rights, obligations, and liabilities of employees and employers. Parties are in principle free to designate the law applicable to their employment agreement. The impact of public law upon employment law is discernible in five major acts that relate to the public aspects of employment relations. The legal framework in which employers and employees negotiate the terms and conditions of employment is governed by the Labor Protection Act B.E. 2541 (1998) which sets minimum working conditions for the protection of the workforce and provides regulations on workplace safety. Second, the Social Security Act B.E. 2533 (1990) requires that all employers withhold social security tax from the monthly wages of their employees and forward these amounts on a regular schedule to the Social Security Office. Moreover, a provident fund may be set up voluntarily between employer and employees. Both employer and employees contribute to the fund and, upon termination of the employment relation, the employee is entitled to receive a lump sum payment as the result of such contributions. Third, the Workmen’s Compensation Act B.E. 2537 (1994) in response to the high number of work accidents and occupational disease statistics, has mandated that employers provide compensation benefits for employees who are injured, sick, disabled, or die in the ordinary course of employment at the rates prescribed by law. Fourth, Labor Relations Act B.E. 2518 (1975) lays out a general framework of regulation in the area of labor dispute resolution in order to reduce employment litigation. The objective is to promote successful reconciliation between employers and employees. The Labor Relations Act also provides for the registration of trade unions with the objective of acquiring and protecting interests relating to conditions of employment and promoting better relationships between employers and employees. Finally, the Labor Court and Labor Procedure Act B.E. 2522 (1979) defines the labor court procedures and jurisdiction with respect to labor claims. In particular, labor courts hear disputes involving employment contracts and wrongful acts between employers and employees in connection with a labor dispute or in connection with the performance of work under an employment agreement. Decisions of labor courts are directly appealed to the Supreme Court, bypassing intermediate-level appellate courts. Since the majority of Thai workers are non-unionized, collective agreements do not contain significant provisions affecting employers and employees.

**3. What is the total duration of sick leave days within one year?**

**Answer:** An employee who is sick is still entitled to leave. Sick leave is based upon a different logic from annual leave: the former is allowed to help people get better while the latter is to rest. As such, sick leave is subject to administrative verification. In case the employee uses sick leave for three or more consecutive workdays, the employer may request a medical certificate from an accredited medical practitioner or from a government clinic justifying the leave (Labor Protection Act, Section 32). Failure to present such documentation requires an explanation of the reasons behind taking the sick leave.

**4. Distinguish an open-ended contract from a fixed-term contract.**

**Answer:** Open-ended contracts are ones that only specify the beginning date of employment but not the expiration. Thus, they run indefinitely until either the employee or the employer decides to terminate the employment relation in conformity with the employment laws, the contract, and the employer’s work regulations.

It is possible to provide for a specific duration in an employment contract only where a number of requirements are met. Section 118, paragraph 3, of the Labor Protection Act stipulates that an employment contract of a fixed term can only be concluded with regard to a specific project which is not the normal business of the employer, to work of a temporary nature, and to seasonal work. If the reason for the fixed-term employment contract does not fit within one of these three categories, then it is regarded as an open-ended contract. Moreover, according to the Labor Protection Act, the employment contract must be in writing and specify a predetermined fixed period for employment as well as the commencement date. Under no circumstances can this period exceed two years. It must also be noted that under case law, fixed-term contracts must not include any provisions that entitle one party to terminate the employment relation before the expiration of the agreed period. If it contains such provisions, the contract will be regarded by the law as an open-ended contract. Similarly, fixed-term contracts containing renewal options and the use of successive fixed-term contracts between the same employer and employee for the same work may lead to the same result.

**5. List and describe the main rights and obligations of employees and employers.**

**Answer:** Under the Civil and Commercial Code, there are some basic rights which apply to all employees, whether it is written in the employment contract or not. In particular, employees have the right to receive payment of wages from the employer during the course of the employment contract. To help a dismissed employee to find new employment, the Civil and Commercial Code also provides that an employer is obliged to present an employee with a written certificate of employment at the end of the employment period (Section 585, Civil and Commercial Code). Other important employees’ rights include the right to terminate the employment contract when the employer transfers the employee’s rights to a third person without the consent of the employee (Section 577, Civil and Commercial Code) and the right to receive the cost of the return journey from the employer when the hire of services labor comes to an end (Section 586, Civil and Commercial Code).

With regard to the performance of duties, the employee is required to work with diligence and due care and the employer is required to reasonably supervise the employee. In other words, the employee is under the legal subordination of the employer and must obey the general discipline contained in the work regulations. Furthermore, the Civil and Commercial Code requires that the employee personally perform the work for which he was employed (Section 577, paragraph 2, Civil and Commercial Code). Unless consent is obtained from the employer, the employee cannot demand assistance or substitute a third person for himself. Another important obligation employees have is related to their special skills. According to Section 578 of the Civil and Commercial Code, if the employee either expressly or impliedly warrants special skill on his part, the employee must have such special qualification.

With regard to the employers, the Civil and Commercial Code provides specific rights and duties for the employer. Specifically, the employer has the right to supervise the employees and control both the method and the result of the services. With respect to the performance of duties, the employer is expected to pay the agreed wages, to abide by the conditions of the employment contract, and to supply the work agreed upon. Other duties of the employer issuing from the individual employment contract are to provide the employee with a work certificate at the end of the employment and to pay the cost of the return journey when the hire of services labor comes to an end under the conditions provided by Section 586 of the Civil and Commercial Code.

**6. Discuss (a) advance notice payment, (b) severance pay, (c) unfair termination.**

**Answer:** In case one party decides to unilaterally terminate an open-ended contract, advance notice of termination is required, unless there is termination with cause. Thus, both employer and employee are entitled to end the employment contract concluded for an indefinite period by giving advance notice. A consequence of the notice is the termination of the employment contract upon termination of the notice period.

However, it must be observed that the Civil and Commercial Code sets out a number of situations where an employment contract may be terminated without prior notice. According to Section 583 of the Civil and Commercial Code, advance notice of termination or payment in lieu of notice is not required if the employee willfully disobeys or habitually neglects the lawful orders of the employer, remains absent from work, commits an act of gross misconduct, or acts in a manner incompatible with the ordinary and faithful discharge of his duty. Furthermore, the Labor Protection Act stipulates that advance notice does not apply to a termination of employment for the reasons referred to in Section 119, as will be clarified in the next section.

With regard to severance payment, Labor Protection Act provides the obligation for the employer to pay a lump financial benefit to the employee when terminating the contract of employment as compensation for the loss of a job. According to Section 118, paragraph 2, of the Labor Protection Act, this payment is due when the employer prevents the employee from continuing to work or suspends payment of wages to this purpose. Severance payment must also be made when the termination is the consequence of the employer’s inability to operate the business.

The law also lists circumstances where severance pay is *not* required. In particular, severance pay is not payable in case of termination upon expiry of the agreed term of the contract and in the cases provided for in the Section 119 of the Labor Protection Act. It should be noted, however, that in order to apply such exceptions and avoid the payment of the severance pay, the employer has to specify the reasons for the termination of the employment contract at the time of termination of employment or later on in the letter of termination of employment (Section 119, paragraph two, Labor Protection Act). Failure to do so will restrain the employer from setting up any of the causes under Section 119, paragraph 1, of the Labor Protection Act as a defense.

Unfair termination represents one of the foundations of employment protection legislation. It is a statutory concept consolidated almost exclusively within the Labor Relations Act and the Labor Court and Labor Procedure Act. Unfair dismissal usually refers to those situations where the employer’s decision to terminate the employment contract is considered to be unfair, unreasonable, or harsh. The Labor Relations Act and the Labor Court and Labor Procedure Act contain some specific provisions relating to unfair dismissal which have very important implications for the employment relationship. In particular, the former lists particular cases where the dismissal is automatically considered as unfair while the latter provides specific rules relating to unfair dismissal both in terms of entitlement to compensation and reinstatement of the employee in the original work position.

**7. Outline the main laws prohibiting unfair termination of the employment contract.**

**Answer:** The Labor Relations Act contains some provisions relating to unfair dismissal which have very important implications for the employment relationship. In particular, Chapter IX Unfair Practices of the Labor Relations Act lists specific cases where the dismissal is automatically considered as unfair. Section 121 of the Labor Relations Act strengthens the prohibitions on employers in relation to employee activities. Specifically, employers cannot terminate an employment agreement due to the fact that the employee is a member of a labor union, calls for a rally, files a complaint, submits a demand, participates to a negotiation, or files a lawsuit against the employer.

Other limitations include preventing the employee from being a member of a labor union through various methods or inducing the employee to resign if he is already a member. The Labor Relations Act also provides general limitations which prohibit the employer from terminating an employee while a collective bargaining agreement is still in force (Section 123, Labor Relations Act). Yet, the employer may raise specific reasons to prove the necessity of termination during the period when the collective bargaining agreement is in force.

In addition to the sections of the Labor Relations Act discussed above, other provisions pertaining to unfair dismissal are applicable in cases where the employment contract is terminated without cause or with insufficient cause. The Labor Court and Labor Procedure Act contains specific rules relating to unfair dismissal both in terms of entitlement to compensation and reinstatement of the employee in the original work position. Section 49of the Labor Court and Labor Procedure Act states that employers who unlawfully terminate employees may be ordered to reinstate them to the same or comparable position with the same wage rate they enjoyed prior to the termination. However, in cases where reinstatement is not possible or is not desirable by the employee, the employer is required to pay adequate compensation to the employee.

**8. Describe the benefits provided to the employee in case of termination of employment.**

**Answer:** The termination of an employment relationship can take place in a number of ways. In case the employer decides to unilaterally terminate an open-ended contract, advance notice of termination is required, unless there is termination with cause. Further, Section 17, paragraph 3, of the Labor Protection Act provides that the employer may decide to dismiss the employee immediately by making a payment in lieu of the notice period. The payment must be calculated on the employee’s basic pay and must be equivalent to the sum the employee would have received if he had continued to work until the last day of the advance notice period.

Also, the employer has to pay a lump financial benefit to the employee when terminating the contract of employment as compensation for the loss of a job, provided that the employee has worked for at least 120 days. Severance pay depends on the duration of service and varies from a minimum of 30 days’ wages to a maximum of 300 days’ wages. An employee who has worked for an uninterrupted period of 120 days but less than one year must receive severance payment for time-rate and piece-rate alike of not less than 30 days’ wages. For an uninterrupted period of service between one year and three years, the amount of compensation corresponds to the last 90 days’ wages. For a period of service between three years and six years, compensation amounts to the last 180 days’ wages. For a period of service of over six years but less than eight years, the severance payment equals the last 180 days’ wages. Lastly, the employee who has worked for a consecutive period of ten years or more must receive payment of not less than 300 days’ wages. The period of service that must be considered to calculate the severance payment includes public holidays, annual leave, and any other leave that is granted to the employee.

**9. On October 2, 2007, Panida was employed by a large construction company with headquarters in Bangkok as a mechanical engineer. On February 17, 2015, shortly after she told her employer she was pregnant with twins, Panida was terminated. Her employer told her the business was shifting away from her area of expertise. Would this be discriminatory? If Panida sues her employer, what will she get?**

**Answer:** In the case above, Panida may claim severance payment as compensation for the loss of a job. According to Section 118, paragraph 2, of the Labor Protection Act, this payment is due when the employer prevents the employee from continuing to work or suspends payment of wages to this purpose. Severance pay depends on the duration of service and varies from a minimum of 30 days’ wages to a maximum of 300 days’ wages. Since Panida has worked for a period of service of over six years but less than eight years, the severance payment equals the last 180 days’ wages.

Also, advance notice of termination is required. The length of the notice period is the same for both the employer and the employee and is specified in the employment agreement. In case nothing is provided in the contract, notice must be given in writing at, or before, any time of payment to take effect at the following time of payment (Section 17, paragraph 2, Labor Protection Act).

In addition to the remedies above described, Panida may also sue her employer for unfair dismissal claiming that her contract was terminated because of her pregnancy. Under the Labor Protection Act, an employer cannot terminate the services of a female employee because of her pregnancy (Section 43, Labor Protection Act). Thus, the termination of Panida’s employment contract would likely be considered as unfair dismissal by the Labor Court.

**10. Parin, an employee of a restaurant, steals eight bottles of a very expensive wine. On June 8, 2014, his employer Oil says, “You’re fired!” “Why?” asks Parin. “Never mind why,” Oil replies. “I don’t want to see your face anymore.” Discuss whether Parin will succeed if he brings a cause of action.**

**Answer:** If Parin decides to sue Oil he may get severance pay. As a matter of fact, although Parin has been dishonest in the course of employment and has intentionally committed a criminal offence against the employer, the employer has neglected to specify the reasons for the termination. Under Section 119, paragraph two, of the Labor Protection Act, the employer has to specify the reasons for the termination of the employment contract at the time of termination of employment or later on in the letter of termination of employment. Failure to do so will restrain the employer from setting up any of the causes under Section 119, paragraph 1, of the Labor Protection Act as a defense.

With regard to advance notice payment, Parin is not entitled to any payment in lieu of the notice period for immediate dismissal. In fact, Section 583 of the Civil and Commercial Code states that payment in lieu of notice is not required if the employee willfully disobeys or habitually neglects the lawful orders of the employer, remains absent from work, commits an act of gross misconduct, or acts in a manner incompatible with the ordinary and faithful discharge of his duty.