

EMPLOYMENT & BENEFITS - TAIWAN

Performance management and termination

Contributed by Lee and Li Attorneys at Law

Labour Standards Act

According to Article 11.5 of the Labour Standards Act, an employer may terminate an employment contract with notice or payment in lieu of notice and provide the appropriate severance payment if an employee is confirmed to be incompetent to perform the work assigned to him or her. However, according to the law, employers may not terminate an employment contract if the employee is on maternity leave or is suffering from an occupational injury or disease while working for the employer.

The act does not provide any guidelines for determining what constitutes an 'incompetent performance', hence its determination is subject to the court's discretion when a dispute arises. However, as Taiwanese courts regard employment termination as a last resort when dealing with employment matters, most courts apply rigorous standards in reviewing whether the termination of an employee for being incompetent is justifiable. Such standards are based on the subjective perception of the judges and could be unreasonable from the employer's viewpoint.

Wrongful termination

If an employee's employment contract is terminated unilaterally by an employer, he or she may claim against the employer for wrongful termination. If the employee's claim is sustained by the court, the employer will have to reinstate the employee and compensate him or her for loss of salary (from the date of wrongful termination to the date of reinstatement). The entire legal proceedings (including the appeal process) for a wrongful termination lawsuit may take two to three years. This means that if an employer loses a wrongful termination lawsuit, it must: 1. reinstate the employee; and

- pay the employee two to three years' back pay.

Incompetence

When determining whether a company's salesperson is incompetent under Article 11.5 of the act, the courts consider whether:

- the employee fails to meet the sales target for a reasonably long period (eg, 12 to 24 months);
- the sales target is reasonable;
- the difference between the actual sales and the sales target is significant;
- the employee's failure is attributable to the employee or to factors beyond his or her control (eg, weak market demand); and
- the employee will have a reasonable chance to achieve the sales target or improve his or her performance if the employer provides proper assistance or guidance.

To prove that an employee's work performance has fallen below a satisfactory level, it is advisable for an employer to establish a good paper record documenting whether:

- the employee has been continuously or successively concluded to be incompetent or nonperforming in his or her duties (eg, criticisms or complaints raised by the employee's colleagues, supervisor or reporting manager);

- the employer has warned the employee of his or her performance issues (eg, warning letters or written records of a consultation or meeting between the employee and the company discussing performance issues);
- the employer has provided several opportunities to correct or improve the incompetence or non-performance (eg, corrective action or a performance improvement plan (PIP));
- the employer has conducted conscientious and strict evaluation procedures before making the termination decision (eg, an evaluation report on the employee's performance); and
- the employer has exhausted all alternatives (eg, job transfer).

Performance improvement plan

Some employers follow a very robust and fair procedure to address performance issues, including a detailed PIP. However, attention should be drawn to the following issues:

- Generally, managers should:
 - conduct informal coaching with the under-performing employee;
 - proceed to a formal PIP if there is insufficient improvement;
 - conduct a second PIP if the employee fails the first PIP; and
 - if the employee fails again, consider starting discussions towards a mutual termination agreement before the employee's employment is unilaterally terminated in accordance with Article 11.5.
- The employer must assign reasonable improvement targets for the PIP process. Moreover, if an employee fails to reach the PIP targets, the employer must ensure that such failure is not due to causes that cannot be controlled by the employee (eg, economic downturn).
- Since most judges are unfamiliar with an employer's business operation, if a former employee initiates a wrongful termination suit, the employee's supervisor or colleagues must testify on behalf of the company. The supervisor or colleagues will be asked to testify on how the employee's failure to reach the assigned PIP targets compromised the company's business. They might also need to provide evidence to refute the employee's possible argument that he or she had reached the improvement targets, so that the judge can have a better understanding as to why termination was the last resort.

For further information on this topic please contact Lawrence Yu at Lee and Li Attorneys at Law by telephone (+886 2 715 3300) or email (lawrenceyu@leeandli.com). The Lee and Li website can be accessed at www.leeandli.com.