



The Legal 500 & The In-House Lawyer
Comparative Legal Guide
The Netherlands: Employment & Labour Law
(3rd edition)

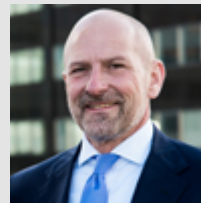
This country-specific Q&A provides an overview to employment laws and regulations that may occur in The Netherlands.

This Q&A is part of the global guide to Employment & Labour Law. For a full list of jurisdictional Q&As visit <http://www.inhouselawyer.co.uk/practice-areas/employment-and-labour-law-3rd-edition/>



Country Author: Windt Le Grand Leeuwenburgh

The Legal 500



**Peter de Waal, Partner
(Corporate Employment)**

p.dewaal@windtlegal.com

The Legal 500



**Steven Palm, Senior
associate (Corporate
Employment)**

s.palm@windtlegal.com

The Legal 500

1. Does an employer need a reason in order to lawfully terminate an employment relationship? If so, describe what reasons are lawful in your jurisdiction?

No. The general rule is that an employer is entitled to terminate employment of employees at its discretion and not required by law to specify a reason for termination. However, in this circumstance, an employer has the obligation to make payment of statutory severance pay at the rate set out by the Labour

Protection Act 1998 ("**LPA**") (which ranges from 30 to 300 days' wages depending upon length of service) to an employee whose employment is terminated without reason or for reasons other than those set out in Section 119 of the LPA.

Examples of reasons for termination of employment under Section 119 of the LPA include the instance (i) where the employee performs his duties dishonestly or intentionally commits a criminal act against the employer or (b) where the employee intentionally causes the employer to suffer losses.

In the case that the employer needs to rely upon one of the grounds under Section 119 of the LPA to terminate employment without paying any statutory severance pay or to protect the employer from a claim for unfair termination, the termination notice must specify clearly details of the misconduct of the employee and the reasons for termination, otherwise, the employer would be prohibited by law from relying on such reasons and fact when defending a Labour Court claim against the employer.

2. **What, if any, additional considerations apply if large numbers of dismissals (redundancies) are planned?**

There are no specific additional legal requirements regarding redundancies. However, if the termination of employment is made without cause or without reasonable cause and fairness to an employee, the employee would be entitled to file a claim in the Labour Court against the employer for damages for unfair termination. Therefore, the employer would need to give careful consideration to the necessity and reasons for the large number of dismissals prior to invoking the termination exercise and implement a fair procedure (using fair criteria) for the selection of employees whose employment would be terminated.

3. What, if any, additional considerations apply if a worker's employment is terminated in the context of a business sale?

There are no specific additional legal requirements regarding termination arising from a business sale. However, in order to mitigate the risk of a claim for unfair termination, the employer must implement and use fair criteria to select employees whose employment is to be terminated.

4. What, if any, is the minimum notice period to terminate employment?

The minimum statutory notice period is one actual prospective pay period for the employee concerned, but no more than 3 months' notice needs to be given (if the actual pay period is more than 3 months). If the employment contract provides for a longer notice period, the employer would be required to comply with such notice period.

Under the LPA, advance notice of termination is not required if the employment is being terminated under any of the grounds in Section 119 of the LPA.

5. Is it possible to pay monies out to a worker to end the employment relationship instead of giving notice?

Yes, in the case where an employer would like the employment to be terminated with immediate effect, the employer is entitled to make payment in lieu of advance notice.

6. **Can an employer require a worker to be on garden leave, that is, continue to employ and pay a worker during his notice period but require him to stay at home and not participate in any work?**

Yes.

7. **Does an employer have to follow a prescribed procedure to achieve an effective termination of the employment relationship? If yes, describe the requirements of that procedure or procedures.**

Except in cases that fall under Section 119 of the LPA, generally, under the law, an employer is required to give prior notice to an employee in order to terminate the employee's employment or make payment of lieu of advance notice for the termination of employment to be effective immediately (please see paragraph 6 above). The employer would also be required to pay wages, overtime pay, holiday pay, holiday overtime pay and unused annual leave which the employee is entitled to receive, to the employee, within three days from the date of termination of employment. In all cases which do not fall within Section 119 of the LPA, the employer would also be required to make payment of statutory severance pay, and any other contractual benefits to which the employee would be entitled under the employee's contract of employment.

However, in the case where the employees have set up a labour union, the termination of employment of an employee who is a member of the Employee's Committee of the labour union must be approved by the Labour Court only. Save for the Labour Court's approval, the termination of employment of a member of the Employee's Committee can be made without having to give notice to any other third party.

8. If the employer does not follow any prescribed procedure as described in response to question 7, what are the consequences for the employer?

An employee would be entitled to claim against the employer for (i) payment in lieu of advance notice (if no advance notice is given as required by law), (ii) statutory severance pay, and (iii) interest on all unpaid amounts. In addition, an employer would be liable to a fine and a term of imprisonment for failure to comply with the requirements under the LPA.

9. How, if at all, are collective agreements relevant to the termination of employment?

Collective agreements would be relevant to the termination of employment if the collective agreement sets out benefits or entitlements of employees upon the termination of employment of employee (for example, a specific amount of payment in lieu of advance notice which exceeds the legal requirement).

10. Does the employer have to obtain the permission of or inform a third party (e.g local labour authorities or court) before being able to validly terminate the employment relationship? If yes, what are the sanctions for breach of this requirement?

No, except in the case that the employee whose employment is being terminated is a member of the Employee's Committee of a labour union, in which case the Labour Court's approval (as mentioned in paragraph 11 above) would be required. Failure to comply with the requirements under paragraph 12 would also result in the employer being liable to imprisonment not exceeding one month and/or to a fine not exceeding Baht 1,000, or to both.

11. What protection from discrimination or harassment are workers entitled to in respect of the termination of employment?

An employee is entitled to claim for unfair termination under the Act Establishing Labour Courts and Labour Procedure B.E. 2522 (1979). What constitutes “unfair” termination is not adequately defined under Thai law. Discrimination and/or harassment can also be seen as a basis for claiming unfair termination. In addition, under the LPA, there is protection from discrimination or harassment as described below.

Protection from discrimination

According to Section 15 of the LPA, discrimination based on genders is prohibited. As such, an employer must treat his male and female workers equally unless it is inapplicable due to the nature or conditions of the work.

Protection from harassment

According to Section 16 of the LPA, an employer, a chief, a supervisor, or a work inspector shall be prohibited from committing sexual harassment against an employee. Additionally, sexual harassment can constitute a criminal offence under Thai law if all elements of the offence are satisfied. Apart from the criminal punishment, the employer who commits sexual harassment may be claimed compensation of the damage by an employee.

12. What are the possible consequences for the employer if a worker has suffered discrimination or harassment in the context

of termination of employment?

Any employer violating Section 15-16 of the LPA shall be imposed a fine not exceeding THB20,000. For unfair termination, there is no set scale for payments; however, we have seen cases where the court has awarded at least one month for every year of service.

13. Are any categories of worker (for example, fixed-term workers or workers on family leave) entitled to specific protection, other than protection from discrimination or harassment, on the termination of employment?

In accordance with the LPA and the Labour Relation Act B.E.2518 (“LRA”), the following categories of employee are entitled to specific protection on the termination of employment:

1. pregnant employees (Section 43 of the LPA);
2. any employees, representatives of employees, committee or sub-committee members of a labour union or labour federation involved in a demand for an agreement relating to conditions of employment or an amendment of that agreement, during the period in which the demand had been submitted to the employer, unless in certain exceptional circumstances (for example, where the employee performs his duties dishonestly or intentionally commits a criminal act against the employer) (Section 31 of LRA); and
3. an employee who is a member of an employee’s committee, unless the Labour Court permits (Section 52 of the LRA).

14. Are workers who have made disclosures in the public interest (whistleblowers) entitled to any special protection from termination of employment?

In Thailand, whistleblowers are not entitled to any special protection from termination of employment. The closest relevant law is the LRA which

prescribes that the employee concerning with a negotiation under the LRA or a lawsuit under the LPA is protected from termination of employment by an employer.

15. What financial compensation is required under law or custom to terminate the employment relationship? How do employers usually decide how much compensation is to be paid?

Under Thai laws, the following financial compensations are required to be paid in order to terminate the employment contract.

1. Notice (Please also see our comment in Q4-5)

Under the LPA, unless a longer notice period is provided for in an employment agreement, an employee is generally entitled to receive one full pay period's advance notice of termination. In Thailand this is usually a one month period.

The employer may pay wages for the notice period in lieu of having the employee serve out the notice period, but wages paid in lieu of service are in addition to the required severance pay.

Advance notice is not required where there has been serious wrongdoing by the employee.

2. Accrued Wages and Benefits

The LPA requires that wages, overtime pay, holiday pay, holiday overtime pay and a payment in lieu of unused annual holiday be paid to an employee within three days from the date of termination of employment.

3. Severance pay

Except in cases of serious wrongdoing, any employee that is terminated in Thailand is entitled under the Act to receive severance pay.

The amount required to be paid is based on the duration of employment, as follows:

Length of Service	Severance Pay Entitlement (determined using current salary rate)
120 days or more but less than one year	30 days
1 year or more but less than 3 years	90 days
3 years or more but less than 6 years	180 days

6 years or more but less than 10 years	240 days
10 years upwards	300 days ^[1]

An employer has an obligation, under the LPA, to pay special severance pay to an employee if the termination of employment is made because of (i) relocation of the employer's establishment in accordance with Section 120 of the LPA; or (ii) replacement of machinery or technology advancement in accordance with Section 121 of the LPA.

16. Can an employer reach agreement with a worker on the termination of employment in which the employee validly waives his rights in return for a payment? If yes, describe any limitations that apply.

Where the employee is terminated, any agreement entered by the employee to waive the right to claim statutory payments for termination is void under Section 150 of the Civil and Commercial Code.

Nevertheless, in practice, such waiver is acceptable where the employee resigns.

17. Is it possible to restrict a worker from working for competitors after the termination of employment? If yes, describe any relevant requirements or limitations.

In Thailand, it is possible to restrict an employee from working for competitors of the employer or engaging in a business that is the same as or which is in competition with the employer's business after the termination of employment. The precedent of the Thai Supreme Court suggests that such restrictive clause to protect commercial rights and benefits of employers, who may suffer from

the loss if the employee breaches the restrictive agreement, is valid if the restriction:

- does not entirely prohibit or hinder the employee from making a living; and
- is enforced on specific restricted business and/or for a restricted time period which is considered to be fair.

Restriction can be either geographical, which prohibits the carrying out of the restricted business in a certain area, and/or for a specified time, provided that the geographical area and time specified is deemed to be fair. Nevertheless, in an event that the Court views that such restriction imposes too much of a burden on the employee, the Court has the power to alter the restriction at its discretion under the Unfair Contract Terms Act B.E. 2540 (“**Unfair Contract Term Act**”).

18. **Can an employer require a worker to keep information relating to the employer confidential after the termination of employment?**

An employer can require an employee to keep information related to the employer confidential after the termination of employment by:

- providing a non-disclosure agreement in an employment contract; or
- mutually making a non-disclosure agreement separately from an employment contract with an employee.

However, a non-disclosure agreement is subject to Unfair Contract Terms Act. A non-disclosure agreement may be deemed to be an unfair contract term if the court consider that such agreement causes excessive restriction of rights, freedom and burden to an employee (e.g. agreement with unlimited binding period). A non-disclosure agreement which is deemed to be an unfair contract term shall only be enforceable to the extent that they are fair and reasonable according to the circumstances.

19. **Are employers obliged to provide references to new employers if these are requested?**

There is no specific rule regarding employer reference. However, according to section 585 of Thai Civil and Commercial Code, when an employment comes to an end, the employee is entitled to a certificate as to the length and nature of his employment.

20. **What, in your opinion, are the most common difficulties faced by employers in your jurisdiction when terminating employment and how do you consider employers can mitigate these?**

From our view, the most common difficulty faced by employers in Thailand when terminating employment is considering whether or not the termination of employment would be considered as “unfair” under Section 49 of the Act Establishing the Labour Courts and Labour Procedure B.E. 2522 (1979). An unfair termination case is a common labour dispute in Thailand, if the Labour Court finds that the termination is unfair, the Court can order reinstatement of the employee on the same terms and conditions of employment (that is, same salary and position before termination). However, if the Court decides that the parties are no longer able to work together, then the Court can order payment of compensation for unfair termination.

Employers may minimise the risk of unfair termination claims by entering into a separation agreement, where the employee agrees to resign in exchange for an ex-gratia amount paid in addition to the amount entitled by the employee if he/she is terminated.

21. Are any legal changes planned that are likely to impact on the way employers in your jurisdiction approach termination of employment? If so, please describe what impact you foresee from such changes and how employers can prepare for them?

A new provision was added to the LPA in 2017 which provides that the retirement of an employee at an age either agreed between the employer and employee or specified by the employer, is deemed to be a termination of employment under the LPA. Where there is no agreement on a retirement age, or the retirement age is not specified by the employer or the retirement age is specified to be at an age older than 60 years, an employee who reaches 60 years of age (or at any time thereafter) is entitled to express his/her intention to retire to the employer, and the retirement will take effect 30 days later. In these instances, the employer is obliged to pay severance pay in accordance with Section 118 of the LPA.

The Thai National Legislative Assembly has recently approved the latest amendments to the LPA, which are to become effective upon their announcement in the Royal Gazette. There is no set date for the announcement at present, but it is expected to take place in the second quarter of 2019. The following are notable amendments.

- The maximum cap for severance pay will be increased from 300 days' wages (at the latest wage rate) for an employee with 10 or more years of service, to 400 days' wages for an employee with 20 or more years of service.
- Employees will be granted a minimum of three days' paid business leave per year.
- Maternity leave will be increased from a minimum of 90 days to 98 days (14 weeks) per pregnancy and will extend to leave taken for pre-natal care such as for attendance at doctor's appointments.