

Employment law – treatment of additional public holidays.

control v 1.4

The issue: Employers honour known national holidays. But what is the requirement when the government announces additional holidays, often at short notice? These can impact a company's operational plans.

Summary: Employers are required to honour a minimum of 13 days of national holiday per year, including Labour Day (1 May) and publish these. There is no hard obligation to support additional holidays and some flexibility applies to additional days. In practice, companies tend to offer 15 or 16 days. (These are separate to annual holidays). Relevant laws are the Labour Protection Act (directly relevant) and the Labour Relations Act (less directly relevant).

This memo is for the private sector. Details follow.

How it works:

National labour laws require companies to have a minimum of 13 holidays per year; anything above that number is voluntary. The only day which is specifically designated as a public day is National Labour Day (1 May), all other dates are flexible and can be moved as desired by businesses, subject to making proper announcements.

The terminology varies, but there are three categories of designation holidays:

- *"Public holidays"* – generally intended as days any employee could take.
- *"Bank holidays"* – this is for financial institutions but is also a benchmark. Thus in legal agreements, for notice periods etc, 'bank holiday' is often the benchmark for what is not a business day, as there is certainty due to a list published by Bank of Thailand.
- *"Government holidays"* are intended for government employees. For example Mon 4 and Tue 5 November 2019 were designated at short notice as government holidays (due to the ASEAN Summit which included the prior weekend). Confusion can arise when 'public' is thought to mean 'public sector' – ie government sector.

For the purposes of this memo, we do not draw a hard distinction between public holidays and bank holidays are both are intended for the private sector. This Memo does not cover government sector.

"Annual holidays" are not public holidays and are not officially designated. They are days taken by employees as annual leave or vacation, minimum six days. More below.

There is also *'leave'* which refers to sick days, leave for sterilisation, for necessary business, military service, training or knowledge and skill development or maternity leave.

For some time, the published Bank of Thailand list of holidays for financial institutions ('bank holidays') was used as the standard. This used to be 13, but has grown to 13+4 (17) and more

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over time¹ and is thus not always used as the standard. It is not clear whether all financial institutions are required to follow the BoT practice, but with new kinds of NBFIs², (eg peer;peer lending and crowd funding platforms) this seems unlikely. For the purposes of this Memo, no real distinction is drawn between ‘public holidays’ and ‘bank holidays’; both affect the private sector.

By practice, many companies include a total of 15 of 16 days.

Section 29 of the Labor Protection Act (LPA) states that an employer must announce in advance not less than 13 public holidays per year for its employees, including National Labor Day (1 May). The employer needs to consider fixing the public holidays in accordance with the annual official holidays, and religious or local traditional holidays. If a public holiday falls on a weekend, the employee can take a substitute day off on the following working day, to substitute for the public holiday and that is often provided in official statements (see for example the BoT list).

Thus there is no requirement for companies to declare any additional public holidays as long as the minimum statutory requirements are met, i.e. at least 13 public holidays a year, inclusive of National Labour Day, and substitution for when a public holiday announced falls on weekend. This assumes of course that the Work Rules and Regulation of the company are in line with the LPA (i.e. 13 public holidays a year, inclusive of National Labour Day).

LPA Section 29. *“For the employees’ information, an employer shall announce in advance the prescription of at least thirteen annual traditional holidays, including the National Labour Day prescribed by the Minister.*

An employer shall consider fixing the traditional holidays in accordance with the annual government holidays, religious or local customary holidays.

If a traditional holiday falls on a weekly holiday of the employees [ie weekend], an employee shall have a substitute holiday for the traditional holiday, to be taken on the following working day.

If an employer does not allow employees to take a traditional holiday because the employees perform work of a nature or conditions prescribed in ministerial regulations [see Annex below], the employer shall agree with the employees that another day be taken as a holiday in substitution for such holiday, or that the employer pay holiday pay.”

How substitute days are agreed is in the Annex below.

¹ Financial Institutions’ Holidays published by Bank of Thailand 2019
<https://www.bot.or.th/English/FinancialInstitutions/FIholiday/Pages/2019.aspx> - For 2019 this is 17 days (for 2020 it is 18 days) to which should be added (for some provinces) Chinese New Year and certain Muslim Holidays if the relevant date is not already covered.

² Non Bank Financial Intermediaries

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An officer at the Department of Labor Protection and Welfare (Ministry of Labour) recently confirmed the understanding³ that if an employer has already announced at least 13 public holidays per year, inclusive of National Labor Day, it will be deemed that the employer has acted in accordance to the law. Therefore, even when the government announces additional public holidays, employers are not legally required to give their employees additional public holidays in accordance with these government's announcements. This is because the determination of public holidays, announced each year, is at the discretion of the employer, and it does not require the employees' prior agreement (Supreme Court decision no. 1850/2544⁴).

In the case where an employer does not announce a particular day as a public holiday to be taken by their employee, but an employee does not show up to work on such day without a valid reason, it can be deemed that the employee has absented himself/herself from duty without justifiable reason. In such cases, the employer may exercise disciplinary action, in accordance with the company's work rules and regulations. Clarity by the employer about the dates of public holidays is needed however.

Additional public holidays which are announced by the government can be used by the company in its consideration of which public holidays will be announced in the subsequent year. As new public holidays have been announced in 2019, the company may take this into consideration when deciding which of the 13 (or more) days will be announced to the employees as public holidays in 2020. For example on 29 October 2019, the government announced (based on a Cabinet decision) 30 December 2019 as an additional public holiday, 'bringing the long New Year weekend up to a total of five days, from Dec 28 until Jan 1'⁵. This is an example of an additional public holiday which is up to the discretion of employers assuming compliance with the LPA minimum, as described in this Memo. This holiday different to the announcement for 4 and 5 November 2019 (see above), which was only intended for government employees.

On a separate but related point, currently there is a mandated minimum (after working for one year) of a six working days **annual holidays**⁶. These are not 'leave' or 'traditional holidays'. For periods of less than a year, annual holidays can be set on a pro-rata basis. Annual Holidays can accumulate⁷

Many factories close during Songkran and allow additional leave at other times. With a relatively small number of annual leave days (eg some economics have ten days, some 20 days and even 30 days), arguably the number of public holidays in Thailand is of heightened interest.

³ Oral confirmation done via Tilleke & Gibbins lawyer

⁴ Supreme Court decision provided in separate PDF file with this summary, in English & Thai, in case of interest.

⁵ Bangkok Post report 30 October 2019.

⁶ Section 30, Labour Protection Act.

⁷ S. 30 LPA.

Annex – Ministerial Regulation No. 4 (1998) under LPA about prescribed work types

The following types of work are of such description or nature whereby an Employer may prevent Employees from taking a traditional holiday:

- (1) Work in a hotel, entertainment establishment, food shop, beverage shop, club, association, medical establishment or tourist service establishment; or
- (2) Work in forestry, work in a location lacking basic facilities, transportation work and work required to be performed continuously and whereby stoppage may cause damage to the work.

Note: where the public holiday is not taken due to such essential tasks, a substitute needs to be agreed. How they can be agreed may be a collective bargaining process which the Labour Relations Act covers. Obviously not every employee would take the same days where critical tasks are involved. How such agreements may be done can bring in some complexity where there are Employee Councils or Employee Welfare councils. Companies with minimum prescribed employee number must have an employee council (referred to as ‘employee committee’ and ‘welfare committee’ in the Labour Relations Act). How such agreements are reached is beyond the scope of this Memo, which is about public holidays. Where the number of employees is low such that no Council is relevant, individual agreements need to be reached with the employee. Thus in these cases of substitute days, employee consent is needed. (Again, not so for public holidays, assuming the base requirements of 13 days are met, as the Supreme Court decision stated).

These guidance notes are prepared for JFCCT members with the assistance of Tilleke & Gibbins. They are made in good faith. However legal advice should be sought about any particular situation.

18 November 2019