



# **FROM HIRING TO FIRING**

## **A BASIC GUIDE TO THE HONG KONG EMPLOYMENT LAW LIFE CYCLE**



## HIRING

For many employers, the key to having a productive and high-performing workforce is recruiting the right people to start with. However, it is important for employers to be aware that even before an employee commences work, there are a number of legal issues which arise in the process of seeking, interviewing and selecting candidates for a position.

### Job advertisements and interviews

Employers are prohibited from making discriminatory statements on prohibited grounds (which include sex, marital status, pregnancy, family status, disability and race) in recruitment advertisements. When shortlisting or selecting candidates, employers should ensure that any decision is based on consistent selection criteria which are not discriminatory.

Employers must also comply with the provisions of the *Personal Data (Privacy) Ordinance* when advertising or interviewing candidates. Applicants should be informed of the collection, use and storage of their personal data. An employer may only collect personal data which is necessary and not excessive for the lawful purpose for which it is being collected (for example, information on work experience, job skills, competencies, academic or professional qualifications and good character).

### Making an offer of employment

An offer of employment need not be in writing. A verbal offer is still an offer for the purposes of forming a binding contract, once accepted by the employee. An employer is

required under the *Employment Ordinance* to provide a prospective employee prior to commencement of employment with information regarding wages and wage period; any end of year payment; and the length of notice required to terminate the employment.

### Existing restrictions

An employer should ensure that the prospective employee does not have any restrictions which may prevent him or her from entering into the employment contract (for example, post-employment restrictive covenants imposed by his/her former employer).

### Employment contract

In concluding the employment contract, an employer should be aware of the minimum statutory terms and conditions set out in the various employment-related legislation. The basic terms usually include the term, position, duties, probationary period (if any), remuneration (including any bonus), other benefits, annual leave, sick leave, mandatory provident fund, notice of termination (including a garden leave clause), the right to summarily dismiss, protection of confidential information and intellectual property, post-termination restrictions (if any), governing law and jurisdiction and a data collection statement. Significantly, any contract for a duration in excess of one month must be evidenced in writing and signed by both parties; otherwise the contract will be treated as being for one-month renewable from month to month.

## Immigration

All employees in Hong Kong must hold an appropriate work visa if they do not have a right of abode or the right to land in Hong Kong. A local sponsor is required and it is generally necessary to show that no local person is capable of filling the applicant's position. A person is not permitted to work in Hong Kong with a work visa pending so employers should ensure that the application is submitted at least six to eight weeks before the employee's commencement date.

## MANAGING

A wide range of matters arise during the employment relationship which require careful management in order to ensure that a positive ongoing relationship is maintained, and that there is compliance with relevant legal obligations. It is important to note that the *Employment Ordinance* imposes criminal liability on employers (and sometimes directors and even managers) for a variety of offences under the *Employment Ordinance*. As a result, a failure to comply with some of the employment – related obligations can result in fines and imprisonment.

### Continuous Employment

Many statutory benefits and protections are only available to employees who are continuously employed. Continuous employment means that the employee has been employed for at least 18 hours a week, for at least four consecutive weeks.

## Benefits and Entitlements

**Annual Leave** – Anyone employed under a continuous employment contract for a minimum period of 12 months is entitled to paid annual leave. The period of paid annual leave is calculated on a sliding scale from seven days (for those employees who have worked for more than one year but not less than three years) up to 14 days (for employees with at least nine years' continuous employment).

**Statutory Holidays** – There are currently 12 statutory holidays recognized in Hong Kong. All employees with at least three months' continuous employment should be granted paid statutory holidays (and given a substituted or alternative day where required to work on such a day). Sundays and a list of specified days are designated as 'general holidays' which must be observed by all banks, educational establishments, public offices and government departments and can be adopted voluntarily by other employers in addition to the statutory holidays.

**Sick Leave** – The *Employment Ordinance* states that employees who are continuously employed are entitled to accrue sick leave allowance at the rate of two paid sick days each month in the first year of employment, and four paid sick leave days each month thereafter, with a maximum accumulation of 120 days. These accrued sick leave days are paid at the rate of four-fifths of the employee's average daily wages calculated over the previous 12 months (or a shorter period where the employee has been employed for a shorter period). However, payment is only due for the sick leave days when the employee is off sick for four consecutive days or more.

**Rest Days** – Employees who are continuously employed are entitled to a minimum of one rest day within every period of seven days. Rest days are required to be a continuous period of at least 24 hours without work and are in addition to statutory annual leave and statutory holidays. The *Employment Ordinance* is silent as to whether rest days should be paid or unpaid.

**Maternity Leave** – Employees who are continuously employed are entitled to a period of 10 weeks' maternity leave. If the employee's period of continuous employment is more than 40 weeks before the start of her maternity leave, then this period will be paid at a rate of four-fifths of the employee's average daily wages calculated over the previous 12 months (or a shorter period where the employee has been employed for a shorter period), otherwise it is unpaid. To be entitled to maternity leave, the employee must submit a valid medical certificate to her employer confirming the pregnancy.

**Paternity Leave** – With effect from February 2015, male employees who are continuously employed are entitled to three days' paternity leave in respect of the birth of each child of which he is the father. If the employee's period of continuous employment is more than 40 weeks immediately before the start of the paternity leave, the leave will be paid at a rate of four-fifths of the employee's average daily wages calculated over the previous 12 months (or a shorter period where the employee has been employed for a shorter period), otherwise it is unpaid.

## Wages

The definition of wages is set out in the *Employment Ordinance*. Under the Minimum Wage Ordinance, an employee is entitled to be paid wages in respect of any wage period of not less than the minimum wage. The current minimum wage rate is HK\$30 per hour but this is expected to increase to HK\$32.50 per hour with effect from 1 May 2015.

The *Employment Ordinance* sets out a number of strict provisions in relation to the manner, timing and payment of wages which employers should comply with. It also strictly prohibits deductions being made by an employer from an employee's wages other than in certain limited circumstances.

## Bonuses

Hong Kong employers often provide employees with an end-of-year payment/bonus. This is sometimes referred to as a 13-month payment, double pay, or end of year bonus and is usually paid out during the Chinese Lunar New Year period. Where bonus provisions are included in an employment contract, they are no longer payable at the discretion of the employer unless such discretion is clearly retained and this is reflected in practice. Where a bonus is contractual, the *Employment Ordinance* regulates the amount, payment and timing of the bonus when the employment contract is silent or unclear on these matters.

## Mandatory Provident Fund

Employers are required to enroll their staff in a Mandatory Provident Fund if an employee is employed for at least 60 days subject to certain exceptions for casual employees employed in the catering or construction industry. Both the employer and employee are required to contribute to the fund at a rate of 5% of the employee's relevant income, although a statutory cap applies. There are exemptions for expatriate employees given permission to remain in Hong Kong for employment purposes for less than 13 months or where the expatriate employee is a member of a provident, pension, retirement or superannuation scheme run in a jurisdiction outside Hong Kong.

## Employees' Compensation

Most employees in Hong Kong are covered by the *Employees' Compensation Ordinance* in respect of injuries arising out of and in the course of employment. Employers are required to take out a policy of insurance in respect of such liability.

## Taxation

All employees who earn income from a Hong Kong employer are liable to pay salaries tax. Employees are responsible for paying tax and employers are generally not required to make any deductions for taxation from an employee's salary. Instead, the employer has reporting duties.

## Varying terms and conditions

Employers must remember basic contractual principles when considering their ability to vary the employment contract unilaterally.

As a matter of contract law, one party cannot unilaterally vary a contract unless such a variation is authorized in the contract itself. Even if the contract does expressly allow for such unilateral variation, the power must be exercised reasonably and in light of the implied duty of good faith. Even if the employee is willing to agree to the contractual variation, employers must remember to satisfy the legal requirement of consideration.

## Occupational Safety and Health

Employers in Hong Kong are subject to common law duties in respect of the health and safety of their employees. This includes a duty to take reasonable care, to provide a safe place of work and to protect employees from foreseeable risk of injury. The *Occupational Safety and Health Ordinance* and its associated regulations also impose statutory obligations in respect of workplace safety and health on employers, occupiers of premises and employees.

## Data Privacy

Employers in Hong Kong are required to comply with data protection principles set out in the *Personal Data (Privacy) Ordinance* when collecting and using employees' personal data. Broadly, the principles require that personal data should only be used for the purposes for which it was collected, or purposes which are directly related to those purposes. The principles impose obligations in relation to informing individuals of the purposes for collecting the personal data and the use which would be made of that personal data. In addition, the principles restrict the use and storage of the personal data and require that the personal data should be

collected by means that are lawful and fair. Employers are also required to ensure that the personal data is accurate and held securely. Individuals have a right to access and correct their personal data which is held by the employer.

## Records

Employers are required under the *Employment Ordinance* to keep employment records, annual leave records, sick leave records and maternity and paternity leave records. Further, under the *Immigration Ordinance*, employers are required to keep a record of the full name of each employee, as shown on the Hong Kong ID card or travel document, and the type and number of that document. If an employee is paid less than HK\$12,300 per month (or HK\$13,300 per month with effect from 1 May 2015) the employer will also have to record the total number of hours (including any part of an hour) worked by the employee in a wage period.

## FIRING

The termination of an employment contract can be brought about in a number of ways, for example, by exercising a contractual or statutory right to terminate, by agreement or by operation of law. In the absence of any ‘unfair dismissal’ regime in Hong Kong, termination of an employment contract is generally considered to be fairly straightforward. However, the *Employment Ordinance* does provide remedies to employees on termination in certain circumstances and, therefore, it is important that employers are aware of their contractual and common law obligations as well as the statutory provisions.

## Notice requirements

In Hong Kong, both employers and employees are permitted to terminate the employment relationship by providing notice, or making a payment in lieu of notice. The required length of notice for various types of employment contracts is set out in the *Employment Ordinance* and depends on the term of the contract. For contracts renewable from month to month, the notice period is whatever the contract provides but not less than seven days. If the contract is silent on the notice period, a minimum of one month’s notice is required. For other contracts, the notice period is a minimum of seven days. Special provisions apply for notice of termination during a probationary period; during the first month, no notice is required (regardless of what the employment contract says); thereafter, not less than seven days.

An employer is entitled to summarily dismiss an employee in certain limited circumstances, including gross misconduct. Employers should note that the threshold to justify a summary dismissal in Hong Kong is very high.

## Procedural requirements

There is no procedure prescribed by statute for an employer to follow prior to dismissing an employee. However, employers should check whether there are any internal contractual procedures.

## Termination Payments

An employee may be entitled to the following payments on termination: accrued wages for work performed, a payment in lieu of notice

(calculated on the basis of the employee's average daily (or monthly) wages); accrued annual leave, outstanding holiday pay and accrued end of year payments.

In addition, employees who are dismissed by reason of redundancy or lay-off may be entitled to a severance payment if they have been in continuous employment for 24 months or more. This is capped at HK\$15,000 per year of service (and pro-rata for any incomplete year) up to a maximum of HK\$390,000. For the purposes of a severance payment, there is a statutory presumption that the termination arose by reason of redundancy. This presumption can only be rebutted by an employer proving that the employment was terminated for a reason wholly unrelated to redundancy. Employees who are not entitled to a severance payment, and who have at least five years' continuous employment, may be eligible for a long service payment on termination (calculated in the same way as the severance payment). Any amount which the employer has contributed into the employee's mandatory provident fund for the relevant period of service may be off-set against any liability to pay a severance or long service payment.

### **Protected Employment**

Employers are prohibited from terminating employees in certain circumstances including termination of employees who have served notice of pregnancy (until the employee returns from maternity leave), employees who are in receipt of sickness allowance, and employees who are in receipt of employees' compensation under the *Employees'*

*Compensation Ordinance*. Employers should also ensure that any termination decision does not involve any aspects that would contravene the discrimination legislation which prohibits less favourable treatment on the grounds of sex, marital status, pregnancy, family status, disability and race.



### **Notifications on termination**

Employers are required to notify the trustee of its Mandatory Provident Fund of the termination of an employee's employment within 10 days after the last day of the calendar month in which the employee's employment ends. An employer is also required to notify the Inland Revenue Department of the employee's termination and, if any employee is chargeable to tax and intending to leave Hong Kong for a period of one month or more following the cessation of employment, the employer is required to withhold all moneys payable to that employee until the Inland Revenue Department has issued a letter of release. If the departing employee possesses an employment visa, the employer must also notify the Immigration Department, in writing, of the termination of employment prior to the date of termination.



## Confidential Information/ Post-Termination Restrictive Covenants

Employers should ensure that they have in place sufficient protection in relation to their confidential information and clients/customers/employees to prevent a departing employee from causing significant damage to the employers' business by engaging in inappropriate conduct after termination of employment. To be enforceable, a post-termination restrictive covenant must protect a legitimate business interest and go no further than reasonably necessary to protect that interest. Some of the relevant factors taken into account to determine reasonableness include: the seniority and role performed by the employee; whether the employee had access to legal advice before signing the agreement; the proximity of the employee to the employer's key knowledge and confidential information; the geographical area of the restraint; any payments made to the employee during the restraint period; and the duration of any restraint.

## References

There is no requirement in Hong Kong that an employer provides an employee with any reference. However, where a reference is provided, so as to avoid exposure to litigation by future employers who rely on the reference, the reference should not be misleading.

This publication is intended as a general overview and discussion of the subjects dealt with. They are not legal advice, and should not be used as a substitute for taking legal advice in any specific situation. DLA Piper will accept no responsibility for any actions taken or not taken on the basis of this publication.

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## Litigation

The Labour Tribunal has exclusive jurisdiction to hear any claim for a 'sum of money' in excess of HK\$8,000 that arises from: the breach of an express or implied term in an employment contract; or the failure to comply with the provisions of the *Employment Ordinance*. Claims of HK\$8,000 and less are adjudicated by the Minor Employment Claims Adjudication Board. Claims for non-monetary remedies and claims arising out of tort are heard by the higher civil courts.

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