Anti-discrimination laws taken forward

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On 11 June 2020, the Discrimination Legislation (Miscellaneous Amendments) Bill 2018 (Bill) was passed at the Legislative Council. The Bill introduced amendments to Hong Kong’s four anti-discrimination legislations, namely the Sex Discrimination Ordinance (SDO), the Disability Discrimination Ordinance (DDO), the Family Status Discrimination Ordinance (FSDO), and the Race Discrimination Ordinance (RDO) (Amendments). Filling the gaps in the existing laws, these Amendments allow broader scope of legal protection against discrimination and harassment.

We summarise the major Amendments and our recommendations to employers as follows:

**Breastfeeding**

**Amendments**
- Express provisions are introduced in the SDO to prohibit direct and indirect discrimination on the ground of breastfeeding.
- The definition of ‘breastfeeding’ will now include expression of breast milk and cover women breastfeeding any child, not just limited to their own child.

**Recommendations**
- Although the Amendments do not mandate the provision of accommodation to breastfeeding women, employers may wish to consider providing lactation breaks and facilities to employees who have such need.
- According to the Employers’ Guide – to Establishing Breastfeeding Friendly Workplace issued by the Department of Health, lactation breaks (about two 30-minute breaks during an eight hour shift) should be allowed for at least one year after childbirth. A private space and a refrigerator should be provided for employees to express and store breast milk.

Note that separately, the Sex Discrimination (Amendment) Bill 2020, which was gazetted on 31 January 2020, will introduce provisions in the SDO prohibiting harassment on the ground of breastfeeding. The Sex Discrimination (Amendment) Bill 2020 if passed will come into operation at the same time as Part 2 of the Bill (amendments to the SDO relating to discrimination on the ground of breastfeeding).

**Harassment at workplace**

**Amendments**
- New provisions are added in the SDO, the DDO and the RDO to make it unlawful for a workplace participant to harass another workplace participant at a workplace of both of them. The definition of ‘workplace participants’ covers employees, employers, contract workers, principal of a contract worker, commission agents, principal of a commission agent, partners in a firm, interns and volunteers.
- Where a person engages an intern or a volunteer, new provisions are added to hold both that person as well as the intern or volunteer liable for workplace harassment done
by that intern or volunteer. It is a defence for the person to prove that he/she took reasonably practicable steps to prevent the intern or volunteer from doing that act. Further, the intern or volunteer will be deemed to aid the doing of that act by that person.

- The DDO and RDO are amended so as to protect service providers from disability and racial harassment by customers which also cover disability and racial harassment between service providers and customers where the acts of harassment are committed on local ships or aircraft outside Hong Kong.

- The DDO and SDO are amended to protect members or applicants for membership of a club from harassment by the management of the club.

**Recommendations**

- Employers should establish a workplace harassment policy (or make modification to their current policy) which applies to all ‘workplace participants’. The policy should set out clearly guidelines to recognise, report and handle harassment.

- Employers should also establish a third party harassment policy which applies to external parties whom the company/firm is connected to or do business with, such as service providers and customers.

### Scope of racial discrimination

**Amendments**

- References to ‘near relative’ in the RDO are replaced with references to ‘associate’ so that it is unlawful to discriminate or harass a person on the grounds of the race of an associate of the person. ‘Associate’ includes a spouse, a relative and a carer, of the person; another person living with the person on a genuine domestic basis; and another person who is in a business, sporting or recreational relationship with the person.

- The meanings of ‘race’ and ‘racial group’ are expanded to include a race, colour, descent or national or ethnic origin that is imputed to a person so as to provide protection from direct and indirect racial discrimination and harassment by imputation.

**Recommendations**

- The scope of racial discrimination is largely expanded to align with the DDO. In determining whether a claimant is the ‘associate’ of another person, Hong Kong Courts would consider the factual circumstances on a case-by-case basis with reference to the literal and ordinary meaning of the provisions and the legislative intent.

- In the context of a workplace, we recommend employers to maintain transparent and systematic decision-making processes when it comes to manpower planning, and keep proper documentation.

### Award of damages

**Amendments**

- In determining an award of damages in claims in respect of an act of indirect discrimination, ‘no intention to discriminate’ will no longer be a defence for the respondent under the SDO, FSDO and RDO.

**Recommendations**

- Employers should be mindful of the possible scenarios that may amount to indirect discrimination. They should have in place more stringent guidelines to reduce the possibility of committing an act of indirect discrimination in the workplace.

- In handling complaints in respect of an act of discrimination, employers should have an appropriate follow-up mechanism to ensure the complaint is properly assessed and duly dealt with.
Looking forward

The Discrimination Legislation (Miscellaneous Amendments) Ordinance 2020 (Ordinance) will come into effect on the day it is published in the Gazette except for Part 2 (amendments to the SDO relating to discrimination on the ground of breastfeeding) which will come into effect 12 months after the publication of the Ordinance in the Gazette. The passing of the Amendments is a big step forward in fostering more comprehensive protection against discrimination and harassment. As the amended laws will have wider interpretations and expanded scopes of protection as well as liability, employers should review their existing policies to ensure compliance with the changes. Employees should be made aware of what they could be availed of in case discrimination or harassment occurs in the workplace.

Want to know more?

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