

Legal considerations when employing an employee in Hong Kong



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The Employment Ordinance and the Minimum Wage Ordinance

The Employment Ordinance (**EO**) is the main legislation prescribing the minimum rights, benefits and protection for employers and employees in Hong Kong. The Minimum Wage Ordinance (**MWO**) imposes a statutory minimum wage on employers and employees in Hong Kong. Under the EO and MWO, employers and employees cannot contract out of the prescribed minimum rights, benefits and protection given to the respective parties by the EO and MWO.

To whom do the EO and the MWO apply?

Both the EO and the MWO apply to every employee engaged under a contract of employment in Hong Kong with only limited exceptions. These exceptions include:

- employees who are family members living with the employers;
- certain employees working outside of Hong Kong; and
- apprentices.

Whether an employment relationship exists is a matter of fact.

Statutory minimum wage under the MWO

The MWO requires that the wages payable to an employee in respect of any wage period should be at least equal to the statutory minimum wage rate on average for the total number of hours worked. For the purposes of computing minimum wage, "hours worked" means the time during which the employee is, according to his employment contract or at the direction of the employer, in attending at a place of employment, or travelling in connection with his employment (excluding travelling between the employee's residence and his place of employment).

The current statutory minimum wage rate is set at HK\$37.5 per hour. Based on the current rate, the statutory minimum wage payable to an employee for a wage period is calculated as follows:

Statutory minimum wage = HK\$37.5 x no. of hours worked

The monthly monetary cap (under which an employer is required to keep a record of the total number of hours worked by an employee in a wage period) is at HK\$15,300.

Minimum protection under the EO

All employees covered by the EO, irrespective of their hours of work, are entitled to basic protection under the EO including (but not limited to) payment of wages, restrictions on wage deductions and the granting of statutory holidays.

Employees who are employed under a continuous employment contract are further entitled to benefits such as rest days, paid annual leave, paid maternity leave, paid paternity leave, sickness allowance, severance payment and long service payment.

Continuous employment

Under the First Schedule of the EO, an employee is deemed to have been continuously employed if he/she has been employed under a contract of employment for a period of four or more weeks, with each week working for no less than 18 hours. Certain breaks such as maternity leave, paternity leave and sickness days are deemed not to interrupt the continuity of employment.

Employee protection/benefits

Employees employed under a continuous contract are entitled to the following protection and benefits:

Rest days

Employees are entitled to not less than one rest day in every period of seven days. These rest days shall be appointed by the employer, which may be granted on a regular or irregular basis.

Annual leave

Employees are entitled to paid annual leave ranging from a minimum of 7 days to a maximum of 14 days depending on their length of service. The daily rate of annual leave pay is a sum equivalent to the daily average of the wages earned by the employee.

Maternity leave and pay

All female employees are entitled to maternity leave of 14 weeks and those who have been employed under a continuous contract for a minimum qualifying period are entitled to be paid during maternity leave. A pregnant employee may decide to commence her maternity leave from two to four weeks before the expected date of confinement, with the agreement of her employer. Maternity leave pay is currently paid at the rate of four-fifths of the daily average wages earned by the female employee.

Paternity leave and pay

All male employees are entitled to paternity leave of five days for the birth of each child (twins or multiple births in one pregnancy are treated as one child) and those who have been employed under a continuous contract for a minimum qualifying period are entitled to be paid during paternity leave. Paternity leave can be taken consecutively or separately during the period beginning 4 weeks before the expected date of delivery of the child and ending 14 weeks after the actual date of delivery of the child. Paternity leave pay is currently paid at the rate of four-fifths of the daily average wages earned by the male employee in the 12-month period preceding the day of paternity leave.

Sickness allowance

Employees are currently entitled to paid sickness leave at the rate of four-fifths of their daily average wages. Sickness days can be accumulated at the rate of two paid sickness days for each completed month of employment during the first 12 months of employment and four paid sickness days for each month of employment thereafter, up to a maximum of 120 paid sickness days. The entitlement to sickness pay applies only if the sickness leave taken is not less than four consecutive days.

Severance payment

An employee who has been employed under a continuous contract for 24 months or more and is dismissed by reason of redundancy or his fixed term employment contract expires without being renewed due to redundancy or lay-off is entitled to severance payment. The amount of severance payment is two-thirds of the employee's last full month's wages or two-thirds of HK\$22,500, whichever is less, multiplied by the number of years of service (pro-rata for an incomplete year). The current maximum severance payment payable is HK\$390,000. Currently, the amount of any gratuity or retirement scheme payment to the employee, based on length of service, is deductible from the amount of severance payment entitlement. In the case of a retirement scheme payment, only the employer's contributions (and interest return thereon) may be deducted. However, the off-setting mechanism may be abolished by the government in the future.

Long service payment

An employee who has been employed under a continuous contract for five years or more and is dismissed for any reason other than redundancy or serious misconduct, is entitled to a long service payment on termination of employment by the employer. An employee who has been paid a severance payment will not be entitled to a long service payment.

Currently, the calculation of long service payment is the same as severance payment and is also subject to the same maximum as stated above. The amount of any gratuity and retirement scheme payment paid to the employee, based on length of service, is deductible from the amount of long service payment entitlement, as in the case of severance payment.

End of year payment

For every employment contract made after 27 June 1997, it is presumed that an annual payment or annual bonus (if provided) is not of a gratuitous nature and is not payable only at the discretion of the employer unless a written term or condition in the contract expresses an intention to the contrary.

Prohibition to making deductions from wages

In general, employers are not allowed to make deductions from the wages of their employees.

There are, however, a number of limited exceptions. These exceptions include deductions:

- for absence from work;
- for damage to or loss of goods or equipment belonging to, or in the possession or control of, the employer or expressly entrusted to an employee for custody where such damage or loss is directly attributable to the employee's neglect or default;
- for meals supplied by the employer at the request of the employee;
- for accommodation provided by the employer and occupied by the employee or the family of the employee;
- for recovery of any advance or over-payment of wages made by the employer to the employee;
- for any loan owed by the employee to the employer;
- in respect of contributions to be paid by the employee through the employer for any medical benefit scheme, superannuation scheme, retirement scheme or thrift scheme of which the employee is a member;
- authorised by an enactment of law;
- approved by the Commissioner for Labour;
- in respect of paternity leave pay paid to the employee before the required document is provided if the employee fails to provide the employer with the required document within 3 months after the first day of paternity leave taken, or if the employee has ceased to be employed, fails to provide the required document before the cessation; and
- in respect of any payment that an employee would be liable to pay for wrongfully terminating an employment contract.

All other deductions not listed above are unlawful. An employer who makes unlawful deductions commits a strict liability offence and will be liable to prosecution and, upon conviction, to a fine and imprisonment for one year.

Definition of wages

Wages under Hong Kong law means all remuneration, earnings, allowances, tips and service charges, however designated or calculated, payable to an employee in respect of work done or work to be done. Allowances including travelling allowances, attendance allowances, commission and overtime pay are within the definition, but the following are excluded:

- the value of any accommodation, education, food, fuel, light, medical care or water provided by the employer;
- any contribution paid by the employer on his own account to any retirement scheme;
- any commission which is of a gratuitous nature or which is payable only at the discretion of the employer;
- any attendance allowance or attendance bonus which is of a gratuitous nature or which is payable only at the discretion of the employer;
- any travelling allowance which is of a non-recurrent nature;
- any travelling allowance payable to the employee to defray actual expenses incurred by him by the nature of his employment;
- the value of any travelling concession;
- any sum payable to the employee to defray special expenses incurred by him by the nature of his employment;
- any end-of-year payment or any proportion thereof;
- any annual bonus which is payable by the employer at his discretion; and
- any gratuity payable on completion or termination of employment.

Overtime pay which is of a consistent character or the monthly average of which over the past 12 months is 20% or more of the average monthly wages of the employee during the same period should also be included in calculating wages.

Calculating the daily or monthly average wages earned

When calculating the various leave pay, the relevant time period used to determine the average daily wage is the 12 month period on or immediately before the date of commencement of the leave, depending on whichever is applicable.

Whenever the employer concerned has employed the employee for a period shorter than 12 months immediately before the date of commencement of leave, the shorter period is the relevant time period.

A simplified formula

In calculating the respective average wages, certain periods of time in which the employee was not paid his/her wages or full wages have to be disregarded and deducted from the relevant time period. Such periods would include, but are not limited to, rest day, maternity leave, paternity leave, sick leave, holidays and annual leave taken by the employee (**Disregarded Periods**).

Accordingly, any amount of wages paid to the employee for the Disregarded Periods and the Disregard Periods are to be excluded in calculating the average daily or monthly wages earned by the employee. After taking into account the exclusion, the resulting amount (**Relevant Amount**) will be used in the calculation of the respective average wages.

The respective average daily and monthly wages of an employee is to be calculated as follows:

Daily average wage = Relevant Amount / (365 days - Disregarded Periods)

Monthly average wage = Relevant Amount / (12 months - Disregarded Periods)

In the event that the employee has been employed for less than 12 months, the period of 365 days and 12 months should be replaced with the shorter period of employment.

Termination

The employment of an employee on probation may be terminated by the employer or the employee without notice during the first month and with at least seven days' notice after the first month. In all other cases, the employee is entitled to:

- at least one month's notice of termination where the contract does not provide for the length of notice required to terminate the contract; or
- seven days or the agreed period, whichever is the longer, where the length of notice of termination is provided for in the contract.

Alternatively, a contract of employment can be terminated without notice by making a payment in lieu of notice equal to the amount of wages which would have accrued to the employee during the requisite period of notice.

Notwithstanding the above, if an employee has willfully disobeyed lawful and reasonable order, committed serious misconduct or fraud or is habitually neglectful of his/her duties, the employer may summarily dismiss the employee without notice or payment in lieu for good cause.

Statutory restrictions on termination of employment contract

The EO provides that it is unlawful for an employer to dismiss an employee under the following circumstances:

- when a female employee has been confirmed pregnant and has served a notice of pregnancy on the employer (up till and including the day she is due to return to work on the expiry of her maternity leave or the date of cessation of pregnancy);
- when an employee is on statutory sick leave;
- if one of the reasons for dismissing an employee is by reason of his giving of evidence or information in any proceedings or inquiry in connection with the enforcement of the EO, work accidents or breach of work legislation;
- if one of the reasons for dismissing an employee is due to his trade union membership and activities, disability, gender, marital status, pregnancy, race, or family status; or
- when an employee is suffered from work related injury or occupational diseases but he has not entered into an agreement with the employer for employee's compensation or before the issue of a certificate of assessment.

Employers who terminate an employee's employment in contravention of these prohibitions are liable to prosecution and, upon conviction, are liable to a fine, and in some instances imprisonment.

Employers should also ensure that employees are terminated only for valid reasons as provided under the EO, namely:

- the conduct of the employee (such as misconduct);
- the incapability or absence of qualifications of the employee for performing work of the kind which he was employed to do;
- the redundancy of the employee or other genuine operational requirements of the business of the employer;
- the fact that the employee or the employer or both of them would, in relation to the employment, be in contravention of the law, if the employee was to continue to work in his original position or, was to continue with the original terms of his/her contract of employment; or
- any other reason of substance, which, in the opinion of the court or the Labour Tribunal, was sufficient to warrant the dismissal of the employee or the variation of the terms of his/her contract of employment.

Any termination that does not fit into one of the 5 categories above will be deemed unreasonable. In such circumstances, the employee will be entitled to seek remedies such as an order for reinstatement, re-engagement or an award of terminal payments from the Labour Tribunal.

Termination payments

Termination payments may differ depending on the length of service, the terms of the employment contract and the reason for termination. These payments will usually include the following:

- outstanding wages;
- notice/payment in lieu of notice (if applicable);
- payment in lieu of any accrued but untaken annual leave;
- any outstanding sum of end of year payment, and pro rata end of year payment for the current payment period (if any);
- where appropriate, long service payment or severance payment;
- other payments under the employment contract, such as gratuity, provident fund, etc.

Others

Insurance coverage

Employers are required to maintain insurance coverage in respect of employees employed in Hong Kong pursuant to the Employees' Compensation Ordinance to cover their liabilities for workrelated injuries, but there is currently no statutory requirement to provide medical benefits.

Mandatory Provident Fund

The Mandatory Provident Fund Schemes Ordinance requires both the employer and the employee to contribute 5% of the employee's relevant income into a mandatory provident fund (**MPF**) scheme.

Currently, the minimum relevant income is fixed at HK\$7,100. This means that if the monthly relevant income of an employee is less than \$7,100, the employee will not be required to make the employee's contribution, whilst his employer remains obliged to make the employer's contribution.

The current maximum level of mandatory contribution required is HK\$1,500 paid each month by both the employer and the employee. The employer and/or the employee may make additional voluntary contributions to the scheme if they wish.

Commencing from the year of assessment 2019 - 2020, employees who are members of an MPF scheme or an MPF exempted ORSO scheme can claim tax deductions under salaries tax and personal assessment for making voluntary contributions to tax deductible voluntary contribution accounts. The aggregate maximum tax deductible limit for each taxpayer is set at HK\$60,000 per year.

Taxation

Employers are required to notify the Inland Revenue Department (**IRD**) of the commencement and cessation of employment of its employees within a prescribed time. If an employer is aware that its employee is about to leave Hong Kong for a period exceeding 1 month (except in the case of an employee who is required in the course of his employment to leave Hong Kong at frequent intervals), it has to notify the IRD by filing the prescribed form, and to withhold payments of salaries and all other moneys due to the employee for a period of one month from the filing of the prescribed form or until receipt of the Letter of Release issued by the IRD, whichever is earlier. Employers are also required to file annual tax returns in respect of all employees shortly after the end of each tax year (31 March).

Employment visa

Generally speaking, every person who does not have a right of abode/right to land/unconditional stay in Hong Kong and wishes to enter Hong Kong for the purpose of employment is required to obtain an employment visa. Under the existing immigration policy, a person seeking to enter Hong Kong for the purpose of employment should possess special skills, knowledge or experience of value relevant to the job and which is not readily available in Hong Kong and that he/she is not filling a post which can be filled locally. There must be a sponsor company in Hong Kong (usually the employing company).

The employer will commit a serious criminal offence punishable by fine and imprisonment if it permits a person without an appropriate visa to be employed in Hong Kong.

Discrimination

The introduction of the Sex Discrimination Ordinance, Disability Discrimination Ordinance, Family Status Discrimination Ordinance and Race Discrimination Ordinance in Hong Kong makes any discrimination in the workplace by reason of a person's gender, marital status, pregnancy, breastfeeding status, disability, race or family status unlawful. These ordinances also make other forms of discrimination including victimisation, sexual harassment, racial harassment and vilification and disability harassment and vilification unlawful.

Currently, only discrimination as described above is unlawful. It is therefore strictly speaking not unlawful for an employer to discriminate on some other basis such as a person's age, physical appearance, height, educational attainment, political opinion, religious beliefs, social skills or sexual orientation. However, the Equal Opportunities Commission is seeking to make discrimination on some or all of these grounds unlawful.

Our services

Our Employment and Pensions Practice is designed to meet client needs at every stage of an employment relationship. Our practice group advises client on a range of legal matters including general employment issues, employment documentation, employee benefits and incentives, day-to-day HR issues, retirement schemes, pension regulations, MPF issues, discriminatory issues, data protection, employment disputes and litigation, immigration and executive transfers, work and residence visa, the employment aspects of M&A, and transfer of business undertakings and restructurings.

About Deacons

Deacons is Hong Kong's premier independent firm. We provide an extensive range of legal and commercial services to local and international corporations. With 170 years of experience in providing legal services, our clients are assured of the integrity and stability of one of the region's oldest and most respected law firms.

Deacons has established three representative offices in the People's Republic of China: Beijing, Guangzhou and Shanghai. Through our own offices and our relationships with various law firm networks including the Employment Law Alliance, we can assist our clients, comprising leading corporations, governments and public authorities, private businesses and financial institutions, to satisfy their legal services requirements throughout Asia and other parts of the world.



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