

# Corporate Commercial Client Alert

## Employment & Pensions

8 February 2024



*Deacons' employment team wishes you a healthy and prosperous Lunar New Year of the Dragon in 2024! We are delighted to announce that our employment practice has been recognized as Band 1 by Legal 500 Asia Pacific 2024 and Chambers and Partners (Greater China Region) 2024.*





Cynthia Chung  
Head of Employment & Pensions,  
Corporate Commercial Practice Group



Elsie Chan  
Partner



Helen Liao  
Partner



Stephanie Yip  
Associate



Eunice Wu  
Registered  
Foreign Lawyer  
(PRC)



Bernie Ng  
Associate



Daniel Xu  
Registered  
Foreign Lawyer  
(PRC)



Nicole Chong  
Associate



Allen Zhang  
Corporate  
Commercial  
Executive

As we reflect on 2023, a year that marked the world's return to a state of normality post-pandemic, we would like to provide you with a summary of the major developments in Hong Kong employment law over the past year. Furthermore, we will provide an outlook on the anticipated changes that lie ahead in 2024.

## Part One: Review of 2023

### February 2023

#### Expansion of Pilot Scheme in Hong Kong to Facilitate Short-term Visitors without Employment Visa Requirement

The Pilot Scheme on Immigration Facilitation for Visitors Participating in Short-term Activities in Designated Sectors in Hong Kong has been expanded to include the addition of two new sectors ((1) Finance, (2) Development and Construction) and 50 authorised host organizations, effective from 1 February 2023.

Under the scheme, eligible visitors can participate in specified short-term activities without the need for an employment visa or entry permit. The duration of participation is limited to 14 consecutive calendar days. Eligible visitors may receive remuneration for their participation but must adhere strictly to the specified activities and roles outlined in the invitation letters issued by authorised host organizations.

It's important for individuals and organizations to familiarise themselves with the requirements and seek legal advice to ensure compliance with immigration and employment laws.

### April 2023

#### Validity of dual employment contract

It is not uncommon for employers and employees to enter into dual employment contracts with overlapping contractual obligations, especially in the context of cross-border employment.

The case of *AIM Global Holdings Ltd. & OR's v Chin Kin Allen & Rising Dragon Global Ltd* [2023] HKCFI 1126 addressed the validity of dual employment contracts where there are overlapping obligations. The court upheld the validity of the contracts, ruling that performance under one contract could constitute valid consideration for another, even if there was some overlap in duties.

Employers should be cautious when arguing that an employment contract is void due to overlapping obligations.

Please click [here](#) to watch our Grab and Go episode on this judgment.

**April 2023**

### **Enhanced employee compensation levels**

Increased levels of compensation under the Employees' Compensation Ordinance (ECO) came into effect on 13 April 2023.

Under the ECO, the levels of nine compensation items were increased, including the ceiling of monthly earnings for calculating compensation for death and permanent total incapacity, minimum amounts of compensation for death and permanent total incapacity, compensation for employees requiring attention by another person, surcharges on late payment of compensation, funeral expenses, the cost of supplying, fitting, repairing, renewing a prosthesis or surgical appliance, and the minimum monthly earnings for calculating periodical payments during work injury sick leave.

**May 2023**

### **Statutory Minimum Wage raised to HK\$40 per hour**

Beginning from 1 May 2023, the minimum wage rate in Hong Kong has been increased to HK\$40 per hour. Additionally, the monthly threshold amount for keeping records of hours worked has been raised accordingly to HK\$16,300 per month. Employers should ensure that they are in compliance with the new minimum wage rate.

**May 2023**

### **First Hong Kong Labour Tribunal Decision Recognises Gig Worker Couriers as Employees**

In a recent case involving Zeek, a food and parcel delivery platform, the Hong Kong Labour Tribunal made a landmark decision classifying gig worker couriers as employees rather than independent contractors. The Tribunal considered 11 factors in examining all the features of their relationship against the indicia developed in case law with a view to deciding whether, as a matter of overall impression, the relationship was one of employment between Zeek and the couriers.

While this ground breaking ruling by the Labour Tribunal has sparked significant public debate on the employment status of gig workers and has prompted discussions regarding the necessity of enacting new laws to protect the rights and well-being of these workers, it is important to highlight that the court evaluates employment relationships on a case-by-case basis, and this specific judgment does not imply that all gig workers are automatically considered employees. Further developments and discussions on the employment status of gig workers in Hong Kong are anticipated.

**May 2023**

### **Court clarifies the contractual nature of discretionary bonuses**

The District Court in the case of *Kan Kin Tong v. Man Leong Fire Services Limited* [2023] HKCU 2020 ruled that the sole labelling of a bonus as discretionary does not determine its nature.

The court emphasised the significance of the actual practices and circumstances surrounding the bonus scheme in establishing its contractual nature. Even if a bonus is described as discretionary, if it is consistently paid upon meeting performance targets, it can be deemed contractual.

Furthermore, the court highlighted that even when a bonus is genuinely discretionary, the employer has an implied obligation to exercise its discretion in good faith. This means that the employer cannot exercise its discretion perversely or arbitrarily but must consider relevant factors and act in the best interests of the employee.

Please click [here](#) to watch our Grab and Go episode on this judgment.

**May 2023**

### **Enhancing Integrity: Hong Kong Implements Mandatory Reference Checking Scheme for Banking Sector**

Phase 1 of the Mandatory Reference Checking Scheme ("MRC Scheme") was launched by the Hong Kong Monetary Authority ("HKMA") in May 2023 to promote and protect the integrity of the banking sector by addressing the "rolling bad apples" phenomenon. The MRC Scheme aims to prevent individuals with a record of misconduct from securing employment in other institutions without disclosing their past misconduct, and is designed to enhance credibility and public confidence in the banking sector.

For more details, please see our [client alert](#).

**June 2023**

### **Repeal of provisions relating to COVID-19 vaccination under Employment Ordinance**

The Employment (Amendment) Ordinance 2022 (Commencement) Notice took effect on 16 June 2023 to repeal the provisions relating to COVID-19 vaccination under the Employment Ordinance (EO).

The vaccination provisions, which came into effect on 17 June 2022, state that the termination of an employee for non-compliance with a valid COVID-19 vaccination request from their employer is not considered an unfair dismissal.

The repeal marks another significant measure by the Hong Kong Government to facilitate the return to full normalcy in Hong Kong society post-pandemic.

For more details, please see our [client alert](#).

**August 2023**

### **Spotlight on Pregnancy Discrimination**

The case of *周露娜 v 中旅貨運物流中心有限公司* [2023] HKCU 3488 highlights the sensitivity surrounding the termination of employment of pregnant women.

Despite the employer's claim that the non-renewal of the pregnant employee's contract was due to business restructuring and downsizing, the court found the employer's alleged reasons to be untrue. This conclusion was supported by the employer's swift hiring of a replacement after learning about the employee's pregnancy, which constituted discrimination under the Sex Discrimination Ordinance.

As a result, the court awarded the pregnant employee compensation for loss of income, loss of bonus, and compensation for injury to feelings. The assessment of compensation for injury to feelings was based on the assumption that the employer would issue an apology and a reference letter. While previous case law had established that the court generally could not compel an unwilling employer to apologise, the employer's refusal to apologise may be taken into account when determining the compensation amount.

This judgment serves as a reminder of the legal protections afforded to pregnant employees and the consequences of discriminatory actions.

Please click [here](#) to watch our Grab and Go episode on this judgment.

**September 2023**

### **Lessons Learned: Taking Reasonable Action in Employee Claims**

The judgment in the case of *Hong Kong Vending System Company Limited v Lui Kin Ming and Another* [2023] HKCU 3725 serves as a crucial reminder for employers to establish a solid foundation when pursuing employment-related claims. Whilst it is natural for employers to be concerned when key employees join competitors, it is important to avoid using the legal process as a means to gather evidence for claims. Employers must carefully assess the remedies sought and select the appropriate legal forum to prevent unnecessary time and expenses.

In this recent District Court case, an employer's claims against former employees were dismissed due to a lack of reasonable action. The claims involved allegations of violating employment obligations, such as competing with the

company and sharing confidential information with a competitor. Furthermore, it was determined that the remaining claim, which concerned the breach of a non-solicitation provision by one employee, should have been exclusively filed in the Labour Tribunal. Filing the claim in the wrong court was considered an abuse of the legal process.

## Part Two: Outlook for 2024

### More details on abolition of MPF offsetting mechanism to be released

The Legislative Council passed the Employment and Retirement Schemes Legislation (Offsetting Arrangement) (Amendment) Bill 2022 (the Bill) in June 2022 to abolish the use of the employers' MPF mandatory contributions to offset severance payment (SP) and long service payment (LSP).

In April 2023, the Chief Executive announced that the abolition of the MPF offsetting arrangement will take effect on 1 May 2025.

Given the target to officially abolish the MPF offsetting arrangement in 2025, we expect that more related information will be released this year.

### Proposed Revision to "Continuous Contract" Requirement Under Hong Kong's Employment Ordinance

The Labour Advisory Board (LAB) – a non-statutory body that advises the Commissioner of Labour on labour matters – has recently on 1 February 2024 reached consensus to relax the definition of "continuous contract", also known as the "418" requirement, under the Employment Ordinance (EO). The current requirement grants comprehensive employment benefits to employees who have worked for the same employer for four weeks or more, with at least 18 hours worked each week.

To extend employment benefits to more individuals, the LAB has agreed to revise the "418" requirement by using the aggregate working hours over four weeks as the basis for determining benefit entitlements, and setting the four-week working-hour threshold at 68 hours.

An amendment bill will be introduced this year to implement the revised requirement once this consensus is reported to the legislature's manpower panel.

### Expanded Statutory Holidays from 2024 Onwards

Starting in 2024, the first weekday after Christmas Day will be added as a statutory holiday in Hong Kong, so that there will be a total of 14 statutory holidays. Furthermore, the number of statutory holidays will in accordance with the Employment (Amendment) Ordinance 2021 progressively increase to 17 days by the year 2030, whereby one additional statutory holiday will be added every two years. Easter Monday will be added as a statutory holiday from 2026, followed by Good Friday from 2028, and the day following Good Friday from 2030.

Other provisions related to statutory holidays remain unchanged. Please be reminded that all employees, including domestic helpers, are entitled to statutory holidays regardless of their weekly working hours or length of service. Employees who have been continuously employed for at least 3 months preceding a statutory holiday are entitled to holiday pay. Employers are prohibited from making any payments in lieu of granting a holiday, and if a statutory holiday falls on a rest day, the employee should be granted an alternative holiday or a substituted holiday if required to work.

## Want to know more?

**Cynthia Chung**  
**Partner**

cynthia.chung@deacons.com  
+852 2825 9297

**Elsie Chan**  
**Partner**

elsie.chan@deacons.com  
+852 2825 9604

**Helen Liao**  
**Partner**

helen.liao@deacons.com  
+852 2825 9779

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