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**Published by**

Law Business Research Ltd  
Meridian House, 34-35 Farringdon Street  
London, EC4A 4HL, UK

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© Law Business Research Ltd 2021  
No photocopying without a CLA licence.  
First published 2006  
Sixteenth edition  
ISBN 978-1-83862-680-8

Printed and distributed by  
Encompass Print Solutions  
Tel: 0844 2480 112



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# Labour & Employment 2021

**Contributing editors**

**Matthew Howse, K Lesli Ligorner, Walter Ahrens,  
Michael D Schlemmer and Sabine Smith-Vidal**

Morgan, Lewis & Bockius LLP

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Lexology Getting The Deal Through is delighted to publish the sixteenth edition of *Labour & Employment*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Austria, Hong Kong, Hungary, Mauritius, Romania, Singapore and Taiwan.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Matthew Howse, K Lesli Ligorner, Walter Ahrens, Michael D Schlemmer and Sabine Smith-Vidal of Morgan, Lewis & Bockius LLP, for their continued assistance with this volume.



London  
April 2021

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This article was first published in May 2021  
For further information please contact [editorial@gettingthedealthrough.com](mailto:editorial@gettingthedealthrough.com)

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# Hong Kong

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## LEGISLATION AND AGENCIES

### Primary and secondary legislation

1 | What are the main statutes and regulations relating to employment?

#### Employment Ordinance

The Employment Ordinance is the main statute governing employment law in Hong Kong. The Ordinance governs, among others:

- employee protection;
- employee benefits;
- wage protection;
- annual leave, sick leave and holidays;
- maternity or paternity protection; and
- severance and long-service payment.

#### Minimum Wage Ordinance

The Minimum Wage Ordinance establishes a statutory minimum wage regime.

#### Employees' Compensation Ordinance

The Employees' Compensation Ordinance regulates liability and compensation for injuries suffered during employment.

#### Occupational Safety and Health Ordinance

The health and safety protection of employees in general workplaces is governed by the Occupational Safety and Health Ordinance.

#### Factories and Industrial Undertakings Ordinance

The Factories and Industrial Undertakings Ordinance protects the health and safety of employees in certain industries:

- factories;
- construction sites;
- catering establishments;
- cargo and container handling undertakings;
- repair workshops; and
- other industrial workplaces.

#### Labour Tribunal Ordinance

The Labour Tribunal Ordinance establishes the Labour Tribunal's jurisdiction over breaches of employment or apprenticeship contracts performed in Hong Kong. The Labour Tribunal also has jurisdiction on contracts of employment partially or wholly performed outside of Hong Kong, where the governing law is Hong Kong or where there is some connection to Hong Kong.

#### Personal Data (Privacy) Ordinance

The Personal Data (Privacy) Ordinance protects the privacy of the personal data of individuals (including the collection and use of the personal data of employees and job applicants).

#### Discrimination ordinances

There are four ordinances, namely the Race Discrimination Ordinance, Disability Discrimination Ordinance, Sex Discrimination Ordinance and Family Status Discrimination Ordinance, which prohibit discrimination or harassment in employment.

#### Mandatory Provident Fund Schemes Ordinance

The Mandatory Provident Fund Schemes Ordinance provides for the retirement protection framework in Hong Kong. It establishes a system of employment-related accrual of financial benefits to protect the general workforce's financial needs after retirement, known as the Mandatory Provident Fund.

#### Protected employee categories

2 | Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

Generally, article 22 of the Bill of Rights Ordinance protects all persons from discrimination on any ground. Discrimination on the basis of race, colour, descent, national or ethnic origin (Race Discrimination Ordinance), disability (Disability Discrimination Ordinance), gender, pregnancy, marital status (Sex Discrimination Ordinance), family status (Family Status Discrimination Ordinance) and trade union membership (Part IVA of the Employment Ordinance) is prohibited. From 19 June 2021, discrimination on the basis of breastfeeding would also be unlawful under the Sex Discrimination Ordinance. Harassment is also prohibited under the Sex Discrimination Ordinance, Race Discrimination Ordinance and Disability Discrimination Ordinance.

Proceedings may be brought under the discrimination ordinances as well as their employers regardless of whether the acts were committed with the employer's knowledge or approval. Any person aiding and abetting the unlawful conduct may also be held liable. A victim of discrimination or harassment, or both, may be awarded compensation for specific monetary loss, punitive or exemplary damages and damages for injury to feelings if civil proceeding are successful.

### Enforcement agencies

- 3 | What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

#### Labour Department

The Labour Department is an integral governmental agency. Its scope of responsibility is reflected through the enforcement of employment statutes and regulations, which primarily involves payments made to employees in insolvency, the oversight of employees' compensation and the registration of trade unions for employees.

#### Minor Employment Claims Adjudication Board (MECAB)

Established under the Minor Employment Claims Adjudication Board Ordinance, MECAB provides accessible, expeditious and inexpensive employment dispute adjudication services for minor employment claims that involves fewer than 10 claimants and a claim amount not exceeding HK\$8,000 per claimant.

#### The Labour Tribunal

The Labour Tribunal has exclusive jurisdiction over a wide range of employment-related monetary claims arising from breaches of employment contracts or non-compliance with the Employment Ordinance. However, it does not have jurisdiction over claims in torts or any claims involving non-monetary relief. Legal representation is generally not permitted in the Labour Tribunal.

#### District Court

The District Court has exclusive jurisdiction in relation to discrimination cases and claims arising out of Employment Compensation Ordinance.

#### High Court

The Labour Tribunal may decline jurisdiction for any reason on its own volition or upon the application of either party and transfer the case to the Court of First Instance. When deciding whether to transfer the case, the Tribunal will consider all relevant factors including, among others, the complexity of the case, the size of the claim and whether the parties would benefit from legal representation.

## WORKER REPRESENTATION

### Legal basis

- 4 | Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

The right for Hong Kong residents to form and join trade unions and the freedom of association is derived from article 27 of the Basic Law.

Employees have a statutory right to join registered trade unions, to take part in trade union activities and to associate with others for the purpose of forming trade unions. The Trade Unions Ordinance provides a system of registration for trade unions.

An employer cannot prevent its employees from exercising these rights and it cannot discriminate against an employee based on his or her involvement in a trade union. It is also unlawful for an employer to make an offer of employment conditional upon the job applicant not being a member of a trade union. Employers breaching these rights will commit an offence that may result in a maximum fine of HK\$100,000.

### Powers of representatives

- 5 | What are their powers?

A registered trade union has the right to sue in its own name and has the power to hold property, enter into contract, institute and defend suits and do all things necessary for the purposes of its constitution.

## BACKGROUND INFORMATION ON APPLICANTS

### Background checks

- 6 | Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

Background checks are generally allowed but employers should be aware of the prohibitions under the discrimination and data privacy laws in Hong Kong.

In particular, the background check should not be conducted in a manner that amounts to unlawful discrimination and employers should ensure the collection and processing of the applicants' personal data comply with the requirements of the Personal Data (Privacy) Ordinance (eg, providing a personal information collection statement, not collecting excessive data and only collecting information that is relevant to assessing the suitability of the applicants, ensuring the security of the personal data). It is also good practice for employers to obtain the applicant's written consent prior to conducting the background check.

It should also be noted that under the Rehabilitation of Offenders Ordinance, subject to certain exceptions, the conviction of a person who is not sentenced to imprisonment exceeding three months or to a fine exceeding HK\$10,000 and who has not previously been convicted in Hong Kong of any offence will be treated as spent once three years has elapsed without another conviction for an offence in Hong Kong. Under the Ordinance, neither the spent conviction nor any failure to disclose it justifies dismissal or exclusion from any employment or any form of prejudice in employment.

A third party engaged in the hiring process would likely be considered a data processor under the Personal Data (Privacy) Ordinance. As the employer would be liable for any wrongful acts by the data processor, the employer should adopt contractual or other means to ensure the third-party data processor complies with the requirements of the data privacy laws in Hong Kong.

### Medical examinations

- 7 | Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

Employers may request an applicant to undertake a medical examination as a condition of employment and may refuse to hire an applicant who does not submit to an examination, provided the employers comply with their obligations under the Disability Discrimination Ordinance and the Personal Data (Privacy) Ordinance.

In particular, the applicant's health-related personal data could be collected through a pre-employment medical examination only (1) if the data directly relates to the inherent requirements of the job, (2) the employment is conditional upon the fulfillment of the medical examination, and (3) the data is collected by means that are fair in the circumstances and not excessive in relation to the purpose.

## Drug and alcohol testing

- 8 | Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

Employers may request an applicant to undertake drug and alcohol testing and may refuse to hire an applicant who does not submit to drug and alcohol testing, provided the employers comply with their obligations under the Disability Discrimination Ordinance and the Personal Data (Privacy) Ordinance.

In particular, drug and alcohol testing should only be carried out if it relates to the inherent requirements of the job.

## HIRING OF EMPLOYEES

### Preference and discrimination

- 9 | Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

It is not legally required for an employer to give preferences in hiring to any particular groups of people. However, employers cannot discriminate on the grounds of sex, race, colour, descent, national or ethnic origin, disability, marital status, pregnancy, family status or trade union membership.

- 10 | Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

Written contracts are not mandatory. However, they are strongly encouraged by the Labour Department as they remind both the employers and employees of their obligations, rights and benefits. Employers should provide their employees with the terms and conditions of the employment in writing upon the employee's written request. Under the Employment Ordinance, once an employer has entered into a written employment contract with an employee, it is obliged to provide a copy of the signed contract to the employee. An employer should consult the employee before making any subsequent change to the terms of the contract.

Written contracts must include basic information as set out below:

- wages;
- wage period;
- length of notice for termination of the employment contract; and
- any end-of-year payment.

- 11 | To what extent are fixed-term employment contracts permissible?

Fixed-term employment contracts are permissible and there is no regulation on the minimum or maximum duration of such contracts.

However, every contract where the employee is employed for at least 18 hours per week for more than four weeks would be regarded as a continuous contract. A continuous contract is deemed to be a contract for one month, renewable from month to month unless there are any express terms that provide otherwise.

### Probationary period

- 12 | What is the maximum probationary period permitted by law?

The length of an employee's probation and any extension of the period is not restricted by the Employment Ordinance. The length or extension of a probationary period can be agreed in the employment contract. The Employment Ordinance does, however, allow the employer and the employee to terminate the employment contract without notice within the first month of probation. Not less than seven days' notice must be given if the employee is terminated after the first month of probation.

## Classification as contractor or employee

- 13 | What are the primary factors that distinguish an independent contractor from an employee?

There is no one single conclusive test to distinguish an independent contractor from an employee. The answer to this question is highly fact-sensitive.

Common factors that are crucial to defining the relationship include:

- extent of control over work procedures, working time and methodology;
- ownership of work equipment and material;
- whether the work carried out was through the employee's own account with investment and management responsibilities;
- whether the individual is regarded as an integral part of the organisation;
- whether the individual has liberty to hire and delegate;
- prospect of profit return and risk of loss;
- responsibilities in insurance and tax; and
- common industry practices of the profession.

The courts would examine all the features of the relationship with a view to deciding whether the relationship was one of employment.

### Temporary agency staffing

- 14 | Is there any legislation governing temporary staffing through recruitment agencies?

There is no legislation governing temporary staffing through recruitment agencies. Anyone who wishes to operate an employment agency to provide job-placement services must have a licence or a certificate of exemption under Part XII of the Employment Ordinance and the Employment Agency Regulation.

## FOREIGN WORKERS

### Visas

- 15 | Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

Hong Kong has no short-term employment visas. Employment visas are possible for employees transferring from another jurisdiction to Hong Kong through intra-group transfer.

### Spouses

- 16 | Are spouses of authorised workers entitled to work?

Spouses of authorised workers will be entitled to work in Hong Kong if they hold a dependent visa from the Immigration Department during the term of the dependent visa. Spouses without a dependent visa must obtain a work visa before taking up any employment in Hong Kong.

### General rules

- 17 | What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

Employers are required to take all practical steps to ensure foreign employees are legally employable. This includes an obligation to inspect the employee's Hong Kong identity documents to ensure that the applicant can be employed without the Director of Immigration's prior

permission and has not breached any condition of stay. An employer that employs a person who is not lawfully employable is subject to a maximum fine of HK\$350,000 and three years' imprisonment.

### Resident labour market test

**18** | Is a labour market test required as a precursor to a short or long-term visa?

There is no specific labour market test in Hong Kong but employers seeking to recruit foreign employees to work in Hong Kong would generally need to demonstrate to the Immigration Department that there is a genuine need for the employee's role in Hong Kong, the role cannot be filled successfully with local candidates and the foreign employee has work experience that cannot be readily taken up by the local workforce.

## TERMS OF EMPLOYMENT

### Working hours

**19** | Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

Although the Employment Ordinance does not provide a statutory standard working hour system or a statutory maximum number of hours, an employee under a continuous contract is entitled to no less than one rest day every seven days. A rest day is defined as a continuous period of not less than 24 hours during which an employee is entitled to abstain from working. An employee may work voluntarily on a rest day. The employer can request the assistance of an employee on a rest day only if there has been an unforeseen emergency. Even so, the employer must grant the employee another full rest day within the next 30 days. Statutory entitlements under the Employment Ordinance override any term of an employment contract that reduces the right, benefit or protection to which an employee is entitled under such law. Therefore, employers cannot contract out a rest day as such a term would be invalid.

### Overtime pay

**20** | What categories of workers are entitled to overtime pay and how is it calculated?

No specific categories of workers are entitled to overtime pay under law. There is no legal requirement to pay for overtime work or formula to calculate overtime pay. If the employment contract provides for payment for overtime work, the employer is legally obligated to provide the wages and would be subject to a fine for withholding the same. Employers can specify categories of employees that are entitled to overtime pay, as well as the calculation for overtime pay in the employment contracts.

**21** | Can employees contractually waive the right to overtime pay?

Employees are not statutorily entitled to overtime pay. It is only when an employee's entitlement to overtime payment is provided in the employment contract that the employee can contractually waive such right.

### Vacation and holidays

**22** | Is there any legislation establishing the right to annual vacation and holidays?

#### Annual vacation

An employee is entitled to annual leave with pay after having been employed under a continuous contract for 12 months. An employee's entitlement to paid annual leave increases progressively from seven days to a maximum of 14 days according to his or her length of service, as specified below.

Years of employment	Annual leave entitlement (days)
1	7
2	7
3	8
4	9
5	10
6	11
7	12
8	13
9 or more	14

While an employer is prohibited from obtaining an employee's consent to waive or forgo the employee's annual leave entitlement, an employee can choose to accept payment in lieu of that part of his or her leave entitlement that exceeds 10 days.

Where an employment contract is terminated, an employee is entitled to pro rata annual leave pay if he or she has been employed under a continuous contract for not less than three months and the employment contract is not terminated by reason of summary dismissal.

### Statutory holidays

An employee, irrespective of his or her length of service, is entitled to 12 statutory holidays per year. An employee must be employed under a continuous contract for not less than three months before he or she is entitled to holiday pay. Banks, public offices and government departments and many private corporations follow the General Holidays Ordinance, which provides for 17 public holidays each year. 'Buy-out' of holidays is not allowed under the Employment Ordinance.

### Sick leave and sick pay

**23** | Is there any legislation establishing the right to sick leave or sick pay?

Employees under a continuous contract can accumulate paid sickness days up to 120 days throughout the employment period. In the first 12 months of employment, employees are eligible for two paid sickness days for each completed month of employment. They are entitled to four days for each completed month thereafter.

Sickness allowance is payable if:

- the employee has accumulated sufficient number of paid sickness days;
- the sick leave taken is not less than four consecutive days (unless the sick leave is in relation to pregnancy check-ups, post-confinement medical treatment or miscarriage); and
- the sick leave is supported by a medical certificate issued by a registered medical practitioner, registered Chinese medicine practitioner or registered dentist.

Sickness allowance is paid at a daily rate equivalent to four-fifths of the daily average wages earned by the employee during the 12-month period immediately before the sickness day or the first sickness day.

Sickness allowance is not payable if:

- the employee refuses treatments from a company doctor of a medical scheme recognised by a Director of Health or disregards the advice of the doctor without any reasonable excuse.

(If the recognised scheme of medical treatment operated by an employer does not cover treatment from a certain medical discipline, the employee may choose to receive treatment from any registered medical practitioner, registered Chinese medicine practitioner or registered dentist under that particular discipline);

- the sickness day falls on a statutory holiday as the employee is entitled to holiday pay; or
- compensation is payable under the Employees' Compensation Ordinance.

### Leave of absence

#### 24 | In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

In addition to annual leave and sick leave, female employees are entitled to maternity leave while male employees are entitled to paternity leave.

### Maternity leave

The statutory maternity leave requirements have been extended from the existing 10 weeks to 14 weeks for female employees under a continuous employment contract for not less than 40 weeks immediately before the commencement of the maternity leave. The daily rate of maternity leave pay throughout the 14 weeks is equal to four-fifths of the average daily wages earned by an employee in the 12-month period preceding the first day of the maternity leave. The rate for the maternity leave pay for the additional four weeks is capped at HK\$80,000 per employee. The employer may apply to the government for reimbursement of the maternity leave pay of the additional four weeks under the Reimbursement of Maternity Leave Pay Scheme published by the Labour Department.

On 1 April 2021, the Labour Department announced that the Reimbursement of Maternity Leave Pay Scheme is open for applications from employers. The government has also established a website containing FAQs, further details on eligibility requirements, application procedures and reimbursement arrangements for employer and employee's reference.

In the case of birth or pregnancy-related illness and disability, the female employee may be entitled to a maximum of four weeks of additional unpaid maternity leave. This is in addition to the employee's sick leave entitlement. In the event that labour occurs later than expected, the period between the expected due date and the actual birth date will be provided as unpaid leave in addition to the 14 weeks of maternity leave. Further, a female employee who suffers a miscarriage at or after 24 weeks of pregnancy is entitled to maternity leave.

### Paternity leave

A male employee is entitled to five days' paternity leave for each confinement of his spouse or partner if he is the father of a newborn child or a father-to-be, has been employed under a continuous employment contract for not less than 40 weeks immediately before the day of paternity leave and has given the required notification to the employer. The daily rate of paternity leave pay is equal to four-fifths of the average daily wages earned by an employee in the 12-month period preceding the first day of the paternity leave.

### Mandatory employee benefits

#### 25 | What employee benefits are prescribed by law?

Employees are also entitled to compulsory employees' compensation insurance, statutory minimum wage, the Mandatory Provident Fund (MPF), severance payment and long-service payment.

An employer must be in possession of a valid insurance policy to cover its liabilities both under the Employees' Compensation Ordinance and at common law for work injuries for its employees. Also, employees must be paid at a rate of not less than the statutory minimum wage, which is HK\$37.50 per hour effective from 1 May 2019.

### Mandatory Provident Fund

The MPF is a compulsory saving scheme for the retirement of residents in Hong Kong under which employers (and employees) are required to make MPF contributions for the employees monthly.

Under the Mandatory Provident Fund Schemes Ordinance, an employer must arrange for its employees (aged between 18 and 65) who have worked 60 days or more to join the MPF scheme. It is within the employer's obligation to calculate the employee's MPF contribution for each period and deduct it from the employee's income. The minimum contribution rate is 5 per cent for income not exceeding HK\$30,000 per month for each party. The mandatory contribution is capped at HK\$1,500 for employees with a monthly income exceeding HK\$30,000.

### Severance payment

An employer must pay an employee a severance payment for his or her dismissal due to redundancy or layoff if the employee has been employed for not less than 24 months.

### Long-service payment

Any employee who has been employed for not less than five years and is dismissed not by reason of redundancy or serious misconduct is entitled to statutory long-service payment. An employee is entitled to either severance payment or long-service payment but not both. The calculation of long-service payment is the same as the calculation of severance payment and is subject to a maximum cap of HK\$390,000 (ie, 26 years of service).

### Part-time and fixed-term employees

#### 26 | Are there any special rules relating to part-time or fixed-term employees?

There are no special rules relating to part-time or fixed-term employees as there is no strict legal distinction between full-time and part-time employees in Hong Kong. However, to be entitled to most of the rights and benefits under the Employment Ordinance, an employee must be continuously employed for a minimum duration of four consecutive weeks for at least 18 hours a week.

### Public disclosures

#### 27 | Must employers publish information on pay or other details about employees or the general workforce?

There are no statutory requirements imposed on employers to publish information on pay or other details about employees or the general workforce.

## POST-EMPLOYMENT RESTRICTIVE COVENANTS

### Validity and enforceability

#### 28 | To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

Post-termination restrictive covenants are generally void for being in restraint of trade and contrary to public policy unless the employer can show that the provision is reasonable in all circumstances to protect a legitimate interest of the employer. Legitimate interests include:

- trade secrets or other confidential information of the employer;
- trade connections including relationships with suppliers, customers and possibly prospective customers; and
- the stability of the workforce.

Once a legitimate interest is established, the restrictive covenant must also be reasonably necessary to protect the said interest by reference to

the relevant activities, the duration and the geographical scope in order to be enforceable. Whether a restriction is reasonable is considered at the time the restriction is entered into. The enforceability of restrictive covenants is heavily dependent on the specific facts of each case.

### Post-employment payments

**29** | Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

There is no statutory requirement for the employer to continue paying former employee while they are subject to post-employment restrictive covenants.

## LIABILITY FOR ACTS OF EMPLOYEES

### Extent of liability

**30** | In which circumstances may an employer be held liable for the acts or conduct of its employees?

An employer may be held liable for the wrongful acts or omissions of employees during their employment irrespective of whether the employer was aware of the unlawful actions of the employees. The Sex Discrimination Ordinance, Family Status Discrimination Ordinance, Disability Discrimination Ordinance and Race Discrimination Ordinance all provide for vicarious liability of the employer for discriminatory acts done by workplace participants. 'Workplace participants' can include individuals with no employment relationship, such as volunteers and interns. It may be a defence to vicarious liability if the employer can demonstrate that reasonably practicable steps were taken to prevent the infringing acts.

## TAXATION OF EMPLOYEES

### Applicable taxes

**31** | What employment-related taxes are prescribed by law?

Salaries tax is assessed in respect of the employee's income arising in or derived from any office or employment of profit and pension in Hong Kong during the year. Income includes salaries, wages, leave pay, perquisites, bonuses and allowances but excludes the Mandatory Provident Fund scheme contribution. The salaries tax charge is the lower of the:

- net assessable income less non-assessable income, allowable deductions and personal allowances, charged at progressive rates; or
- net assessable income less charitable donations and allowable deductions at the standard rate (15 per cent).

There is no withholding tax liability on the part of the employer. However, if the employment is terminated and the employer is aware that the employee is about to leave Hong Kong for a period exceeding one month, the employer is required to promptly notify the Inland Revenue Department of the departure and temporarily withhold all payment due to the employee until a letter of release is issued. The employee is responsible for bearing his or her own tax liability.

## EMPLOYEE-CREATED IP

### Ownership rights

**32** | Is there any legislation addressing the parties' rights with respect to employee inventions?

There is no legislation specifically governing the parties' rights over employee inventions. An employer should spell out the provisions governing employee-created intellectual property (IP) rights and ownership in a written contract.

It is prudent to address the following:

- the IP in work created by an employee in the course of employment is owned by the employer;
- the employee will sign all documents that the employer requires to record the employer's ownership of the IP in work created by the employee, including after the employment relationship has ended;
- the employee will waive moral rights under the Copyright Ordinance; and
- the employee will keep in confidence all the employer's confidential information, including the IP, as well as trade secrets and know-how, and will not misuse that confidential information, including the IP, trade secrets and know-how.

### Trade secrets and confidential information

**33** | Is there any legislation protecting trade secrets and other confidential business information?

There is no legislation that specifically provides for the protection of trade secrets and other confidential business information. However, employees have an implied duty of fidelity not to disclose confidential information of an employer.

An employer may impose a restrictive covenant in the employment contract to prohibit an employee from disclosing or misusing trade secrets and similar highly confidential information of the employer after the termination of the employment contract, provided that the employer can show that the restrictive covenant is reasonably necessary to protect the legitimate interest of the employer.

## DATA PROTECTION

### Rules and obligations

**34** | Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

The collection, use and handling of personal data of employees in Hong Kong is governed by the Personal Data (Privacy) Ordinance (PDPO). The Office of the Privacy Commissioner for Personal Data (the Privacy Commissioner) has published a Code of Practice on Human Resource Management (HR Code), which provides practical guidance to employers on how to properly handle personal data that relate to each phase of the employment process.

The following table summarises the key data protection requirements in different stages of the employment cycle: recruitment, employment and post-employment.

	Recruitment	Current employment	Post-employment
<b>Specific types of personal data</b>			
Hong Kong Identity Card (HKID card)	<p>Job applicant's HKID card number can be collected during the recruitment process if (1) the employer has a retention policy on HKID card numbers of former employees and unsuccessful applicants for a certain period; (2) it is necessary to collect the HKID card numbers for correct identification of the applicants and their records; (3) the employer has to confirm from a large pool whether the applicant has applied for a position before or was a former employee; and (4) there is no less privacy-intrusive alternative available.</p> <p>Copy of the HKID card can only be collected after the applicant has accepted the job offer</p>		Former employee's HKID card can be retained for linking, retrieving or processing records
Health data	When to collect – no earlier than making a conditional offer of employment provided that (1) the data collected directly relates to the inherent requirements of the job; (2) the employment is conditional upon fulfilment of the medical examination; and (3) the means of collection is fair and the data collected is not excessive	When to collect – any time provided that (1) it is for a purpose directly related to the assessment of the suitability of the employee's continuous employment or the employer's administration of medical or other benefits or compensation; (2) the means of collection is fair and the data collected is not excessive; and (3) the employer has a policy on medical examination that is brought to the attention of the employees	
Family members' personal data	When to collect – at the beginning of the recruitment process but only to the extent of assessing conflict of interest	When to collect – after the employee accepts the job offer, provided that certain requirements are satisfied	
Employee monitoring		Inform employees of the monitoring policies	
Biometric data (fingerprint/DNA)		Generally not allowed	
<b>Data management and security</b>			
Data accuracy	Where it is practicable, inform third parties that administer employment-related matters of any data inaccuracy and provide the third parties with particulars to rectify the data	Refrain from using data collected from recruitment for the purpose of identifying suitable candidates if there are grounds to believe that such data has become inaccurate	Provide employees with copies of employment-related data at regular intervals and ask employees to provide any changes to their personal data
Data access and correction	Update the data upon notification from former employees or when data is about to be used where any inaccuracies of the data would have a material effect on the use of the data	Provide a copy of the requested data (or make the necessary correction and provide a copy of the corrected data) within 40 days after receiving a data access or correction request	If unable to comply with the request, inform the individual concerned in writing of the reasons within the 40-day period and comply with the request as soon as practicable
Data retention	Recruitment-related data about a job applicant should be held no longer than two years from the date of rejecting the applicant	No specified retention period but generally employment-related data should be held no longer than seven years following the event	Employment-related data about a former employee should be held no longer than seven years from the date the employee leaves  Subcontract staff may retain staff's data for two years after completion of the contract
Data security	Ensure staff who handle employment-related personal data comply with the data privacy policies	Take appropriate measures to protect employment-related data against unauthorised or accidental access, processing, erasure, loss or use	If a third party is engaged, contractual or other means must be adopted to ensure that the third party applies appropriate security protection to the employment-related data

**35 | Do employers need to provide privacy notices or similar information notices to employees and candidates?**

Employers should provide a personal information collection statement (PICS) to employees and candidates on or before the collection of their personal data. A PICS should include the purpose of collecting the data, the classes of persons that the data would be transferred to, and the right to request access to and correction of the data.

In relation to recruitment advertisement, the HR Code requires parties that place recruitment advertisement to identify themselves and state the purpose for which the data is to be used if they directly solicit personal data from job applicants in a recruitment advertisement.

**36 | What data privacy rights can employees exercise against employers?**

Under the Data Protection Principles of the PDPO, employees have rights to access their personal data and to make corrections where the data is inaccurate. An employee who finds a possible breach of the PDPO by the employer in relation to the handling of his or her personal data may lodge a complaint with the Privacy Commissioner. Depending on the facts and evidence available, the Privacy Commissioner may conduct an investigation of the suspected contravention, and if upon completion of an investigation it is found that the relevant employer is contravening or has contravened the PDPO, the Privacy Commissioner may issue an enforcement notice to that employer directing remedial or preventive steps to be taken, or both.

Contravention of certain provisions of the PDPO is an offence. Also, contravention of an enforcement notice issued by the Privacy Commissioner is an offence that may result in a maximum fine of HK\$50,000 and imprisonment for two years, with a daily penalty of HK\$1,000. Subsequent convictions can result in a maximum fine of HK\$100,000 and imprisonment for two years, with a daily penalty of HK\$2,000.

Employees may also seek compensation by civil action against the employers for damage caused by a contravention of the PDPO. The Privacy Commissioner may provide legal assistance to the aggrieved data subjects if the Privacy Commissioner thinks fit to do so.

**BUSINESS TRANSFERS**

**Employee protections**

**37 | Is there any legislation to protect employees in the event of a business transfer?**

Under Hong Kong law, there is no automatic transfer of the employment relationship from one entity to another where there has been a transfer of business ownership. In cases of a sale of a business, existing contracts of employment with the previous employer must be lawfully terminated and new contracts of employment with the new employer will need to be entered into. If an employee accepts an offer of employment with the buyer, the Employment Ordinance provides that the employee's preceding period of employment with the seller will be counted as a period of employment with the buyer.

Where the transfer of business is via a sale of shares, there will be no change of the identity of the employer and there is hence no need for termination of employment.

**TERMINATION OF EMPLOYMENT**

**Grounds for termination**

**38 | May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?**

An employer can dismiss an employee without any reason by giving notice or payment in lieu of notice. Under section 9 of the Employment Ordinance, an employer may summarily dismiss an employee without notice or payment in lieu of notice if an employee, in relation to his or her employment:

- wilfully disobeys a lawful and reasonable order;
- misconducts himself/herself, such conduct being inconsistent with the due and faithful discharge of his/her duties;
- is guilty of fraud or dishonesty; or
- is habitually neglectful in his/her duties; or
- under any other ground on which the employer would be entitled to terminate the contract without notice at common law.

**Notice**

**39 | Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?**

Section 6 and section 7 of the Employment Ordinance allow either party to an employment contract to terminate at any time by providing the following required notice or payment in lieu of notice to the other party:

Employment period	Length of notice/ payment in lieu of notice		
	Within the first month of probation		Not required
During probation period	After the first month of probation	With agreement	As per agreement but not less than seven days
		Without agreement	Not less than seven days
No probation period/after probation period	With agreement		As per agreement but not less than seven days
	Without agreement		Not less than one month

**40 | In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?**

An employer can dismiss an employee without any reason by giving notice or payment in lieu of notice. Under section 9 of the Employment Ordinance, an employer may summarily dismiss an employee without notice or payment in lieu of notice if an employee, in relation to his or her employment:

- wilfully disobeys a lawful and reasonable order;
- misconducts himself/herself, such conduct being inconsistent with the due and faithful discharge of his/her duties;
- is guilty of fraud or dishonesty; or
- is habitually neglectful in his/her duties; or
- under any other ground on which the employer would be entitled to terminate the contract without notice at common law.

## Severance pay

41 | Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

Any employee who has been employed for not less than two years and is dismissed by reason of redundancy is entitled to statutory severance payment. There is a statutory presumption that an employee who has been dismissed by his or her employer shall be presumed to have been dismissed by reason of redundancy unless rebutted by the employer.

The formula for calculation of severance payment is as follows:

- in the case of a monthly rated employee, two-thirds of the employee's last month wages (subject to a cap of HK\$15,000) multiplied by the years of service. Service of an incomplete year will be calculated on a pro rata basis; and
- for daily or piece-rated employees, 18 days' wages based on any 18 days chosen by the employee and occurring during his or her last 30 normal working days or two-thirds of HK\$22,500, whichever is less.

The above is subject to a total current maximum amount of HK\$390,000.

An employer is entitled to offset the statutory severance payment against the contributions it made to the employee's government-mandated pension scheme, the Mandatory Provident Fund (MPF) or other pension schemes, such as the Occupational Retirement Scheme or gratuity based on length of service (if applicable).

In the event of a summary dismissal, the employee will not be entitled to any severance or long-service payment.

## Procedure

42 | Are there any procedural requirements for dismissing an employee?

If there is no employment agreement governing the requirement of notice, not less than seven days of prior notice must be given if an employee is terminated after the first month of employment but during the probation period. Not less than one month of notice must be given if termination happens after the probation period.

If there is a contractual term on the notice period, the length of notice or payment in lieu of notice would be the period set out in the contract, but it must not be less than seven days. No notice is required if an employee is terminated within the first month of the probation period.

There is no statutory requirement in Hong Kong to have a fair process prior to dismissal. Nevertheless, according to recent case law, if the employment contract provides for disciplinary and grievance procedures, an employer cannot choose to invoke a clause of the contract to dismiss an employee for disciplinary reasons by giving notice or by payment in lieu without first going through the prescribed disciplinary and grievance procedure.

Employers must also notify the Inland Revenue Department of the termination either one month before the termination or as soon as possible thereafter. The employer is required to notify the Inland Revenue Department if it is aware of the employee's departure from Hong Kong for more than one month after the termination of employment.

If the employee's working visa is sponsored by the employer, the employer must also notify the Immigration Department of the termination. Notification should also be sent to the trustee of the MPF or other retirement scheme.

## Employee protections

43 | In what circumstances are employees protected from dismissal?

### Unlawful dismissal

Under the Employment Ordinance, employers are prohibited from terminating an employee for the following reasons:

- who is a member of a trade union or participates in trade union activities;
- who has given notice of pregnancy and has confirmed her pregnancy by medical certificate up until the date on which she is due to return to work on the expiry of her maternity leave, or the date of cessation of her pregnancy;
- who is on statutory sick leave;
- who is giving evidence in relation to proceedings for the enforcement of the Employment Ordinance or the Factories and Industrial Undertakings Ordinance;
- who is giving information in any enquiry in connection with the enforcement of the Employment Ordinance, the Factories and Industrial Undertakings Ordinance, work accidents or breach of work safety legislation;
- who has been injured at work and is entitled to employees' compensation under the Employees' Compensation Ordinance before compensation becomes determinable or payable;
- who is injured and the conclusion of an agreement for employee's compensation or the issue of a certificate of assessment is pending; and
- who is carrying out jury service.

### Unreasonable dismissal

The Employment Ordinance provides protection to employees against unreasonable dismissal or unilateral variation of the contract if an employee (1) has been continuously employed for not less than 24 months and (2) is dismissed by the employer other than for a valid reason as specified in the Ordinance. The five valid reasons include conduct, qualification and capability of the employee, redundancy or other genuine operational requirements of the business of the employer, statutory requirements and other substantial reasons.

Remedies available for unreasonable dismissal includes an order for reinstatement or re-engagement or an award of terminal payments.

If the dismissal is both unlawful and unreasonable, the employee may seek an order for reinstatement or re-engagement or an award of terminal payments or an award of compensation not exceeding HK\$150,000, or both.

### Mass terminations and collective dismissals

44 | Are there special rules for mass terminations or collective dismissals?

There are no special rules governing mass terminations or collective dismissals in Hong Kong.

### Class and collective actions

45 | Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

In Hong Kong, class or collective actions are in the form of representative proceedings. When numerous persons have the same interest (ie, the identical issues of fact and law) in any proceeding, the proceedings may be commenced by any one or more of them representing all or all except one or more of them. All class members of the 'same interest' must prove that there is (1) the same contract between all plaintiff class members and the defendant, (2) the same defence (if any) pleaded by

the defendant against all the plaintiff class members and (3) the same relief claimed by the plaintiff class members.

Upon the application of the plaintiffs, the court is also empowered to appoint one or more of the defendants to act as representatives of all, or all except one or more defendants being sued. A judgment or order given in representative proceedings will be binding on all persons so represented.

Section 25 of the Labour Tribunal Ordinance expressly provides for representative claims in respect of labour disputes. Similar provisions for representative claims are also provided in section 24 of the Minor Employment Claims Adjudication Board Ordinance and section 21 of the Small Claims Tribunal Ordinance.

Nevertheless, if an employer becomes insolvent, unpaid wages, severance payment and unpaid leave could be claimed as ex gratia payment from the Protection of Wages on Insolvency Fund. Accordingly, there would not be a need for a class action in such a situation.

### Mandatory retirement age

**46** | Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

There is no law imposing a mandatory retirement age in Hong Kong. The age of retirement is subject to the provisions of employment contracts. The Hong Kong government has indicated the retirement age for civil officers and disciplined services officers is 60 to 65 depending on the rank and year of entry, and encourages the private sector to follow suit.

## DISPUTE RESOLUTION

### Arbitration

**47** | May the parties agree to private arbitration of employment disputes?

Yes, parties to an employment contract are generally free to enter into private arbitration or any other method of conciliation in the event of employment disputes, subject to the restrictions in the employment contract (if any). Employment matters involving monetary relief are still subject to the Labour Tribunal's jurisdiction. If proceedings in the Labour Tribunal are on foot, parties could apply for a stay of the proceedings in favour of arbitration. The Court has discretionary power to refer the employment dispute to arbitration if it is satisfied that there is no sufficient reason why the parties should not be referred to arbitration and the party requesting was ready and willing at the time the action was brought to do all things necessary for the proper conduct of the arbitration.

### Employee waiver of rights

**48** | May an employee agree to waive statutory and contractual rights to potential employment claims?

Where an employer and an employee have reached mutual agreement regarding termination, an employer can request that an employee execute an agreement containing a waiver of claims in consideration of a payment by the employer. Nevertheless, section 70 of the Employment Ordinance provides that any term that purports to extinguish or reduce any right, benefit or protection conferred on the employee by the Employment Ordinance shall be void, and so clauses that have the effect of contracting out of the Employment Ordinance would generally not be enforceable. One exception is that an employer and an employee can agree to waive their right to notice or to payment in lieu of notice of termination at the time notice is to be given.

### Limitation period

**49** | What are the limitation periods for bringing employment claims?

The limitation period for an employee to commence proceedings against an employer for breach of the employment contract is six years from the date on which the cause of action accrued.

Limitation periods also apply to circumstances where an employee has been unreasonably dismissed, unlawfully dismissed or where the employee's employment contract has been unreasonably varied. In these cases, the employee has three months from the date of termination or variation of contract to make a claim against the employer by serving the employer a notice in writing. Such period can be extended for a further six months if approved by the Commissioner for Labour. Alternatively, the employee has nine months from the date of termination or variation of contract to file his or her claim if the employee wants to file a claim with the Labour Tribunal.

The limitation period for discrimination claims is two years and the limitation period for personal injury actions is three years.

## UPDATE AND TRENDS

### Key developments of the past year

**50** | Are there any emerging trends or hot topics in labour and employment regulation in your jurisdiction? Are there current proposals to change the legislation?

#### Proposed reform of Personal Data (Privacy) Ordinance

On 20 January 2020, the Constitutional and Mainland Affairs Bureau and the Privacy Commissioner jointly published a consultation paper noting several important issues in data protection and proposing possible amendments to the Personal Data (Privacy) Ordinance. Proposed amendments include introducing a mandatory data breach notification mechanism, requiring a data retention policy for personal data collected, increasing the Privacy Commissioner's power to impose direct administrative fines, expanding the definition of personal data, and regulating data processors and the disclosure of other data subjects' personal data.

The proposed reform mimics the general trend in the data protection regimes in other jurisdictions, such as the EU and Australia, following several data breach incidents and personal privacy issues that have occurred in Hong Kong locally. Public consultations on the proposed reform have not yet been launched at the time of writing. Greater compliance obligations for employers in Hong Kong are expected if the proposed reform becomes law.

#### Proposed abolition of MPF offsetting mechanism

The Hong Kong government has announced its target date to ensure the passage of a proposed legislation that abolishes the controversial Mandatory Provident Fund (MPF) offsetting mechanisms. In November 2020, the Secretary for Labour and Welfare has reassured that the abolition of the MPF offsetting mechanisms would be introduced to the Legislative Council by the end of 2021 and formally come into force in July 2022.

#### Statutory minimum wage remains frozen

Following a review by the Minimum Wage Commission, on 2 February 2021, the Hong Kong government announced that the statutory minimum wage would remain as HK\$37.50 per hour. This is the first recommendation of the Minimum Wage Commission that the prevailing statutory minimum wage should be frozen since 2011. The next round of review will be conducted in October 2022.

### Statutory holidays

On 5 March 2021, the Employment (Amendment) Bill 2021 which seeks to increase the number of statutory holidays under the Employment Ordinance from 12 days to 17 days progressively from 2022 to 2030, was gazetted. It is proposed that the implementation of the first out of the five statutory holidays commences from 1 January 2022. The said Bill will be debated in the Legislative Council of Hong Kong.

### Coronavirus

51 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

### Employment Support Scheme

The Hong Kong government has launched the Employment Support Scheme to provide time-limited financial support to employers to retain employees who may otherwise be made redundant. The subsidy granted is calculated based on the number of employees employed by the employer and their salaries during the specified period. Employers must undertake and warrant that they will not implement redundancies during the subsidy period and will spend all wage subsidies granted by the government on paying wages to their employees. There is also a claw-back mechanism for any subsidy that was granted to the employer but not fully utilised, and the government imposes a penalty if there is any reduction in the employee headcount during the specified subsidy period.

The government has also implemented various sector and industry-specific subsidy schemes, such as for retail businesses, the property management sector, child or elderly care sectors, tourism and travel businesses, etc.

### Notification requirement to health officers

Coronavirus has been added to the Prevention and Control of Disease Ordinance as a statutorily notifiable infectious disease. The Prevention and Control of Disease (Disclosure of Information) Regulation has been amended to empower authorised officers to ask any person to disclose information that is relevant to tracing of persons who might be at risk of contracting covid-19. Criminal penalty, including a fine of HK\$10,000 and imprisonment for six months, is applicable to individuals that have failed to comply with the disclosure requirement or have provided misleading or false information.

There is also an obligation for the employer to report an infected employee who has worked in a workplace during the incubation or infectious period to the Centre of Health Protection (CHP). The employer should ensure that the workplace premises are closed as soon as possible and employees are advised to stay home. The employer should notify the CHP of the names, Hong Kong identity card numbers and phone numbers of the list of staff in contact with the infected individual in the past two weeks and arrange for disinfection of the office premises as soon as practicable.

### Data privacy and protection

It is generally permissible to collect temperature measurements or limited medical symptoms of covid-19 of the employees for the purpose of protecting the health of the employees and visitors. There is a health exemption under the PDPO, where the employer does not require the consent of the employee to use or transfer his or her health data if to do so would cause serious harm to the physical health of any other individuals.

The Privacy Commissioner issued three guidance notes for the protection of personal data connected with working from home (WFH) arrangements for organisations, employees and the use of video conferencing. In short, the obligations for employers in WFH arrangements do

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not change. The same standard should apply to security and handling of personal data. This includes taking all reasonably practicable steps to ensure the security of the communications.

### Discrimination

For the safety and health of the workplace, it is not discriminatory for an employer to direct an employee to stay home or take paid leave if the employee or his or her relatives are infected with or displaying symptoms of covid-19. The Equal Opportunities Commission has advised that this would not amount to unlawful discrimination under the Disability Discrimination Ordinance or the Family Status Discrimination Ordinance. However, it is discriminatory if an employer terminates an employee or subjects an employee to unfair detriment due to the employee or his or her family members contracting (or potentially contracting) the disease.

### Employee compensation

The Hong Kong Labour Department confirmed that an employee who contracts the coronavirus could be protected under the Employees' Compensation Ordinance. While covid-19 is not an 'occupational disease', section 36 of the Employees' Compensation Ordinance provides that an employee can still be compensated for a disease if it is a personal injury by accident that arises out of and in the course of employment.

### Health and safety best practices

Under the existing law, an employer has both statutory obligations under the Occupational Safety and Health Ordinance (OSHO) and common law duties to provide safety and health protections to employees in workplaces. In addition to the obligations under the OSHO, an occupier owes a common duty of care towards all visitors on its premises to ensure that they will be reasonably safe when on the premises under the Occupiers' Liability Ordinance. When measures to minimise the risk of contact and spreading covid-19 are implemented, employers have responsibilities to inform their employees and ensure compliance for the general safety and health of their workforces. This includes regularly cleaning and disinfecting workplaces, enforcing social distancing rules, avoiding large-scale meetings and face mask wearing as far as feasible.

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