

# LABOUR & EMPLOYMENT 2023

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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 Employment Ordinance governs, among others:

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

### **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:

- 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 prohibiting discrimination or harassment in employment:

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- the [Race Discrimination Ordinance](#);
- the [Disability Discrimination Ordinance](#);
- the [Sex Discrimination Ordinance](#); and
- the [Family Status Discrimination Ordinance](#).

## 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 grounds. Discrimination on the basis of race, colour, descent, national or ethnic origin (Race Discrimination Ordinance); disability (Disability Discrimination Ordinance); gender, pregnancy, breastfeeding, marital status (Sex Discrimination Ordinance); family status (Family Status Discrimination Ordinance); and trade union membership (Part IVA of the Employment Ordinance) is prohibited. Harassment is also prohibited under the Sex Discrimination Ordinance, the Race Discrimination Ordinance and the Disability Discrimination Ordinance.

Proceedings may be brought against a person who violates 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 proceedings 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

Established under the [Minor Employment Claims Adjudication Board Ordinance](#), the Minor Employment Claims Adjudication Board provides accessible, expeditious and inexpensive

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employment dispute adjudication services for minor employment claims that involve fewer than 10 claimants and a claim amount not exceeding HK\$8,000 per claimant.

### 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 at the Labour Tribunal.

### District Court

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

### High Court

The Labour Tribunal may decline jurisdiction for any reason of its own volition or upon the application of either party and transfer the case to the Court of First Instance under the High Court. When deciding whether to transfer the case, the Labour 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 as well as the right to freedom of association are 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 their 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 fine of up to HK\$100,000.

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## Powers of representatives

### 5 | What are their powers?

A registered trade union has the right to sue in its own name. It has the power to hold property, enter into a 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 that the collection and processing of applicants' personal data comply with the requirements of the Personal Data (Privacy) Ordinance (eg, providing a personal information collection statement, not collecting excessive data, only collecting information that is relevant to assessing the suitability of the applicants and 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](#) and subject to certain exceptions, the conviction of a person who was 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 have elapsed without another conviction for an offence in Hong Kong. Under the Rehabilitation of Offenders 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.

There is no substantive difference in terms of legal compliance if an employer conducts its own checks or hires a third party. 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 that the third-party data processor complies with the requirements of the data privacy laws in Hong Kong.

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## 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 that 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 if:

- the data directly relates to the inherent requirements of the job;
- the employment is conditional upon the fulfilment of the medical examination; and
- 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 that 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 the results relate 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, skin colour, descent, national or ethnic origin, disability, marital status, pregnancy, breastfeeding status, family status or trade union membership.

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## Written contracts

### 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 the 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, including:

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

## Fixed-term contracts

### 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 under which 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 upon in an 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. No less than seven days' notice must be given if the employee is terminated after the first month of probation.

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## Classification as contractor or employee

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

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

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 transfers.

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## 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 who 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\$500,000 and up to 10 years of 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 by 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 one rest day every seven days. A rest day is defined as a continuous period not shorter 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 following 30 days. Statutory entitlements under the Employment Ordinance override any term of an employment contract

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that reduces the right, benefit or protection to which an employee is entitled. Therefore, employers cannot contract out a rest day as such a term would be invalid.

### Overtime pay – entitlement and calculation

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

No specific categories of workers are statutorily entitled to overtime pay. 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.

### Overtime pay – contractual waiver

#### 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 pay is provided in the employment contract that the employee can contractually waive such a right.

### Vacation and holidays

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

##### Annual leave

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 their length of service, as specified in the table below.

Duration of employment (years)	Annual leave entitlement (days)
1-2	7
3	8
4	9
5	10
6	11
7	12
8	13
9+	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 the part of their entitlement that exceeds 10 days.

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When an employment contract is terminated, an employee is entitled to pro rata annual leave pay if they have been employed under a continuous contract for a minimum of three months and the employment contract is not terminated by reason of summary dismissal.

### Statutory holidays

An employee, irrespective of their length of service, is entitled to statutory holidays under the Employment Ordinance. Following the Employment (Amendment) Ordinance 2021, from 2022 onwards, statutory holidays will be increased progressively from 12 days to 17 days as laid out in the table below to align with the public holiday regime.

Year	Number of statutory holidays (days)
2022	13
2024	14
2026	15
2028	16
2030	17

An employee must be employed under a continuous contract for a minimum of three months before they are entitled to holiday pay. Banks, public offices, government departments and many private corporations follow the General Holidays Ordinance, which provides for 17 public holidays each year. A buyout 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 sick days up to 120 days throughout the employment period. In the first 12 months of employment, employees are eligible for two paid sick 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 a sufficient number of paid sick 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, a registered Chinese medicine practitioner or a 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 sick day or the first sick day.

Sickness allowance is not payable if:

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- 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;
- 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.

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.

## 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

On 11 December 2020, the statutory paid maternity leave requirements were extended from 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 the employee in the 12-month period preceding the first day of the maternity leave. The pay rate for the 11th to 14th week of the maternity leave is subject to a cap of 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 frequently asked questions, further details on eligibility requirements, application procedures and reimbursement arrangements for employer and employee 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 of paid 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

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under a continuous employment contract for a minimum of 40 weeks immediately before the day of paternity leave, and has given the required notification to the employer. The male employee must also provide the birth certificate of his child within 12 months of the first day of the paternity leave. The daily rate of paternity leave pay is equal to four-fifths of the average daily wages earned by the 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 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 to its employees. Also, employees must be paid at a rate no lower than the statutory minimum wage, which is currently HK\$37.50 per hour and shall be increased to HK\$40 per hour as of 1 May 2023.

#### **MPF**

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

Under the Mandatory Provident Fund Schemes Ordinance, an employer must arrange for its employees (aged between 18 and 65) who have worked for 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 their dismissal due to redundancy or lay-off if the employee has been employed for a minimum of 24 months.

#### **Long-service payment**

Any employee who has been employed for a minimum of 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).

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## 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 the 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 interest by reference to the relevant activities, duration and geographical scope 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 employees while they are subject to post-employment restrictive covenants.

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## 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, the Family Status Discrimination Ordinance, the Disability Discrimination Ordinance and the 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?

Salary tax is assessed in respect of the employee's income arising 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
- the 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 their own tax liability.

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## EMPLOYEE-CREATED IP AND CONFIDENTIAL BUSINESS INFORMATION

### Ownership rights

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

Section 57 of the Patent Ordinance provides that an invention made by an employee shall be taken to belong to the employer if it was made in the course of the normal duties of the employee (or in the course of duties falling outside the normal duties but specifically assigned to the employee) and in circumstances where the invention might reasonably be expected to result from the carrying out of the employee's duties.

Section 14 of the Copyright Ordinance and section 3(3) of the Registered Designs Ordinance also provide that, where a work product is made by an employee in the course of employment, the employer shall be treated as the owner of the rights in the work products unless otherwise agreed by the parties.

Notwithstanding the above, it would be prudent for an employer to spell out the provisions governing employee-created intellectual property (IP) rights and ownership in a written contract and to address the following in the contract:

- 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 to not disclose the 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 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 interests of the employer.

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## DATA PROTECTION

### Rules and employer 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. The Office of the Privacy Commissioner for Personal Data (the Privacy Commissioner) has published a Code of Practice on Human Resource Management, which provides practical guidance to employers on how to properly handle personal data relating 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
Specific types of personal data			
Hong Kong Identity Card (HKID card)	<p>Job applicant's HKID card number can be collected during the recruitment process if:</p> <ul style="list-style-type: none"> <li>the employer has a retention policy on HKID card numbers of former employees and unsuccessful applicants for a certain period;</li> <li>it is necessary to collect the HKID card numbers for correct identification of the applicants and their records;</li> <li>the employer has to confirm from a large pool whether the applicant has applied for a position before or was a former employee; and</li> <li>there is no less intrusive alternative available.</li> </ul> <p>A copy of an HKID card can only be collected after the applicant has accepted the job offer.</p>	Not applicable.	Former employees' HKID cards can be retained for linking, retrieving or processing records.

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	Recruitment	Current employment	Post-employment
<b>Specific types of personal data</b>			
Health data	<p>Health data can only be collected on or after making a conditional offer of employment, provided that:</p> <ul style="list-style-type: none"> <li>the data collected directly relates to the inherent requirements of the job;</li> <li>the employment is conditional upon fulfilment of the medical examination; and</li> <li>the means of collection is fair and the data collected is not excessive.</li> </ul>	<p>Health data can be collected any time, provided that:</p> <ul style="list-style-type: none"> <li>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;</li> <li>the means of collection is fair and the data collected is not excessive; and</li> <li>the employer's policy on medical examinations is brought to the attention of the employees.</li> </ul>	Not applicable.
Family members' personal data	Data can be collected at the beginning of the recruitment process, but only to the extent of assessing conflict of interest.	Data can be collected after the applicant accepts a job offer, provided that certain requirements are satisfied.	Not applicable.
Employee monitoring	Not applicable.	Employees must be informed of the monitoring policies.	Not applicable.
Biometric data (eg, fingerprints and DNA)	Not applicable.	Generally not allowed.	Not applicable.
<b>Data management and security</b>			
	Where practicable, inform third parties that administer employment-related matters of any inaccuracies in the data and provide the third parties with the particulars to rectify the data.		
Data accuracy	Refrain from using data collected from recruitment for the purpose of identifying suitable applicants 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.	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.

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	Recruitment	Current employment	Post-employment
<b>Data management and security</b>			
Data access and correction	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 for no longer than two years following the date of rejecting the applicant.	There is no specified retention period, but employment-related data should generally be held for no longer than seven years following the event.	Employment-related data about a former employee should be held for no longer than seven years following the date an employee leaves. Data on subcontracted staff may be retained 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 employment-related data.		

## Privacy notices

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

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

In relation to recruitment advertisements, the Code of Practice on Human Resource Management requires parties that place recruitment advertisements 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.

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## Employee data privacy rights

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

Under the Data Protection Principles of the Personal Data (Privacy) Ordinance, employees have the right to access their personal data and to make corrections where the data is inaccurate. An employee who finds a possible breach of the Personal Data (Privacy) Ordinance by the employer in relation to the handling of their 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 Personal Data (Privacy) Ordinance, 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 Personal Data (Privacy) Ordinance 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 up to 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 Personal Data (Privacy) Ordinance. The Privacy Commissioner may provide legal assistance to the aggrieved data subjects if the Privacy Commissioner thinks it fitting 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 the case of the 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 to the identity of the employer and there is therefore no need to terminate employment.

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## 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 their employment:

- wilfully disobeys a lawful and reasonable order;
- commits misconduct, such conduct being inconsistent with the due and faithful discharge of their duties;
- is guilty of fraud or dishonesty;
- is habitually neglectful in their duties; or
- on any other grounds upon which the employer would be entitled to terminate the contract without notice at common law.

### Notice requirements

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

Sections 6 and 7 of the Employment Ordinance allow either party to an employment contract to terminate at any time by providing the required notice or payment in lieu of notice to the other party as laid out in the table below.

Employment period		Length of notice or payment in lieu of notice	
During probation period	Within the first month of probation		Not required
	After the first month of probation	With agreement	As per agreement but a minimum of seven days
		Without agreement	A minimum of seven days
No probation period or after probation period	With agreement		As per agreement but a minimum of seven days
	Without agreement		A minimum of one month

### Dismissal without notice

**40** | In which circumstances may an employer dismiss an employee without 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 their employment:

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- wilfully disobeys a lawful and reasonable order;
- commits misconduct, such conduct being inconsistent with the due and faithful discharge of their duties;
- is guilty of fraud or dishonesty;
- is habitually neglectful in their duties; or
- on any other grounds upon 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 a minimum of 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 their 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 previous month's 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.
- For daily or piece-rated employees, 18 days' wages based on any 18 days chosen by the employee and occurring during their previous 30 normal working days or two-thirds of HK\$22,500, whichever is less, multiplied by years of service.

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

Currently, 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). On 9 June 2022, the Legislative Council passed the Employment and Retirement Schemes Legislation (Offsetting Arrangement) (Amendment) Bill 2022 to abolish the MPF offsetting mechanism. It is expected that the new arrangement will not come into effect until 2025 at the earliest.

In the event of 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, a minimum of seven days' prior notice must be given if an employee is terminated after the first month of employment but during the probation period. A minimum of one month's notice must be given if termination happens after the probation period.

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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 shorter than seven days. No notice is required if an employment relationship 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 dismiss an employee for disciplinary reasons by giving notice or by payment in lieu without first going through the prescribed disciplinary and grievance procedures.

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 schemes.

## Employee protections

### 43 | In what circumstances are employees protected from dismissal?

#### Unlawful dismissal

Under the Employment Ordinance, employers are prohibited from terminating an employee who:

- is a member of a trade union or participates in trade union activities;
- 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;
- is on statutory sick leave;
- is giving evidence in relation to proceedings for the enforcement of the Employment Ordinance or the Factories and Industrial Undertakings Ordinance;
- is giving information in any enquiry in connection with the enforcement of the Employment Ordinance, the enforcement of the Factories and Industrial Undertakings Ordinance, a work accident or a breach of work safety legislation;
- has been injured at work and is entitled to employees' compensation under the Employees' Compensation Ordinance before compensation becomes determinable or payable;
- is injured and the conclusion of an agreement for employee's compensation or the issue of a certificate of assessment is pending; and
- is carrying out jury service.

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## Unreasonable dismissal

The Employment Ordinance provides protection to employees against unreasonable dismissal or unilateral variation of the contract if an employee has been continuously employed for a minimum of 24 months and is dismissed by the employer other than for a valid reason as specified in the Employment 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:

- the same contract between all plaintiff class members and the defendant;
- the same defence (if any) pleaded by the defendant against all the plaintiff class members; and
- 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.

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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 payments and unpaid leave could be claimed as ex gratia payments 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 that the retirement age for civil officers and disciplined services officers is between 60 and 65 years of age, 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?

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 pending, parties could apply for a stay of the proceedings in favour of arbitration. The relevant 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 requesting party 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 a mutual agreement regarding termination, the employer can request that the 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. Therefore, 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

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employee can agree to waive their rights 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 or 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 the contract to make a claim against the employer by serving the employer notice in writing. Such a 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 the contract to file their 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 and emerging trends

#### 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?

##### Abolition of Mandatory Provident Fund offsetting mechanism

The Employment and Retirement Schemes Legislation (Offsetting Arrangement) (Amendment) Ordinance 2022 became law on 17 June 2022 and seeks to abolish benefits accrued by employers' mandatory contributions under the Mandatory Provident Fund system being used to offset severance and long-service payments. The abolition of this arrangement will not have retrospective effects. It is expected that the amendment will not come into effect until 2025 at the earliest.

##### Employment (Amendment) Ordinance 2022

The Employment (Amendment) Ordinance 2022 came into force on 17 June 2022 to address employment-related issues relating to measures adopted during the covid-19 pandemic. The main amendments include that:

- it would not constitute unreasonable dismissal if an employee were to be dismissed for failing to comply with a legitimate vaccination request by the employer;

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- it would constitute unreasonable dismissal if an employee were to be dismissed by reason of absence from work due to compliance with mandatory quarantine requirements; and
- absence from work due to compliance with mandatory quarantine requirements would constitute a sick day.

Since December 2022, the Hong Kong government has cancelled various measures that aimed to combat the covid-19 pandemic, including the vaccine pass arrangement as well as the quarantine requirements for close contacts and infected persons. As a result, the above amendments are unlikely to be relevant going forward.

### Increase of statutory holidays from 2022

Following the Employment (Amendment) Ordinance 2021, from 2022 onwards, statutory holidays will be increased progressively from 12 days to 17 days as laid out in the table below to align with the public holiday regime.

Year	Number of statutory holidays (days)
2022	13
2024	14
2026	15
2028	16
2030	17

### New minimum wage

The statutory minimum wage will increase from HK\$37.50 per hour to HK\$40 per hour and the monthly threshold amount for keeping records of hours worked will also increase from HK\$15,300 per month to HK\$16,300 per month. The revised rate and threshold will take effect on 1 May 2023.

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