



Hong Kong

April 2020

HONG KONG EMPLOYMENT LAW IN THE AGE OF COVID-19

COVID-19 has brought employment law issues to the forefront. The following provides an analysis of Hong Kong employment law issues in current focus, including:

- Flexible working arrangements;
- Discriminatory acts;
- Personal data concerns;
- Sick leave and sickness allowance;
- Paid and unpaid annual leave;
- Termination and severance; and
- Employees claims under the Employees Compensation Ordinance (**ECO**) for contracting COVID-19 in the workplace.

1. Flexible Working Arrangements under Hong Kong Law

Many Hong Kong private companies have implemented or are considering implementing flexible or otherwise mandatory working from home arrangements whereby employees are required or allowed to work from home. Although the issue of whether working from home is permissible or not is often governed by the terms of the employment contract as there is currently no legislation obliging an employer to allow employees to work from home, if the employment contracts are silent on such issue or the employment contracts have

fixed a specific working location, employers should come to an agreement with employees regarding any alternative working arrangements to avoid breaching the employment contracts.

Further, to curb the spread of COVID-19, the Hong Kong Government issued the Prevention and Control of Disease (Prohibition on Group Gathering) Regulation (the “**Prohibition on Group Gathering Regulations**”). The Prohibition on Group Gathering Regulations temporarily prohibits gatherings of more than four people in public places. However, a group gathering at a place of work for the purposes of work is exempt (the “**Work Place Exemption**”) and it is expected that board meetings of the board of directors of companies will fall within the Work Place Exemption. Therefore, regular work meetings may continue to be held during the course of business without being in contravention of the Prohibition on Group Gathering Regulations.

For a more detailed discussion on how the Prohibition on Group Gathering Regulations may affect the holding of annual general meetings, please see Charltons’ April 2020 Newsletter, Public Gatherings – Implications for AGMs, EGMs and Professional Meetings.

a) Key Issues for Hong Kong Employers with Employees Working From Home

- Hong Kong employers are still obliged to pay the employees under the employment contracts in accordance with the Employment Ordinance (Chapter

57 of the Laws of Hong Kong) (“**EO**”) even if employees are working from home. Any reduction or non-payment of the salary by employers may be regarded as unilateral variation of the terms of the employment contracts which may amount to breach.

- If Hong Kong employees are entitled to overtime payment under the employment contracts, employers should ensure there is in place mechanism and the necessary software to keep proper track and record of the employees’ working hours.
- Hong Kong employers should update their data protection policy to cover areas relevant to remote working setting, for example, measures that employees should take to avoid leakage of client information, and should ensure that all employees working from home are aware of such policy. Additional cyber infrastructure may be necessary for such purpose.
- Hong Kong employers are generally required to provide employees with sufficient resources to perform their duties and as such employers should consider appropriate measures and access is in place such that employees are able to work from home. In addition, employers will have to consider if they are required under the relevant terms of employment to reimburse employees any costs or expenses they incur in working from home (i.e. phone or internet charges).

b) Key Issues for Hong Kong Employers whose Offices / Workplaces in Hong Kong Remain Open

- Hong Kong employers are under a statutory duty pursuant to the Occupational Safety and Health Ordinance (Chapter 509 of the Laws of Hong Kong) (“**OSHO**”) to provide for the safety and health protection of employees in both industrial and non-industrial settings. This duty includes, among other, the provision of a safe and healthy work environment and provision of the necessary information. Further, the Occupational Safety and Health Regulation provides that the workplace should be kept clean and adequately ventilated. In particular, employers may be liable for breach of the common duty of care under the Occupiers’ Liability Ordinance (Chapter 314 of the Laws of Hong Kong) if employers fail to take reasonable care to ensure the safety of its visitors using the premises. Employers are also under a common duty to ensure workplace safety. As such, employers should ensure the cleanliness of the workplaces and provide staff with

supplies such as alcohol wipes, masks, disinfectants or soap etc. Business travel and face-to-face meeting should be minimized to the extent possible. Employers should also consider warning visitors of any health and safety hazards, including if any confirmed or suspected cases of the coronavirus have taken place in or around the workplaces.

- Under the OSHO, employees should also be responsible for taking care for the safety and health of persons at the workplace. Employers might be entitled to terminate an employees who willfully disobeys a lawful or reasonable order relating to maintaining the safety and health of other employees at the workplace.
- Under the EO, an employee is entitled to terminate the employment contract without notice or payment in lieu if he/she reasonably fears physical danger by violence or disease such as was not contemplated by the employment contract expressly or by necessary implication. Therefore, reasonable preventative measures should be taken by employers for employees who work at the office or other workplaces as designated by employers.

2. Discriminatory Acts Prohibited under Hong Kong Law

During the SARS outbreak in 2003, the Equal Opportunities Commission (the “**Commission**”) advised employers that it is discriminatory to dismiss or subject to detriment employees who have (or might have) SARS, or who have family members or associates who have (or might have) SARS (under the Disability Discrimination Ordinance (Chapter 487 of the Laws of Hong Kong) and the Family Status Discrimination Ordinance (Chapter 527 of the Laws of Hong Kong)). However, the Commission also advised that it is not unlawful for an employer to take action if the employee refuses to take precautions or refuses to comply with the quarantine measures, where such act is reasonably necessary to protect public health.

Therefore, employers should make sure their policies relating to the coronavirus are reasonable to protect the health and safety of the employees and are not discriminatory. Depending on the circumstances, it may be reasonable to require employees to wear masks, submit health declaration forms or have their temperature taken.

3. Personal Data Concerns under Hong Kong Law

In collecting data and information from employees for the purpose of responding to the coronavirus outbreak in the workplace (for example, requesting the travel history or health declaration forms from employees or taking temperature of employees), employers should bear in mind not to breach the Personal Data (Privacy) Ordinance (Chapter 486 of the Laws of Hong Kong) and the data protection principles. As such, employers should review and if necessary, update their personal data policy and should, including but not limited to,

- only collect personal data in responding to the coronavirus outbreak and should not collect excessive information;
- inform employees of the purpose of collection in advance;
- inform employees of their rights to have access to the data;
- not retain the personal data for a period longer than necessary;
- not use the personal data for other purposes; and
- ensure the security of the personal data and protect the personal data against unauthorized or accidental access, processing or loss.

4. Sick Leave and Sickness Allowance under Hong Kong Law

Employers should also be reminded that if employees have taken sick leave due to contracting the coronavirus, the employers cannot terminate the employment contract of such employees while on sick leave unless it is a case of summary dismissal (e.g. employee willfully disobeying a lawful or reasonable order, gross misconduct, fraud or dishonesty or being habitually neglectful in one's duties).

Employees who are required or ordered by a health officer of the Hong Kong government to be placed under medical surveillance or quarantine are issued medical certificates. In the press release issued by the Labour Department on 30 January 2020, the Labour Department states that "If an employee is required or ordered by a Health Officer to be put under medical surveillance or quarantine, he will be issued a medical certificate with the statement of "under medical surveillance". The employer would need to grant that employee sick leave in accordance with the requirements under the EO

or the relevant employment contract. However, in the advice published by the Labour Department in February, under the heading "if an employee does not contract any disease during quarantine and therefore no sick leave being granted, will wages be paid during this period", the Labour Department advised that "The EO does not provide for wage arrangements in such circumstances. Under the EO, wages generally means all remuneration in terms of money which are payable to the employee in respect of work done or to be done. We encourage employers to be considerate and show understanding to such employees' situation and make flexible arrangements".

It would seem that there has not been a conclusion as to whether employees are entitled to sickness allowance for the period of compulsory quarantine if the employees are not infected with the coronavirus. Therefore, it is advisable for employers to devise a policy in advance in this regard and make known to their staff.

5. Paid / Unpaid Annual Leave under Hong Kong Employment Law

Business may be adversely affected by the coronavirus outbreak and some business may not be able to operate for a short period of time or less manpower may be required to sustain the business. In such cases, employers may prefer the employees taking their paid annual leave. Under the EO, 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 the length of service. The EO specifies that times at which paid annual leave is granted shall be determined by the employer after consultation with the employee and the employer should give at least 14-days notice in writing to the employee on the time of the paid annual leave unless the employer and the employee agrees to a shorter period. Therefore, employers should discuss and agree with employees in advance regarding taking paid annual leave.

On the other hand, the EO does not contain provisions regarding unpaid leave. If employers would like the employees to take unpaid leave, employers must seek employees' agreement in advance. However, if an employee is employed on such terms and conditions that his remuneration depends on his being provided by the employer with work of the kind he is employed to do, he will be taken to be laid-off if the total number of days on which no work is provided or no wages are paid exceeds: (i) half of the total number of normal working days in any four consecutive weeks; or (ii) one-third of the total

number of normal working days in any 26 consecutive weeks. Employees who are laid-off are entitled to severance payment if certain conditions are met as discussed below.

6. Termination and Severance under Hong Kong Law

A contract of employment may be terminated by the employer or employee through giving the other party due notice or wages in lieu of notice. In the case of a continuous contract of employment, minimum notice varies from 7 days to 1 month and it may also depend on the term of the employment agreement.

If the business has been adversely affected by the coronavirus outbreak, employers may consider laying off employees or even close the business. In such cases, the usual provisions in relation to severance payment and long service payment under the EO will apply.

An employee is eligible for severance payment or long service payment subject to the following conditions:

Entitlement*	Severance Payment	Long Service Payment
Qualifying period of employment	not less than 24 months under a continuous contract	not less than 5 years under a continuous contract
Conditions / Requirements	The employee is dismissed by reason of redundancy**	The employee is dismissed but: <ul style="list-style-type: none"> • he is not summarily dismissed due to his serious misconduct; • his dismissal is not by

Entitlement	Severance Payment	Long Service Payment
Conditions / Requirements	Employment contract of a fixed term expires without being renewed by reason of redundancy	Employment contract of a fixed term expires without being renewed**
	The employee is laid off	The employee dies
		The employee resigns on ground of ill health
		The employee, aged 65 or above, resigns on ground of old age

* Entitlement is subject to the requirement that the employee give notice in accordance with section 31N of the Hong Kong Employment Ordinance to be entitled to a claim.

** An employee will not be simultaneously entitled to both long service payment and severance payment.

a) Meaning of Redundancy under Hong Kong Law

An employee is taken to be dismissed by reason of redundancy if the dismissal is due to the fact that: (i) the employer closes his business; (ii) the employer has ceased the business in the place where the employee was employed; or (iii) the requirement of the business for employees to carry out work of a particular kind ceases or diminishes.

b) Meaning of Lay-off under Hong Kong Law

If an employee is employed on such terms and conditions that his remuneration depends on his being provided by the employer with work of the kind he is employed to do, he will be taken to be laid-off if the total number of days on which no work is provided or no wages are paid exceeds: (i) half of the total number of normal working days in any four consecutive weeks; or (ii) one-third of the total number of normal working days in any 26 consecutive weeks.

c) Amount of Severance Payment/ Long Service Payment under Hong Kong Law

The following formula applies to the calculation of both severance payment and long service payment:¹

Monthly-paid employee	(last month wages x 2/3) ^{***} x reckonable years of service
Daily-rated/ piece-rated employee	Any 18 days' wages chosen by the employee out of his last 30 normal working days ^{***} x reckonable years of service

^{***} Subject to a cap of two thirds of HK\$ 22,500.

7. What if an employee has contracted COVID-19?

Due to the novelty of COVID-19, it is not one of the occupational diseases subject to compensation under the ECO although the Hong Kong Government is currently considering adding coronavirus to the list of occupational diseases. However, it does not mean an employee may not be able to make a claim under the ECO if the employee contracts the coronavirus by accident in the course of employment.

¹ Subject to a maximum payment of HK\$390,000 (assuming employment commences on or after 1 October 2003).

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