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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

The primary source of employment law in Hong Kong is legislation as supplemented by case law. The Employment Ordinance (Cap. 57) ("**EO**"), which prescribes certain basic rights and protections for employees, is the key piece of employment-related legislation.

In addition, statutes including the Employees' Compensation Ordinance (Cap. 282) ("**ECO**"), Minimum Wage Ordinance (Cap. 608) ("**MWO**"), Occupational Safety and Health Ordinance (Cap. 509) and the Factories and Industrial Undertakings Ordinance (Cap. 59) ("**FIUO**") address various other aspects of the employment relationship, including employees' rights in relation to work-related injuries and diseases, minimum wage requirements, as well as employee health and safety.

The Sex Discrimination Ordinance (Cap. 480) ("**SDO**"), Disability Discrimination Ordinance (Cap. 487) ("**DDO**"), Family Status Discrimination Ordinance (Cap. 527) ("**FSDO**") and Race Discrimination Ordinance (Cap. 602) ("**RDO**") also provide protections to individuals against harassment and discrimination in various contexts, including in employment situations.

1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

The EO protects employees engaged under a contract of employment, regardless of whether they are classified as full-time, part-time or temporary workers. It does not protect self-employed workers.

The EO also does not apply to an:

- individual who is a family member and employee of the business owner, and who lives in the same dwelling as the business owner;
- employee who is covered by the Contracts for Employment Outside Hong Kong Ordinance (Cap. 78);
- apprentice whose contract of apprenticeship has been registered under the Apprenticeship Ordinance (Cap. 47) ("**AO**"), except as provided for in that Ordinance; or
- employee who serves under a crew agreement (as defined in the Merchant Shipping (Seafarer) Ordinance (Cap. 475)) or on board a ship that is not registered in Hong Kong.

All employees covered by the EO are entitled to the basic protections under the EO. Further protections are provided to employees who are employed under a "continuous contract", meaning they have been continuously employed by the same employer for at least four consecutive weeks and have worked for at least 18 hours in each of those weeks.

1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

There is no requirement in Hong Kong for contracts of employment to be in writing. However, an employer must provide the following information to individuals before they commence employment:

- the wages and wage period;
- details of the end of year payment or proportion of the end of year payment (if any is to be provided) and the payment period; and
- the length of notice required to terminate the contract of employment.

There is no requirement to provide this information in writing, but if the employer receives a written request from the individual for these details to be provided in writing, the employer must comply with this request.

1.4 Are any terms implied into contracts of employment?

In addition to express terms, there are a number of terms implied into employment contracts by legislation and common law. A non-exhaustive list of such implied terms is provided below.

Employees have an implied duty to:

- carry out their work with reasonable skill and competence;
- obey lawful and reasonable instructions of the employer;
- serve the employer with fidelity and in good faith;
- keep certain categories of information confidential; and
- account for property and secret profits received as a result of their employment.

Employers have an implied duty to:

- provide an employee with work;
- provide a safe working environment;
- behave in a manner that does not destroy the relationship of trust and confidence; and
- indemnify employees for permitted expenses incurred in the fulfilment of their duties.

1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

All employees covered by the EO are entitled to basic protections, including payment of wages, restrictions on deductions from wages and unpaid statutory holidays.

Employees who are employed under a "continuous contract" (see question 1.2) are entitled to additional benefits under the EO that include statutory holiday pay, paid annual leave, rest days, sickness allowance, maternity leave, paternity leave, severance pay and long service pay.

Employers must enrol employees in, and contribute to, a Mandatory Provident Fund in accordance with the Mandatory Provident Fund Schemes Ordinance (Cap. 485) if the employee is employed in or from Hong Kong for a continuous period of at least 60 days, unless he/she is exempted, e.g. where the employee has elected to join an occupational retirement scheme offered by the employer or where the employee is not a Hong Kong permanent resident and has an overseas pension scheme.

All employees (subject to limited exceptions) must be paid at least the statutory minimum wage prescribed under the MWO.

1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

In Hong Kong, it is rare for terms and conditions of employment to be collectively agreed. There is no collective bargaining legislation, and trade union recognition by employers is uncommon. Even where a trade union enters into an agreement with the employer, an employee will only be able to rely on the terms of the agreement if it forms part of his/her contract of employment or if the employer and the employee otherwise agree for it to be binding between them.

1.7 Can employers require employees to split their working time between home and the workplace on a hybrid basis and if so, do they need to change employees' terms and conditions of employment?

This is a matter of contract between the employer and each of its employees. The express terms of the existing contract should first be considered. Unless the parties have expressly agreed that the employee will not be required to work from home, and if the employer can demonstrate that the hybrid working requirement is a lawful and reasonable instruction, then this is permissible. If the requirement is a long-term or permanent arrangement, the new hybrid working arrangement should be documented to ensure that the terms and conditions of employment are clear and unambiguous. Where the parties have expressly agreed previously that the employee will not be required to work from home, the employer should obtain the employee's consent to the hybrid working arrangement, otherwise a unilateral imposition of the requirement could amount to a breach of contract.

1.8 Do employees have a right to work remotely, either from home or elsewhere?

In Hong Kong, an employee does not have a statutory right to work remotely from home or elsewhere. Unless the contract of employment expressly states that the employee's place of work is his/her home or another location outside the normal workplace, the employee cannot assert a right to work remotely without the employer's consent.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

The Trade Unions Ordinance (Cap. 332) ("**TUO**") and Trade Union Registration Regulations (Cap. 332A) govern the registration and regulation of trade unions. Under the TUO, every trade union must register with the Registrar of Trade Unions within 30 days of its establishment. An application for registration of a trade union must be signed by at least seven voting members of the trade union. Upon registration of the trade union, the Registrar of Trade Unions will issue a certificate of registration.

It is a criminal offence for a person to act as an Officer of a trade union, or to take part in the management or administration of a trade union that is not duly registered.

2.2 What rights do trade unions have?

Upon registration, a trade union will become a body corporate that may sue or be sued in its own name. It is provided with certain immunities from civil legal proceedings in respect of acts done in contemplation or furtherance of a trade dispute, e.g. where the act causes a member of the trade union to breach his/her employment contract. The TUO also provides trade union members with immunity from criminal prosecution for conspiracy where they are acting in restraint of trade.

The EO provides for certain rights in relation to trade union membership and protection against anti-union discrimination. Specifically, an employee has the right to become a member or an Officer of a registered trade union, take part in its activities outside working hours (or within working hours with the employer's consent) and associate with others for the purposes of forming and applying for the registration of a trade union.

2.3 Are there any rules governing a trade union's right to take industrial action?

Under the TUO, it is lawful for trade unions to engage in peaceful and lawful picketing, subject to the limitations set out in the TUO.

The provisions of the Public Order Ordinance (Cap. 245) ("**POO**") may apply if the industrial action is a "public procession", "public gathering" and/or "public meeting" as defined in the POO. For example, notice must be given to the Commissioner of Police of the intention to hold a public meeting or public procession in the manner prescribed in the POO. The POO also prohibits "unlawful assembly" or "riots".

The EO protects employees against termination, penalisation and discrimination by or on behalf of the employer when exercising their rights, including participating in lawful industrial action.

2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

There is no statutory requirement for employers to set up works councils in Hong Kong.

2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

This is not applicable in Hong Kong.

2.6 How do the rights of trade unions and works councils interact?

This is not applicable in Hong Kong.

2.7 Are employees entitled to representation at board level?

There is no statutory entitlement for employees to have representation at board level in Hong Kong.

3 Discrimination

3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

Employees are protected from discrimination on the grounds of sex, pregnancy, marital status, disability, family status, race, and breastfeeding under the SDO, DDO, FSDO and RDO.

See also question 2.2, in relation to protection against anti-union discrimination under the EO.

3.2 What types of discrimination are unlawful and in what circumstances?

Each of the anti-discrimination Ordinances prohibits direct and indirect discrimination on the ground of a protected characteristic (sex, pregnancy, marital status, disability, family status, race, or breastfeeding status).

Direct discrimination occurs where a person with a protected characteristic is treated less favourably on the ground of that protected characteristic than a person without that protected characteristic is or would be treated in comparable circumstances.

Indirect discrimination occurs where a condition or requirement is applied equally to a group of individuals, but it has a disproportionately detrimental effect on individuals with the protected characteristic because they cannot comply with the condition or requirement. However, it does not constitute indirect discrimination if the application of the condition or requirement is justifiable.

Sexual harassment, disability harassment, racial harassment and breastfeeding harassment are also prohibited under the anti-discrimination Ordinances. Generally, harassment occurs if the behaviour is unwelcome in circumstances where a reasonable person would have anticipated that the person being harassed would be offended, humiliated or intimidated by the conduct. There is also the concept of "hostile environment" harassment where a person engages in conduct on the ground of an individual's sex or race or because she is breastfeeding, which creates a hostile or intimidating environment for that individual.

The anti-discrimination Ordinances also prohibit victimisation that occurs when a person is treated less favourably on the ground that he/she has made allegations of unlawful discrimination or harassment, has commenced (or given evidence in connection with) proceedings against an alleged discriminator or has taken steps to enforce any of the anti-discrimination Ordinances.

Vilification on the ground of disability or race is also unlawful. This occurs where a person does an act in public that incites hatred towards, serious contempt for, or severe ridicule of a person or persons on the ground of disability or race. Where such behaviour involves a threat of physical harm or property damage, this may constitute serious vilification, which is a criminal offence.

3.3 Are there any special rules relating to sexual harassment (such as mandatory training requirements)?

There is no express statutory requirement to provide training. However, it is recommended that employers implement appropriate policies and provide training as a matter of good practice. Further, an employer may have a defence to a claim of vicarious liability in relation to unlawful discrimination or other unlawful acts carried out by its employees or agents if the employer can prove that it has taken reasonably practicable steps (such as training) to prevent such acts from occurring.

3.4 Are there any defences to a discrimination claim?

An employer is generally afforded a defence against a discrimination claim if it can prove that:

- the act complained of was not done because of an individual's protected characteristic;
- the individual was not treated less favourably than others who do not have the protected characteristic;
- the employee has not suffered any detriment; or
- a requirement or condition applied equally to individuals without a protected characteristic is justifiable.

Under the DDO, SDO and RDO, it is a defence to show that being a person without a disability, being a specific gender, or being a person of a particular race, respectively, is a "genuine occupational qualification" of the job.

Under the DDO, it is also a defence for an employer to show that the treatment complained of is justified because:

- the employee is unable to carry out the "inherent requirements" of the job due to his/her disability; or
- the provision of facilities or services required to enable the employee to meet the inherent requirements of the job would cause "unjustifiable hardship" to the employer.

See also question 3.3 above, regarding a potential defence in relation to vicarious liability of employers.

3.5 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

Employees can lodge a complaint with the Equal Opportunities Commission ("**EOC**"). The EOC may decide not to investigate the matter if it is clear that the alleged treatment was not unlawful, or if more than 12 months have elapsed since the act occurred, or if the EOC is of the opinion that the complaint is frivolous, vexatious, misconceived or lacking in substance.

Prior to fully investigating a complaint, the EOC will write to the employer to enquire whether the employer is open to conciliation. The employer may, therefore, seek to settle the claim at this stage. If conciliation attempts fail or if the employer is unwilling to conciliate, the EOC will proceed with the investigation.

The EOC does not have the power to adjudicate claims. Therefore, on completion of an investigation, if it considers that discrimination may have occurred, the EOC will, again, invite the parties to conciliate. If conciliation is successful, the EOC will facilitate the signing of a written conciliation agreement

between the parties. However, if conciliation attempts fail, the complainant may apply to the EOC for legal assistance. This includes legal assistance for the purpose of commencing proceedings in the District Court.

It is also possible for the employee to bypass the EOC process and to file a claim directly with the District Court.

3.6 What remedies are available to employees in successful discrimination claims?

The District Court is empowered to make a declaration that the respondent has engaged in unlawful conduct, order the respondent to redress any loss or damage (e.g. by making an apology), order the respondent to re-employ the claimant, order the respondent to pay compensation to the claimant for loss or damage (including damages for injury to feelings), order the respondent to pay punitive or exemplary damages, or make an order declaring void a contract (or part of a contract) that was made in contravention of an anti-discrimination Ordinance.

3.7 Do "atypical" workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

There are no additional legislative protections for part-time, fixed-term or temporary workers.

3.8 Are there any specific rules or requirements in relation to whistleblowing/employees who raise concerns about corporate malpractice?

There is no overarching whistleblowing legislation in Hong Kong. However, there are various laws and codes that provide for whistleblower protections in certain circumstances.

Under the EO, an employer cannot terminate (or threaten to terminate) the employment of an employee, or discriminate against an employee, by reason of him/her giving evidence in relation to proceedings or an inquiry in connection with the enforcement of the EO or in relation to safety at work.

Under the anti-discrimination Ordinances, it is unlawful for a person to victimise another person on the ground that he/she has made a complaint or given information or evidence in relation to a complaint of alleged discrimination.

Under the Prevention of Bribery Ordinance (Cap. 201), the names and addresses of informers are protected from disclosure in legal proceedings.

Under the Securities and Futures Ordinance (Cap. 571), a whistleblower is protected against civil liability for reporting financial irregularities.

Under the HKEX Corporate Governance Code, listed companies are expected, as a matter of best practice, to establish a whistleblowing policy and system for employees to confidentially and anonymously raise concerns about possible improprieties relating to the issuer.

3.9 Are employers required to publish information about their gender, ethnicity or disability pay gap, or salary or other diversity information?

There is no requirement in Hong Kong for employers to publish information about their gender, ethnicity or disability pay gap, or other salary or diversity information.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

A female employee is entitled to maternity leave of 14 continuous weeks, provided that she: (i) has been employed under a continuous contract (see question 1.2) immediately before the commencement of maternity leave; (ii) has given notice of her pregnancy and her intention to take maternity leave to her employer; and (iii) if required by her employer, has provided a medical certificate confirming her pregnancy and date of confinement.

The employee is entitled to further maternity leave if she gives birth later than the expected due date. The employee is also entitled to additional leave of up to four weeks on the ground of illness or disability relating to pregnancy or giving birth.

The employee must commence maternity leave between two and four weeks before the expected due date. If the employee does not specify, or the employer does not agree with the commencement date, the employee must commence her maternity leave four weeks before the expected due date.

4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

A female employee is entitled to 14 weeks of paid maternity leave if she has been continuously employed for at least 40 weeks immediately before the commencement date of her maternity leave and has met the requirements of points (ii) and (iii) in question 4.1 above.

Statutory maternity leave is paid at the rate of four-fifths of the employee's daily average wages earned in the 12 months (or the period of employment, if shorter) prior to the commencement of maternity leave. Maternity leave pay in respect of the 11th to 14th weeks of maternity leave is subject to a cap of HK$80,000.

Employers are prohibited from terminating the employment of an employee who is confirmed pregnant by a medical certificate until the date when she is due to return to work upon the expiry of her maternity leave, except where: (i) the employee is being summarily dismissed; or (ii) the termination occurs during the first 12 weeks of an employee's probationary period for reasons other than pregnancy.

A pregnant employee may, on producing a supporting medical certificate, request her employer to refrain from assigning her heavy, hazardous or harmful work pursuant to the provisions of the EO.

4.3 What rights does a woman have upon her return to work from maternity leave?

Pregnant employees generally have a right to return to the role they held prior to the commencement of their maternity leave. They are protected by the SDO and FSDO against less favourable treatment by their employer on the ground that they have taken maternity leave or on the ground of their sex, family status, marital status, pregnancy or breastfeeding status.

4.4 Do fathers have the right to take paternity leave?

A male employee is entitled to five days of paternity leave, which may be taken consecutively or otherwise, if he: (i) is (or is about to become) the father of a newborn child; (ii) has been employed

under a continuous contract (see question 1.2) immediately prior to the commencement of his paternity leave; and (iii) has given the required notification to his employer.

If the employee: (i) has been continuously employed for at least 40 weeks immediately before the commencement date of his paternity leave; and (ii) provides the child's birth certificate within the required timeframe confirming that he is the child's father, he is entitled to be paid for the paternity leave. Statutory paternity leave is paid at the rate of four-fifths of the employee's daily average wages earned in the 12 months (or the period of employment, if shorter) prior to the commencement of the paternity leave.

4.5 Are there any other parental leave rights that employers have to observe?

There are no other statutory rights specific to parental leave that employers have to observe.

4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependants?

There are no express statutory provisions in Hong Kong providing for any entitlement to work flexibly if employees have responsibility to care for dependants. However, an employee could seek to challenge his/her employer's refusal to agree to flexible working if it can be demonstrated that this amounts to family status discrimination and/or sex discrimination.

5 Business Sales

5.1 On a business sale (either a share sale or asset transfer), do employees automatically transfer to the buyer?

Hong Kong law does not provide for an automatic transfer of employees to the buyer on an asset sale. To effect a transfer of employees to the purchaser, existing contracts of employment with the previous employer must be lawfully terminated and the purchaser must enter into new contracts of employment with the transferring employees. However, the EO provides for certain exceptions and mechanisms enabling the previous employer to avoid paying statutory severance or long service payments and preserving continuity of employment.

On a share sale, there is no need to effect any transfers of employment because the employees will remain employed by the same company.

5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

Where the business sale is a share sale, there is no impact on employee rights as set out in question 5.1 above.

Where there has been a change of ownership of the business or the transfer is between associated companies as detailed in the EO, the employee relinquishes his/her rights to termination payments on a transfer to the new employer. However, the new employment contract will be on substantially the same terms as the previous employment contract and there will be no break in continuity of employment.

Whether and how a business sale affects a collective agreement will depend on the terms of the relevant agreement.

5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

There are no statutory rights for employees to be provided with information and/or be consulted on a business sale unless there is an enforceable contractual obligation to engage in any such process.

5.4 Can employees be dismissed in connection with a business sale?

Employees can be dismissed in connection with a business sale. The reason for dismissal is likely to be redundancy, in which case, the statutory provisions on terminations and severance payments will apply.

5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

Employers are free to change the terms being offered to employees following the usual rules governing variation of an employee's contract. However, an employee may choose to refuse the new contract (assuming that it is less favourable than his/her existing one), in which case, the refusing employee will be entitled to receive a severance payment (if he/she has the requisite years of service) and other termination payments.

6 Termination of Employment

6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

Employees must be given either notice of termination or payment *in lieu* of notice. Similarly, an employee can terminate his/her employment by giving notice or making a payment *in lieu* of notice to his/her employer. The requisite notice period is typically specified in the employment contract, but is subject to the overriding requirements set out in the EO as discussed below.

Under the EO, during the first month of the probationary period (if any), either party can terminate the employment without notice or payment *in lieu* of notice. For the remainder of the probationary period, either party may terminate the employment by giving the period of notice prescribed under the employment contract, which must not be less than seven days.

After completion of the probationary period, either the employer or the employee can terminate the employment by giving notice as specified in the employment contract (which must not be less than seven days). If there is no agreed notice period, the EO prescribes how the notice period should be determined.

Where an employee has engaged in gross misconduct, the employer can terminate the employee's employment without notice or payment *in lieu* of notice. This is referred to as "summary dismissal".

An employee can also terminate his/her employment contract without notice or payment *in lieu* of notice in certain situations; for example, where he/she is subjected to ill-treatment by the employer, where the employer commits a repudiatory breach going to the root of the contract or where the employer has failed to pay the employee's wages within one month from the due date. Termination by the employee in such circumstances is referred to as "constructive dismissal".

6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?

An employer can require an employee to serve out his/her notice period on garden leave if the employment contract provides the employer with the power to do so. Otherwise, separate consent should be obtained from the employee.

6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

Under the EO, an employee with continuous employment of at least 24 months is taken as being dismissed if he/she is employed on a fixed-term contract that is not renewed, or if the employee is summarily dismissed (see question 6.1), or if the employee treats himself/herself as having been constructively dismissed (see question 6.1).

An employee who has been continuously employed for at least 24 months may also be treated as having been dismissed if the employer (i) terminates the employment contract, or (ii) varies the terms of the employment contract without the employee's consent, because the employer intends to extinguish or reduce a right, benefit or protection conferred or to be conferred on the employee by the EO. However, the employer is afforded a defence if it can show that the reason for the dismissal or the variation of contract was due to: (i) the conduct of the employee; (ii) the capability or qualifications of the employee; (iii) redundancy or other genuine operational requirements of the business; (iv) the fact that continuing the contract without the variation would be in contravention of the law; or (v) another reason of substance that would be considered sufficient grounds for dismissal by the Court or Labour Tribunal.

Consent from a third party is not required before an employer can dismiss an employee.

An employee may also have protections against dismissal under other legislation, including the anti-discrimination Ordinances and the ECO.

6.4 Are there any categories of employees who enjoy special protection against dismissal?

It is unlawful to terminate the employment of an employee:

- who is on paid sick leave under the EO, except if the employee is being summarily dismissed;
- who is confirmed pregnant by a medical certificate until the date when she is due to return to work from maternity leave;
- who has made a claim for employees' compensation under the ECO before the relevant certificate of assessment has been issued by the Labour Department or a settlement agreement has been reached with the employee;
- by reason of the employee exercising his/her rights under the EO in respect of trade union membership and activities; or
- who has given evidence in any proceedings or given information to a public officer in relation to an inquiry under the EO, ECO, or FIUO, or in relation to safety of persons at work.

6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business-related reasons? Are employees entitled to compensation on dismissal and if so, how is compensation calculated?

An employer is entitled to validly dismiss an employee for the following reasons:

- the conduct of the employee;
- the capability or qualifications of the employee;
- redundancy or other genuine operational requirements of the employer;
- the fact that the employer and/or the employee would be in contravention of the law if the employment continued; or
- any other reason of substance that would be considered sufficient grounds for dismissal by the Court or Labour Tribunal.

The EO also allows an employer to summarily dismiss an employee if the employee: (i) wilfully disobeys a lawful and reasonable order; (ii) misconducts himself/herself; (iii) is guilty of fraud or dishonesty; or (iv) is habitually neglectful in his/her duties. The employer may also justify summary dismissal on any other ground available under common law.

Where an employee's employment is terminated on the ground of redundancy, he/she will be entitled to statutory severance if he/she has been continuously employed for at least 24 months.

Where the dismissal is deemed unreasonable, an employee may be entitled to an award of terminal payments, an order for re-engagement or reinstatement (which may require the employer's consent) and/or an order of compensation of up to HK$150,000.

6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

An employer needs to:

- give the required notice to the employee or make a payment of wages *in lieu* of the required notice; and
- make all statutory and contractual termination payments due to the employee within seven days of the termination date, subject to tax withholding obligations (if applicable).

If the employer has adopted a contractual disciplinary procedure, this should be followed prior to effecting the termination.

6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

Please refer to questions 6.3 and 6.5 above. Employees can attempt to conciliate claims by seeking the assistance of the Labour Relations Division of the Labour Department. Failing conciliation, employees can commence legal action in the Labour Tribunal. If the complaint involves issues of discrimination, these can only be dealt with by the EOC or the District Court. Please refer to questions 3.5 and 3.6 for discrimination complaints and remedies.

6.8 Can employers settle claims before or after they are initiated?

An employer can settle a claim with an employee before or after the claims are initiated.

6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

There is no statutory obligation to engage in any consultation or process as a result of an increased number of dismissals. An obligation may arise where there is some form of collective agreement, but such agreements are rare.

6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

Mass dismissals do not give rise to any specific rights for employees or specific obligations for employers, except where they exist under a collective agreement. Employees may seek the assistance of the trade union of which they are a member. However, employees generally enforce their rights on an individual basis since there is no class action regime in Hong Kong.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

The main types of restrictive covenants recognised in Hong Kong relate to non-disclosure of confidential information, non-competition, non-solicitation of employees, clients and customers and non-dealing.

7.2 When are restrictive covenants enforceable and for what period?

For restrictive covenants to be enforceable, they must be necessary to protect a legitimate business interest of the employer and must go no further than is reasonable to protect that interest. The Courts will consider factors such as the duration of the restraint period, the geographical area of the restraint and the nature and scope of the restraint in determining whether the restrictive covenants are reasonable. The appropriate period of the restraint will depend on different factors. These may include the seniority of the employee and the nature of the confidential information to which the employee has (or has had) access.

7.3 Do employees have to be provided with financial compensation in return for covenants?

It is not legally required or necessary to provide financial compensation in return for covenants in order for them to be enforceable if they are included in the contract of employment. The remuneration and benefits provided under the employment contract are sufficient consideration for the post-termination restrictive covenants.

7.4 How are restrictive covenants enforced?

Restrictive covenants are enforced by commencing legal proceedings in the District Court or High Court against a former employee and/or his/her new employer. The employer may seek an injunction to restrain the former employee from continuing the contravening activity, and/or claim damages and/or an account of profits associated with the former employee's breach of a restrictive covenant.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

The collection and use of personal data in Hong Kong, including personal data collected and held by employers at various stages of the employment relationship, are governed by the Personal Data (Privacy) Ordinance (Cap. 486) ("**PDPO**"). An individual may lodge a complaint with the Privacy Commissioner if there has been a contravention of the PDPO.

Section 33 of the PDPO, which regulates cross-border personal data transfers from Hong Kong, is not yet in force. As such, employers can, in theory, freely transfer employee data outside of Hong Kong, provided that they comply with other requirements of the PDPO. For example, the personal data of an employee may only be transferred to a third party in a class of transferees that has been notified to the employee on or before the original collection of the employee's personal data, and the transfer can only be for the stated purposes that the employer has notified to the employee or for which the employer has the employee's express consent.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

Employees are entitled to request copies of personal data held by their employer by making a data access request. The requirements for making and complying with a data access request are prescribed under the PDPO. An employer is entitled to charge a reasonable fee for complying with the data access request.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

Pre-employment checks are generally allowed, but employers should be aware of the prohibitions under the anti-discrimination Ordinances and the requirements under the PDPO. For instance, employers should ensure that: (i) prospective employees are informed about the purposes of the collection of this data; (ii) the data collected is directly related to a function or activity of the employer; (iii) only personal data that is necessary and not excessive for that purpose is collected; (iv) the data is collected through lawful and fair means; and (v) the data collected is securely stored and is not retained for longer than is necessary. If a third party is engaged in conducting the checks, it must also observe the requirements under the PDPO.

Employers are not prohibited from asking about an employee's criminal record, provided that the requirements of the PDPO are met, but employees have no duty to disclose any prior convictions. There are limited means (if any) for an employer to independently verify and confirm an employee's criminal record in Hong Kong.

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

Employers are not prohibited from monitoring an employee's emails, telephone calls or use of an employer's computer system, but such monitoring must comply with the PDPO if personal

data is collected. The Privacy Commissioner has issued guidelines that set out best practices when conducting such monitoring. Employers are recommended to conduct processes known as the 3As (Assessment, Alternatives and Accountability) and the 3Cs (Clarity, Communication and Control). The 3As process involves an assessment of the risks and benefits of the monitoring, considering whether less intrusive alternatives are available and ensuring proper accountability for any data that is collected. The 3Cs process is used in designing monitoring policies and involves providing clarity around the specific purposes of the monitoring, communication of this to employees prior to engaging in such monitoring and ensuring proper safeguards and controls are implemented for the holding, processing and use of monitoring records.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

Employers may require employees to adhere to certain standards and expected behaviours when using social media in or outside the workplace to minimise the risk of the employer's confidential information being disclosed or the reputation of the employer being damaged. However, a balance should be carefully struck to ensure that the employer does not engage in conduct that might destroy the relationship of trust and confidence in the employment relationship, resulting in a breach of contract. Where the employee's conduct on social media causes damage to the employer, this may be taken into account in making disciplinary decisions.

8.6 Are there any restrictions on how employers use AI in the employment relationship (such as during recruitment or for monitoring an employee's performance or productivity)?

There are currently no specific laws or regulations in Hong Kong regarding how employers can use AI in the employment relationship. However, employers must comply with existing data privacy legislation relating to how an individual's personal data is collected, processed, stored and transferred in the recruitment process and throughout the employment relationship. In addition, employers are bound by existing laws that prohibit them from utilising AI in a manner that amounts to unlawful discrimination.

9 Court Practice and Procedure

9.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

The Labour Tribunal has exclusive jurisdiction to hear any claims above HK$15,000 arising from:

- a failure to comply with the EO, the MWO, or the AO;
- a breach of an express or implied term of a contract of employment or contract of apprenticeship; and
- claims transferred by the Minor Employment Claims Adjudication Board ("**MECAB**") or the Small Claims Tribunal.

There is no upper limit to the monetary claims that can be heard by the Labour Tribunal.

Proceedings in the Labour Tribunal will be heard and determined by a Presiding Officer or a deputy Presiding Officer who sits alone. No legal representation is allowed. The Labour Tribunal has a wide discretion to refer a claim to higher Courts if the circumstances justify a transfer.

The MECAB has jurisdiction to adjudicate employment claims involving not more than 10 claimants for sums of up to HK$15,000 per claimant. The proceedings are heard and determined by an Adjudication Officer.

Claims for non-monetary remedies must be brought before the District Court or High Court. The District Court has exclusive jurisdiction to hear discrimination claims and employees' compensation cases. It also hears tort cases (including personal injuries claims) within its jurisdiction (where the claims are over HK$75,000, but do not exceed HK$3 million). There is no upper limit on the *quantum* of claims that can be heard by the High Court, Court of First Instance. It also hears appeals from the MECAB and Labour Tribunal.

Magistrates' Courts hear criminal prosecutions against employers that have contravened statutory provisions.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

A claimant should first make an appointment with the Labour Relations Division of the Labour Department to seek the assistance of a Conciliation Officer in reaching a settlement with the employer. If no settlement is reached, or if the employer declines to attend the conciliation meeting, the Conciliation Officer will refer the claimant to the MECAB or Labour Tribunal so that the employee can file a claim.

The employee will need to file the necessary claim forms and pay a small filing fee. The MECAB and the Labour Tribunal will not hear a claim until a certificate of conciliation in the prescribed form signed by an Authorised Officer is filed or produced.

The Officer will make inquiries about the claim and assist the employee in filing the claim. The Officer will then write to the employer with regard to the defence and other documents to be submitted. No legal representation is permitted at the MECAB or Labour Tribunal, although parties are free to take legal advice and to ask their legal representative to assist with drafting their pleadings and submissions.

It is usual for the Adjudication Officer/Presiding Officer to attempt to help the parties resolve the claim. If the parties cannot reach a settlement, directions will be given for the filing of evidence and a date will be fixed for the substantive issues to be heard.

Employment-related claims in the District Court and the High Court are governed by separate civil procedure rules.

9.3 How long do employment-related complaints typically take to be decided?

Generally speaking, cases in the Labour Tribunal and the MECAB are dealt with relatively quickly. However, in the Labour Tribunal, more complex cases involving a large amount of evidence and/or multiple witnesses will usually take longer. Where the matter proceeds to trial, it may take several months for the case to be heard and decided.

9.4 Is it possible to appeal against a first instance decision and if so, how long do such appeals usually take?

In the Labour Tribunal, a party may apply for a review of the

award or order within seven days after the award or order is made. The review must be conducted within 14 days from the date of the award or order. The review is normally carried out by the Presiding Officer who heard the case, but he/she may transfer the review to another Presiding Officer. Following the review, the Presiding Officer may decide that the case should be re-opened and re-heard.

Either party may also, within seven days from the date of the decision, apply to the Court of First Instance for leave to appeal against the decision of the Labour Tribunal. The appeal must be based on the award, order or determination being erroneous in law or outside the jurisdiction of the Labour Tribunal. The length of the appeal will depend on factors such as the complexity of the case.

Diana Purdy is a Partner leading the Greater China Employment team. She has been practising law since 1997, handling a full range of employment matters, including contracts and policies, contentious terminations, investigations, discrimination claims, enforcement of restrictive covenants, employment transfers, data privacy, diversity and inclusion, restructuring and regional projects.
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