

Hong Kong Employment Law Update: 2014 round-up and looking ahead to 2015

January 2015

We summarise last year's developments in Hong Kong's employment regime and look ahead at what we expect for 2015.

Developments during 2014

Paternity leave

Three days of paid paternity leave will become a statutory entitlement on 27 February 2015 on commencement of the Employment (Amendment) Ordinance 2014. The employee may take paternity leave at any time during the period from four weeks before the expected date of delivery to ten weeks beginning on the actual delivery date. Payment for paternity leave will be at four-fifths of the employee's average daily wages, which mirrors statutory maternity leave pay.

An employer who fails to comply with the paternity leave provisions without reasonable excuse commits an offence and will be liable to a maximum fine of HK\$50,000¹, as for maternity leave.

Employers should update their existing policies to ensure compliance. In particular, employers should consider whether notification procedures should be implemented in the workplace for paternity leave and to update its employment manual to reflect the company's paternity leave policy.

Updated procedures for employment and discrimination claims

In November, changes were made to simplify procedures for equal opportunities claims². The updates form part of the judiciary's on-going initiative to streamline proceedings, facilitate speed and lower costs. The changes aim to reduce interlocutory applications and include, for example, the introduction of prescribed forms instead of pleadings, and a fixed timetable for proceedings on an *unless* basis save for exceptional circumstances. While these changes principally assist plaintiffs in bringing their claim, they will bring efficiency benefits for all parties.

¹ This reflects the current amount under a level 5 fine.

² Practice Direction SL8 The Equal Opportunities List and the District Court Equal Opportunities (Amendment) Rules 2014.

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In December, the Labour Tribunal Ordinance was amended to improve the operations of the Labour Tribunal. Changes include:

- it is now clear that the tribunal has the power to deal with all types of monetary claims relating to employment claims, including unliquidated damages;
- the Tribunal now has enhanced case management powers make orders for payment of security, where a party can show that it would be "just and expedient" to do so. In essence, this provision should assist employers facing claims from vexatious litigants who are bringing unmeritorious claims or delaying the process;
- the time limit for enforcing its awards or orders has been aligned with that for other civil claims (namely, six years).

Extended scope of anti-harassment law

The Sex Discrimination Ordinance was amended in December to extend the protection to cover service providers from sexual harassment by their customers. The ordinance also extends its protection to cover unlawful sexual harassment which occurs on a Hong Kong registered ship or aircraft while outside Hong Kong.

The new law is particularly relevant to service industries where personal interaction with customers is frequent. Employers in these industries should consider implementing training and updating their anti-harassment policies to include a section on sexual harassment of service providers and how complaints of such conduct will be dealt with.

Protection of personal data

In May, the Privacy Commissioner for Personal Data in Hong Kong took enforcement action against 48 companies that had placed job advertisements in Hong Kong without disclosing their identities, thereby soliciting job applicants' personal data in an unfair manner. The Commissioner's office confirmed that it had received 550 enquiries regarding so called "blind ads" in the last five years and despite issuing advisory notices to each advertiser, the practice has continued unabated. It is clear that this is an area that the Commissioner will continue to monitor in 2015.

In December the Commissioner published guidance to businesses exporting personal data from Hong Kong. Hong

Kong's section 33 export controls have never been brought into force, so the guidance has been prepared primarily with a view to assisting businesses in preparing for its eventual implementation. The guidance prescribes a format for data export consents and a set of model data transfer terms. It is clear that the implementation of section 33 envisaged by the Commissioner will raise significant compliance challenges for Hong Kong businesses, in particular in relation to consolidated HR systems and databases hosted outside of Hong Kong.

Looking ahead to 2015

Looking ahead to 2015, we will be monitoring the following developments:

Third parties in employment-related contracts

The Contracts (Rights of Third Parties) Ordinance was passed in December 2014 and is expected to come into effect late in 2015. From an employment perspective, this means that a third party may have the right to enforce a term of a contract against an employer (but importantly, *not* against an employee) where the contract expressly provides a term to that effect or if the contract contains a term which purports to confer a benefit on the third party. The third party must be identified by name, as a member of a class, or answering as a particular description. Even if the third party is not in existence at the time the contract is entered into, so long as it can be identified by its description in the contract, the benefit of the contract may still be enforced by that third party.

An example of employment related contract terms that may be enforced by a third party is an agreement to provide medical or life insurance to the employee's family, which may be enforced by those family members identified, unless this is excluded by the contract.

Although the ordinance will not affect contracts entered into before the commencement date of the ordinance, we would recommend businesses start reviewing their employment-related contracts as well as other contracts to see if amendments are necessary to allow a third party to enforce a contract (for example, a group company) or if there should be express exclusions to prevent enforcement by a third party.

An important point to note is that as the ordinance does not permit a third party to enforce any terms of a contract against an employee, any terms in an employment contract which may confer a benefit on a third party cannot be enforced by that third party. It may only be enforced by the employer.

Mandatory Provident Fund

Amendments to the Mandatory Provident Fund scheme have been proposed to provide more flexibility for scheme members to plan and manage their retirement funds. The proposals include:

- allowing phased withdrawal of accrued benefits;
- "terminal illness" as an additional ground for early withdrawal;
- simplifying compliance measures for trustees with a view to driving down MPF fees.

The Mandatory Provident Fund Schemes (Amendment) Bill 2014 was gazetted in June 2014, following a public consultation during 2011-2012. The proposals are still under discussion in LegCo.

Discrimination Law Review

In July 2014, the Equal Opportunities Commission commenced a wholesale review of the existing anti-discrimination laws. The principles behind the review are to modernise, simplify, harmonise, and potentially consolidate the current laws. A report with recommendations is expected in mid-2015, following the completion of a public consultation exercise.

Protection of personal data

Hong Kong's Privacy Commissioner is very much an activist regulator. He has published a substantial volume of guidance on a range of topics and publicly comments on developments in privacy law abroad. Business handling of employee data is clearly an area of interest. The Commissioner's Code of Practice on Human Resources Management sets out detailed compliance requirements for handling employee and job applicant data and he has separately published guidance on topics such as workplace monitoring. As a keen advocate of the comprehensive, "top down" approach to company data privacy policies and procedures it is likely that 2015 will see the Commissioner press for wider ranging regulation and heavier enforcement powers under the Personal Data (Privacy) Ordinance in Hong Kong.

Policy address 2015

In the latest Policy Address 2015, the Chief Executive announced:

- **the minimum wage** will be increased from the current HK\$30/hour to HK\$32.5/hour with effect from 1 May 2015, subject to the approval of LegCo.

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- the Government is raising **retirement age** of civil servants, in order to encourage other employers to follow suit.
 - enhanced **child-care services** to provide better support for women wishing to join the work force.

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