

GALL

THE HONG KONG EMPLOYMENT LAW HANDBOOK COVID-19 EDITION



WWW.GALLHK.COM

THE HONG KONG EMPLOYMENT LAW HANDBOOK

COVID-19 EDITION

The Covid-19 pandemic has challenged businesses across the world and raised unprecedented issues for both employers and employees in the employment law space. In this “**The Hong Kong Employment Law Handbook - COVID-19 Edition**” we address your most asked queries relating to everything from working from home (WFH), to working from abroad, to unpaid leave and annual leave, redundancies and restructurings, compulsory testing and vaccinations, as well as occupational health and safety.

Learn more about the key employment law themes that shaped 2020 and remain relevant for the year ahead.

Please don't hesitate to get in touch if you have any questions.

新冠肺炎疫情给全球的企业带来了许多挑战, 并为雇主和雇员带来了前所未有有关於雇佣条例上的问题。在这本《香港雇佣条例新冠肺炎疫情指南》中, 我们解答了您最常问到的问题, 涉及的话题由在家工作(WFH)到在国外工作, 无薪假期和年假, 裁员和重组, 以及职业安全与健康。

详细了解塑造2020年及于未来一年相关的重要就业法主题。

如有任何疑问, 请随时与我们联系。



Nick Gall 高嘉力
Senior Partner
高级合伙人
nickgall@gallhk.com



Matthew Durham
Registered Foreign Lawyer
注册外地律师
matthewdurham@gallhk.com



Vanessa Ip 叶锡义
Associate
律师
vanessaip@gallhk.com



SECTION ONE

WORKING FROM HOME (WFH)

What are the legal implications of working from home? And what needs to be considered for a successful WFH experience?

1. Preliminary issues

a. Entitlement to work from home

In Hong Kong, there is no statutory right to work from home.

In some cases, the employment contract may provide a right to work from home. Where no contractual rights exist, it may be possible to agree to work from home in certain situations.

b. What is working from home?

Working from home is an arrangement whereby the employee performs his/her work from home. It could be a temporary feature in response to special circumstances or it could be a permanent arrangement.

However, working from home does not automatically vary the working hours or the nature of the work. The employee continues to remain bound by the obligations in the employment contract and/or employer's policies (if any).

Any change to the employment terms needs to be agreed between the employer and the employee.

2. Factors for suitability of working from home

The following factors should be considered when determining the suitability of working from home:-

a. Role of the employee

The employee's role and the nature of work have an impact on the practicability of working from home. Generally, such an arrangement is possible where the employee can carry out his/her work indoors and remotely with the use of technology. The level of authority of the employee, the need for face-to-face interactions and the line of reporting are also factors that should be considered. In addition, the employee should demonstrate that the quality and effectiveness of work is not compromised when working from home.

b. Employee's personal attributes

In addition to the employee's role itself, the employee's personal attributes and skills should also be considered

carefully. Some of these attributes are:

- i. the ability to work independently;
- ii. self-motivation and self-discipline;
- iii. the ability to effectively manage time;
- iv. employees should be comfortable and able to use technology for accessing work-related materials and for work-related communication;
- v. the ability to separate his/her work life and personal life.

In this regard, the employee's personnel record, including his/her recent conduct and performance levels and any unexpired warnings, should be taken into account before agreeing to any work from home arrangements.

c. Home environment

The employee should have a private space without distractions which can be used as a workspace and access to strong internet and mobile telephone connections.

In respect of protecting confidential information, employees should be able to receive and make calls from a quiet space without the risk of being overheard. Employees could also be required to have document storage facilities which should mitigate the risk of confidential information being viewed by third parties.

d. Insurance coverage / health and safety

Employers are required to have in place an insurance policy that covers the employer's liabilities under the Employees' Compensation Ordinance (Cap. 282). Employers should check whether the insurance policy includes a provision for working from home, as accidents may happen whilst the employee is out of the office.

Employees should also be required to take reasonable care whilst working from home and should be under an obligation to promptly notify the employer if they suspect any health and safety concerns, or if an accident or incident takes place. Employers should also take necessary care in providing equipment to employees that are safe to use.

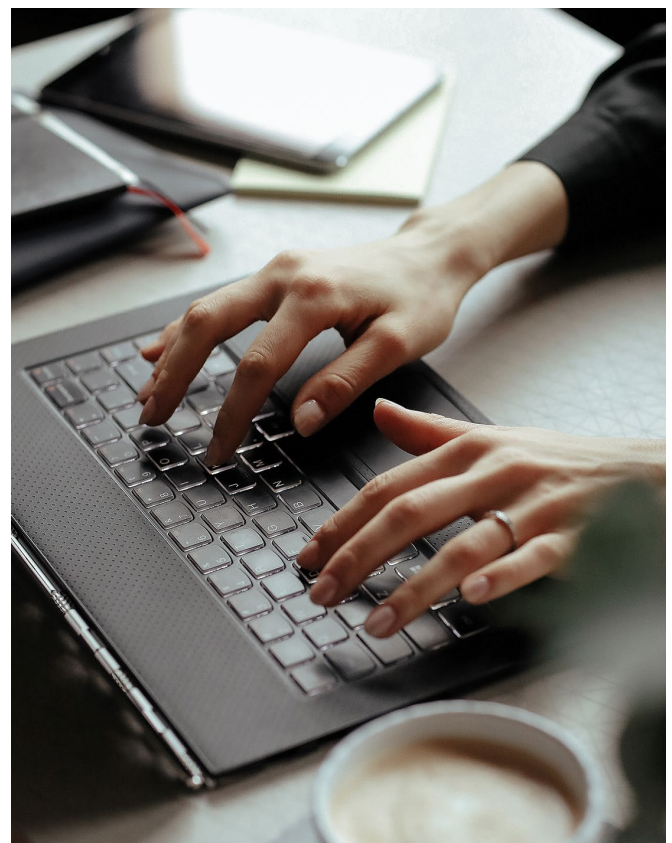
3. Setting up working from home

a. Property and equipment

Employers should consider providing its employees with office equipment which may include laptop/desktop computer, document storage facilities, printer, shredder and mobile phone. Employees should also be directed as to whether the equipment may only be used for work-related purposes. It is generally suggested that employees should not be permitted to use personal equipment for work purposes.

b. Security, confidentiality and data protection

Whilst working from home, the contractual obligations and the employer's policies (if any) in respect of security, confidentiality and data protection will continue to apply. Prior to introducing a work from home arrangement, it will be prudent for employers to review their confidentiality policy to ensure it is adequate to protect their business and is compliant with the law. The policy should also contain clear guidelines on authorised use and restrictions with respect to confidential information, which may also require employees to promptly inform the employers of any potential or threatened breach of confidentiality.



4. Managing working from home

a. Employee's considerations

Employees who work from home are subject to the same rules, procedures and standards of conduct and performance as if they were working in the office. In addition to their day to day tasks, this could include:-

- i. Keeping up to date with news, events and developments related to the employer.
- ii. Keeping in regular contact via phone, email or video conferencing.
- iii. The annual leave and sick leave related policies continue to apply even while working from home. The employee should report to his/her employer any absence due to illness or injury.
- iv. The employee will continue to be subject to disciplinary policies of the employer. Accordingly, any conduct or performance issues that arise from working from home should be dealt with in the usual way.
- v. Employees continue to owe duties of fidelity, good faith, diligence and to act in the best interests of the employer. During work hours, the employees should not engage in personal commitments or carry out any work for any third parties. Equally, the employee should not treat working from home as taking off from work.

b. Employer's considerations

The employer also needs to bear in mind other practical considerations that arise in the course of working from home:-

- i. There is a likelihood of employees feeling isolated or require guidance and support. Accordingly, the employee's manager and/or members of human resources team should be sufficiently trained to understand potential issues and be readily available to address issues of the employees over telephone or video-conference.
- ii. It would not be appropriate to hold meetings in the employee's home, or to give out the employee's residential address as it could amount to a potential breach of the Personal (Data) Privacy Ordinance (Cap.486).

5. Ending the work from home arrangement

A work from home arrangement could be permanent or temporary. In either case, both employers and employees should have the right to terminate the work from home arrangement on reasonable notice.

It is advisable to set out the notice requirement and grounds of termination in writing. If the work from home arrangement is temporary, the duration should be clearly stipulated. Otherwise, it would be prudent to provide for a clause regarding the extension and/or termination of the work from home arrangement.

Key Points to Consider

- Employers should implement a detailed work from home policy.
- The work from home policy should ideally provide the employee with sufficient information and direction to allow the employee to effectively work from home.
- The policy should also set out who to seek assistance from during any period of working from home.





Guidance for Protecting Personal Data in WFH Arrangements

The Privacy Commissioner for Personal Data (“PCPD”) issued Guidance Notes for (1) organisations, (2) employees, and (3) users of video conference software, in January 2021 with a view to enhance measures for data security and data privacy in the use, storage and handling of personal data when employees work from home (“WFH”).

Guidance for Organisations

Organisations, in their capacity as data users, must comply with the Data Protection Principles (“DPP”) set out in Schedule 1 of Personal Data (Privacy) Ordinance (Cap 486) (“PDPO”) while collecting, handling and using personal data. Briefly, the six DPP are:-

1. Data collection:	Personal data must be collected lawfully and for a purpose that is directly related to the activity of the data user;
2. Accuracy and retention:	Data users are required to take practicable steps to ensure that the data is accurate and is not retained for longer than necessary;
3. Use of data:	Unless consent of the data subject is obtained, the data must be used only for the purpose for which it was obtained;
4. Data security:	Practicable steps must be taken to prevent unauthorised access, processing, use, loss, or erasure of personal data
5. Openness and transparency:	Data users are required to maintain openness regarding their policies and practices for use of data and the purpose for which the data is collected; and
6. Access and correction:	The data subjects have a right to access their personal data and request correction of personal data. Any refusal to allow access must be reasoned.

The PCPD considers employers to be primarily responsible for data security and personal data privacy. The PCPD recommends the following measures that employers may consider adopting while implementing WFH arrangements:

Conducting a risk assessment of data security and employees' personal data privacy prior to formulating policies;

Reviewing and revising existing policies and practices and provide sufficient guidance to the employees in each case regarding transfer of data and documents, remote access to networks and data, erasure and destruction of unnecessary data and materials, and the handling of data breaches;

Training and providing support to employees for WFH arrangements to ensure data security with designated staff to address concerns arising during WFH;

Providing employees with devices and including protective measures such as passwords, anti-malware software, remote access to devices, prevention of transfer of data from corporate to personal devices;

Encouraging the use of virtual private networks to enable secured remote access to corporate networks; and

Implementing security measures for remote access such as granting access on a need basis only and reviewing of remote access logs to track suspicious activities.

Guidance for Employees

During WFH, employees will have access to employer's data which may be processed through networks that are beyond the employer's control. As such there is a risk of the employee breaching the DPP, particularly the data security principle. Accordingly, the PCPD recommends adopting the following measures to guard against the potential risks:-

Requiring employees to adhere to their employer's policies on handling of data;

Suggesting the use of corporate devices during WFH for all work-related matters;

Avoiding working in public places in order to prevent disclosure of personal data and restricted information. However, if working in a public place is unavoidable, employees should use security measures such as screen filters and mobile hotspots rather than using public Wi-Fi;

Implementing security measures to be taken while using Wi-Fi such as strong passwords, review of devices connected to the network and use of updated security protocols;

Requiring employees to use corporate email accounts for all work-related communications; and

Whilst it is not advisable to carry physical documents out of office, in the event removal becomes necessary, employees should seek approval of their supervisor. Where practicable, the personal data should be redacted before removal and only necessary documents should be removed from the office. In addition, employees should have secure filing cabinets at home and should follow the employer's established shredding procedures.

Guidance for users of video conferencing software

The increased use of video conferencing software by organisations and employees in the course of WFH poses additional risks to data security and personal data privacy. To provide safeguards, the PCPD recommends the following measures:-

Prior to opting for a particular video conferencing software, organisations are encouraged to assess the risks associated with its use;

When using video conferencing facilities, strong passwords and a secure internet connection should be used;

The host of the video conference should take measures such as setting up unique meeting ID, virtual waiting room to allow authorised access only and obtain consent of participants before recording and storing records; and

Implementing security measures to be taken while using Wi-Fi such as strong passwords, review of devices connected to the network and use of updated security protocols;

The participants should also be careful that their background setting during the video conference and screen sharing functions do not lead to inadvertent disclosure of personal data and restricted information.

Whilst it is not advisable to carry physical documents out of office, in the event removal becomes necessary, employees should seek approval of their supervisor. Where practicable, the personal data should be redacted before removal and only necessary documents should be removed from the office. In addition, employees should have secure filing cabinets at home and should follow the employer's established shredding procedures.

Key Points to Consider

- Although the Guidance lacks statutory force, it serves as a helpful guide for organisations to consider when implementing WFH arrangements.
- Employers should consider reviewing their existing policies and incorporate additional measures as appropriate to protect the personal data of individuals and other confidential information.

Remote Working from Overseas

Remote working arrangements have become prevalent in response to the challenges posed by the pandemic such as risk of infections, travel restrictions and quarantine requirements in Hong Kong and elsewhere. Many employers are also considering remote working as 'the new normal' given the reduced operational costs.

For some employees, remote working may mean working overseas.

Key Points to Consider

- Prior to allowing any employee to work remotely overseas (especially if the employee will be present in the overseas jurisdiction for more than 183 days in a 12-month period), it is suggested that employers seek appropriate legal advice and tax advice in Hong Kong and the overseas jurisdiction.

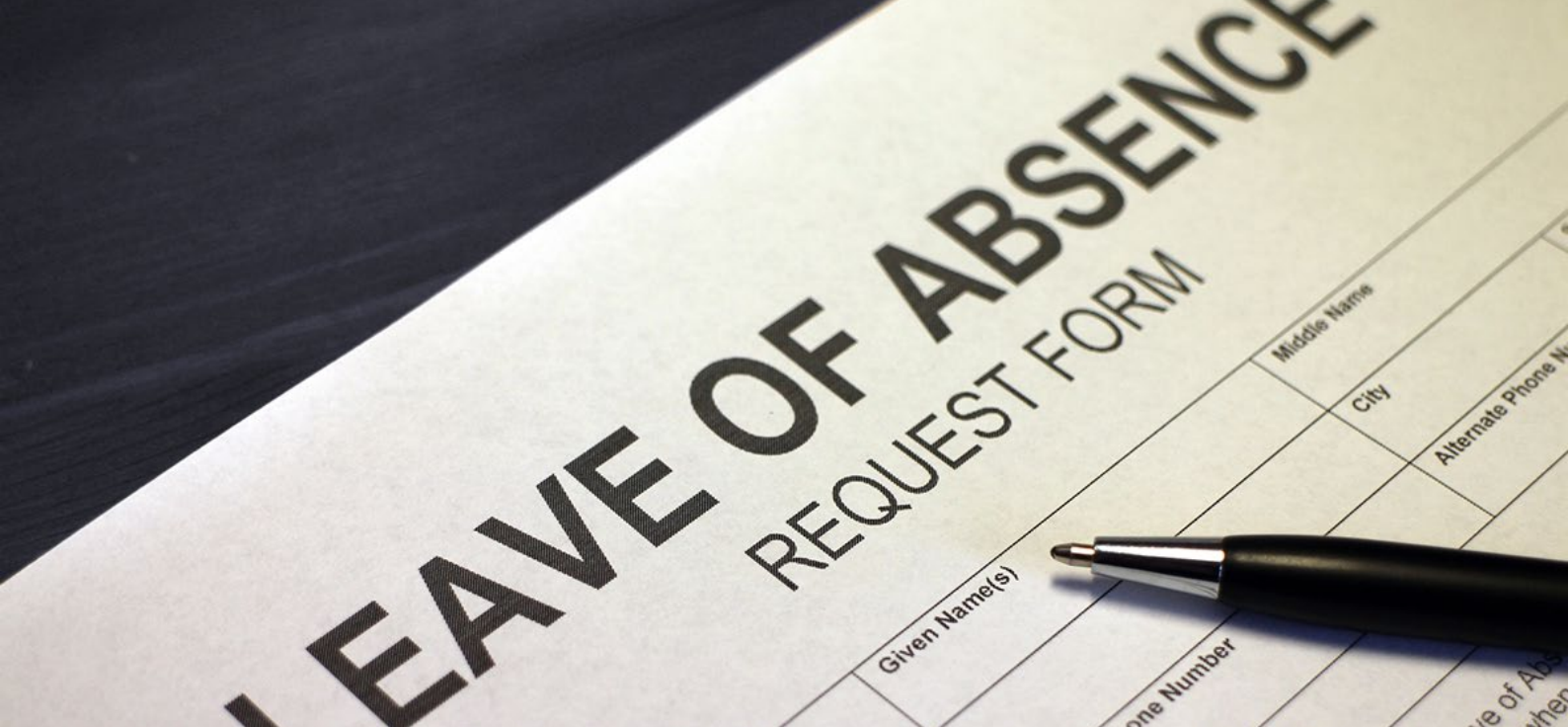
It is important to ensure that the employee has a right to work in the overseas jurisdiction.

- Any agreement to work remotely overseas should be documented in writing along with sufficient details on the applicable law, nature of duties, length of stay overseas, and necessary indemnities in relation to taxes and in the event the employee contravenes any law while working overseas.

Depending on the role of the employee, employers may also consider varying the employment contract and engaging the employees on an independent contractor basis.

- Employers should also review their existing policies and insurance coverage and consider updating their policies or implementing new policies for employees working remotely.





SECTION TWO

ANNUAL LEAVE AND UNPAID LEAVE – Q&A WITH OUR EMPLOYMENT LAWYERS

Can an employer force an employee to take paid annual leave?

Annual leave falls into two categories:

1. Statutory annual leave: which is governed by the rules under the Employment Ordinance (Cap. 57) (“EO”); and
2. Contractual annual leave: which is any annual leave in excess of statutory annual leave as agreed in the employment contract;

If an employment contract does not distinguish between statutory annual leave and contractual annual leave, the employer may be able to rely on the statutory provisions in respect of requiring employees to take leave. Pursuant to the EO, an employer can generally direct an employee to take statutory annual leave by giving at least 14 days’ notice in writing following consultation with the employee. The exception to this rule is that generally an employer cannot force an employee to take statutory annual leave in the year of its accrual.

In terms of contractual annual leave, the right to direct an employee to go on contractual annual leave would depend on the specific terms of the annual leave clause.

Can Unused Annual Leave be Forfeited?

Statutory annual leave cannot be forfeited. Untaken statutory annual leave must be rolled over to the following year or, in certain limited circumstances, may be paid out, but this is an expensive option.

In the case of contractual annual leave (where clearly distinguished), however, the employer is free to follow the relevant provisions of the contract. This may include, for example, a capped or no carry forward policy in respect of contractual annual leave and the right to forfeit untaken contractual annual leave in specific circumstances.

Strategies and Approaches Relating to Annual Leave

Annual leave is an important and prized entitlement of employees. As such, employers need to tackle the issue of “backlogs” with both rigour and sensitivity when considering what strategies are available to them.

Firstly, employers should be clear about the situation for their staff: review employment contracts and annual leave policies to be clear about how much leave employees have and whether specific rights and conditions apply to contractual annual leave; and update and check HR

records contractual annual leave; and update and check HR records to calculate accurate entitlements. This is vital for devising the best approach and maintaining the trust of employees.

Clear communication with employees and consistency of approach is also key to avoid mis-trust and disputes. One of the underlying purposes of annual leave and a primary reason for having minimum thresholds of statutory annual leave is to promote and maintain employees' physical and mental wellbeing, as well to allow time with family and on external pursuit so a clear rationale for taking periodic breaks during the course of the year.

Can an employer unilaterally require employees to take unpaid leave?

In Hong Kong, there is no statutory right that entitles an employer to instruct their employees to take unpaid leave .

Therefore, unless there is an express provision in the employment contract, the employer cannot unilaterally force an employee to take unpaid leave.

If an employer decides to force an employee to take unpaid leave against his/her wishes, in the absence of an express contractual term, it could amount to a breach of contract. Where an employee volunteers to go on unpaid leave, it is suggested that the agreement is documented in writing.

What course of action can an employer take if an employee refuses to accept the unpaid leave option?

The course of action available to an employer depends on whether the employment contract entitles the employer to direct the employee to take unpaid leave. Where there is no contractual right, the employer cannot force the employee to take unpaid leave.

If there is a contractual right, the employer can treat the refusal to comply with its direction as a refusal to comply with a lawful order. The employee should be first warned about the refusal, and if he/she persists, then the employer may consider taking disciplinary action against

the employee. However, even in this case, it is unlikely that a singular incident of an employee refusing to go on unpaid leave would entitle the employer to terminate the employee for cause.

How much unpaid leave can an employer expect employees to take?

The number of days an employer can direct his employee to take as unpaid leave would depend on the specific terms of the unpaid leave clause. Any additional duration of unpaid leave should be agreed between the employer and employee.

How can an employer incentivize employees to take unpaid leave?

In the absence of a contractual right, an employer may consider policies to incentivise the employees to take unpaid leave.

This may include an assurance of future increases in wages, for example, when the business environment improves, or explain to the employees that if no employee accepts the unpaid leave option, there may be a possibility of redundancies. However, please note that an employer's right to terminate on grounds of redundancy may be affected if the employer subscribes to the Hong Kong Government's proposed Employment Support Scheme.

How should an employer approach the unpaid leave option?

Subject to any contractual right which entitles an employer to direct its employees to take unpaid leave, where the employer is asking its employees to take unpaid leave, it should direct such request to all staff in the relevant department/ team that has been affected by the disruption in business.

How much notice should be given to employees requiring them to take unpaid leave?

The notice period would depend on whether the contract provides the employer the right to direct the employees to take unpaid leave. In such case, if the contract stipulates a

specific notice requirement, the clause must be followed. If the clause does not provide a notice period, it should be agreed between the employer and the employee.

In the absence of a contractual right, where the unpaid leave is mutually agreed by the employer and employee, no notice period is required.

Key Points to Consider

- The situation with Covid-19 continues to evolve and communication with employees is key during this time.
- Where possible, employers should try to be flexible on working practices in order to maintain employee relations and reduce anxiety and panic.





SECTION THREE

MANAGING REDUNDANCIES DURING THE PANDEMIC

There is no regulatory framework in Hong Kong that governs the redundancy process nor are employers required to consult their employees prior to making him or her redundant.

In general, employers can select which employees to terminate so long as the employee has not been selected due to discriminatory reasons (for e.g. due to his disability, gender, race or family status) or where it is otherwise unlawful to do so.

The Employment Ordinance (Cap. 57) ("EO") provides that it is unlawful for an employer to terminate the employment of, or give notice of termination to an employee who has:

- suffered a work-related injury entitling him to compensation under the Employees' Compensation Ordinance (Cap. 282) (unless consent of the Commissioner for Labour has been obtained); or
- suffered temporary incapacity for a period not exceeding three days in circumstances in respect of

in respect of which the employee is entitled to claim employees' compensation.

It is also unlawful for an employer to terminate an employee's employment in the following circumstances:

- where the employee is undertaking jury service;
- where the employee is absent from work on sick leave and is in receipt of sickness allowance, other than where summary dismissal is justified;
- where the employee has given evidence under the Factories and Industrial Undertaking Ordinance (Cap. 59);
- where the employee has a spent conviction, and the employer terminates the employee's employment on the basis of that conviction or failure to disclose it;
- where the employee is taking accrued statutory annual leave; and
- where the employee is a female employee on a continuous contract of employment who has given notice of her pregnancy to the employer. This does not prevent an employer from terminating the employee's employment where summary dismissal is

justified, or in the first 12 weeks of the employee's probationary period.

It is usually best practice for employers and employees alike, to talk through circumstances where redundancy may be avoided and if so, this may produce "win-win" situations.

What are Some Practical Considerations after an Employee is Made Redundant?

Employers should be prepared to address a number of practical considerations after a decision to terminate an employee by reason of redundancy is made:

1) Statutory severance payment

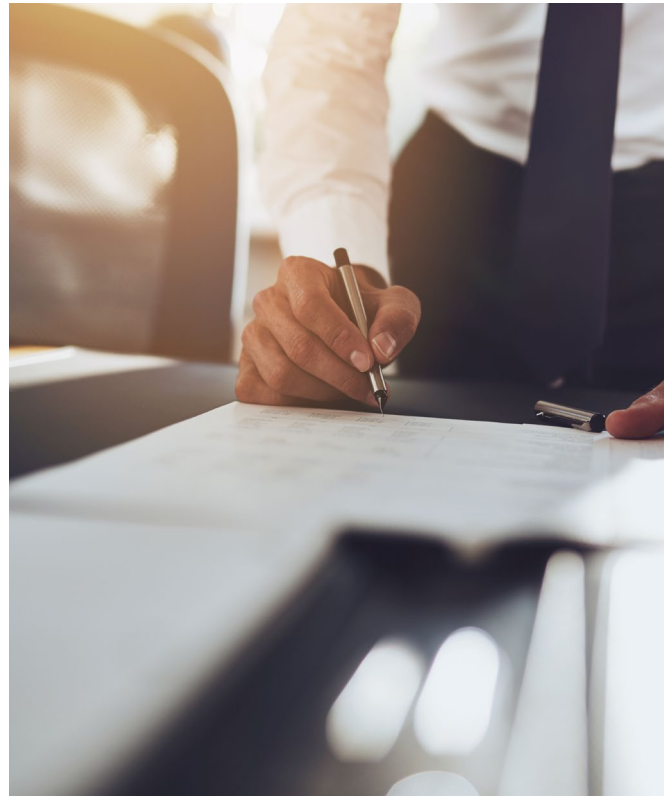
Under EO, where an employee has been employed for at least 24 months, he or she is entitled to a statutory severance payment equating to two-thirds of the last full month's salary, or two-thirds of HK\$22,500 (whichever is lower), multiplied by the number of years' service. A pro-rata amount applies in respect of any incomplete year.

The cap on statutory severance payments is HK\$390,000.

2) Other common payments

In addition to the above statutory severance payment, employers may also be required to make further payments including:

- contractual severance payments (in excess of the above statutory minimum);
- wages up to and including the date of termination of employment;
- payment in lieu of notice (if applicable);
- payment in lieu of accrued but untaken annual leave; allowances and/or reimbursement of personal expenses contracted and incurred by the employee (such as for food, travel, housing, cost of living);
- any maternity leave pay due;
- accrued end of year payment;
- any sickness allowance due;
- any payment of bonuses and/or commissions; and
- any deferred compensation including stock or stock options where termination accelerates vesting.



3) Penalty for failure to pay termination payments

An employer who fails to make termination payments due as soon as practicable and in any case not later than 7 days after the day of termination, may be liable to criminal prosecution. If found guilty, the maximum penalty is a fine and/or up to three years imprisonment.

Is There Anything Else That Should be Considered?

Confidential Information

Whilst common law implies certain obligations on employees not to misuse information which amounts to a trade secret or certain information imparted through a duty of confidence, for greater protection for an employer's confidential information, the employer may agree to further contractual duties of confidentiality.

Return of Company Property

It may be sensible for employers to consider including an express clause in the employee's employment contract and/or separation agreement requiring the employee to return all company property and/or delete any confidential information and materials relating to the business of the employer prior to his or her departure.

Such confidential information may include customer lists and records, electronic data and office files, which if disclosed, may be very valuable to a competitor and cause significant damage to the employer. Office equipment, such as keys, laptops and credit cards, should also be returned on termination.

Post Termination Restrictive Covenants ("PTRs")

In certain circumstances, the departure of an employee could have an adverse effect on an employer's business particularly if the departing employee joins a direct competitor, solicits and/or poaches clients and staff. Accordingly, an employer can agree certain PTRs to protect its business from such conduct.

PTRs in contracts which restrict an employee's activities, especially after his/her employment has ended, are considered prima facie unenforceable as being contrary to public policy. Two conditions must be fulfilled if the restraint is to be held valid. First, the employer has shown a legitimate interest to protect, in relation to that employee's employment. Second, the PTR must be shown to be no wider than is reasonably necessary for the protection of that interest.

If a PTR is held to be unreasonable, it will be struck down and will not be enforced unless the offending parts can be severed by applying the "blue pencil" test.

Courts cannot enforce a restriction of lesser extent which would have been reasonable. However, if only part of a

PTR is unreasonable, individual words or phrases may be ignored, so permitting a reasonable call to stand.

It follows that when drafting PTRs, employers should take care to ensure that the PTRs are reasonable in scope when properly construed.

Retaining Employee Records

There are various statutory obligations which require employers to keep certain records such as identity records, employment records, leave records and records in relation to the employee's right to work. Such records must be retained for a minimum of 6 months after the termination of the employment and should generally be retained for a longer period in case of any future disputes.

Notification

- Has the employee been notified of the decision in writing?
- Does the notification clearly identify the employee's last day at work and termination payments?

Termination payments

- Is the employee entitled to any statutory and/or contractual severance payment?
- Has the employee been paid all other applicable termination payments within 7 days including:
 - contractual severance payments (in excess of the above statutory minimum);
 - wages up to and including the date of termination of employment;
 - payment in lieu of notice (if applicable);
 - payment in lieu of accrued but untaken annual leave;
 - allowances and/or reimbursement of personal expenses contracted and incurred by the employee (such as for food, travel, housing, cost of living);
 - any maternity leave pay due;
 - accrued end of year payment;
 - any sickness allowance due;
 - any payment of bonuses and/or commissions; and
 - any deferred compensation including stock or stock options where termination accelerates vesting.

Key Points to Consider after a Redundancy

- Employee should return all company property and/or delete any confidential information and materials relating to the business of the employer prior to his or her departure.
- Employers should consider whether any post termination restrictions are necessary and in place.
- Employers should keep certain records such as identity records, employment records, leave records and records in relation to the employee's right to work.

Taxation obligations

- Has the employer notified the Inland Revenue Department if an employee intends to leave Hong Kong?
- Is the employer required to withhold monies payable to an employee intending to leave Hong Kong?

MPF obligations

- Has the employer arranged for the last payment of the employee's mandatory contributions on or before 10 days after the last day of the calendar month following the employee's termination of employment?
- Has the employer notified the MPF scheme trustee about the employee's termination of employment within 10 days after the last day of the calendar month in which the employee left the company?
- Has the employer given written notice to the MPF scheme trustee regarding the date of cessation of employment?
- Where a statutory severance payment has been made to the employee, has the employer considered whether to apply to the MPF scheme trustee to withdraw the relevant amount from the employee's accrued benefits to offset the statutory severance service payment?



SECTION FOUR

OTHER KEY EMPLOYMENT LAW THEMES

Compulsory Testing and Ambush Lockdowns

The Hong Kong Government has lowered the threshold for compulsory COVID-19 testing to identify and curb the transmission chain of COVID-19 by implementing new measures under the Prevention and Control of Disease (Compulsory Testing for Certain Persons) Regulation (Cap. 599J) (“Regulation”).

What is the new compulsory testing threshold?

As announced on 1 February 2021, a compulsory testing notice will be applicable:

- In the case of residential building: if a single untraceable confirmed COVID-19 case is discovered in a residential building (including buildings used for both residential and commercial purposes) or detected in the sewage samples of the building; or
- In the case of a workplace: if two or more confirmed COVID-19 cases are found in a workplace.

What happens if a residential building or a workplace is subject to a compulsory testing notice?

Upon being included in a compulsory testing notice, all the residents / persons in the workplace (as the case may be) are subject to compulsory COVID-19 testing.

Furthermore, all persons who have been present at the relevant premises for more than 2 hours in the period specified by the Government (such as visitors, part time employees etc) are also subject to the compulsory testing.

Once the Government delineates a restricted area and makes a “restriction-testing declaration” (popularly known as a “lockdown”), all the individuals are required to stay within the restricted area, follow the Government’s arrangements for undergoing compulsory testing, and are only permitted to leave once the appropriate test results are obtained. During such lockdowns of workplaces, workplace operations must be suspended and the relevant residential building and/or workplace must be disinfected.

Are there any penalties for not following the directions of the Government?

Yes. In addition, the relevant person will also be subject to a compulsory testing order (“Order”) for undergoing testing within a specified time frame. Failure to comply with such an Order is an offence liable to a fine at level 4 (HK\$25,000) and imprisonment for six months.

A person who fails to comply with a compulsory testing notice is liable to a fixed penalty of HK\$5,000.

Is there any obligation to provide information to the Government?

The Regulation empowers Government officials to seek information and assistance from any individual when necessary. Accordingly, there may be circumstances where either employers or specific employees may be subject to such requests. A failure to comply with such a request constitutes an offence and is subject to a fine at level 3 (HK\$10,000).

Compulsory testing and, in particular, the broad right of the government to designate specific areas in so called “ambush lockdowns” presents a risk of significant disruption and uncertainty for employers.

Key Points to Consider

Employers should remain alert to the evolving and fluid situation by, for example:

- Communicating with building management contacts regarding detection and reporting of potential cases
- Reviewing business continuity and alternative working protocol.
- Re-organising work teams and rosters to ensure that there is adequate coverage of key functions at any given time.
- Communicating with employees clearly and regularly
- Maintaining records by using the “LeaveHomeSafe” app or other digitised systems for recording entry and exit at the workplace.

Covid-19 Testing and the Workplace

Do employers have a right to ask their employees to get tested for Covid-19?

Unless an employee is subject to compulsory testing, such as under a government ambush lockdown, or is employed in a sector which is subject to compulsory testing such as catering services, there is no clear and confirmed basis for employers to lawfully require employees to undergo Covid-19 testing.

Given the contagious nature of Covid-19 and the health risks it poses, however, employers could seek to lawfully direct or reasonably request employees to undergo testing in compliance with the obligations under the Occupational Safety and Health Ordinance (Cap 509) (“OSHO”).

Employers have a common law duty, as well as a statutory duty under the OSHO, to take measures as far as reasonably practicable to ensure safety and health of all employees at work.

What can employers do if an employee refuses to undergo a regular Covid-19 test?

If an employee refuses to comply with a lawful and reasonable direction (unlike a mere request) from the employer, it may entitle the employer to take disciplinary action against the employee. In this regard, employers should review and follow their disciplinary policies.

Employers should weigh the reasons for refusal against the proposed sanctions, as well as consider other measures that potentially could be used, such as requiring the employee to take annual leave, unpaid leave, or requiring them to work from home.

Can employers ask their employees to provide Covid-19 test reports?

Employers do not have a statutory right per se to ask for test reports. However, in compliance with the duties under the OSHO, it may be reasonable for employers to require employees to produce test reports.

Employers are responsible to ensure that the no employee is discriminated against on the basis of the medical reports.

Key Points to Consider

- In Hong Kong, employers do not have a statutory right to mandate their employees to undergo any form of medical tests.
- If employees refuse to undergo Covid-19 testing, subject to contractual terms, requiring the employees to work from home or from an alternative office may be another alternative an employer could consider.
- It will be reasonable for employers to direct employees to declare if they know they have been in contact with anyone who has tested positive or if they have been at places where Covid cases have been detected

Given the sensitivity of the situation, and without further government direction, it is recommended that employers ask and seek to persuade employees to have tests, as opposed to insisting.



Hong Kong's COVID-19 Vaccination Programme

While employees are obliged to follow the lawful and reasonable direction of their employer, it is not clear whether such a direction would be deemed reasonable. Employees could provide a number of reasons against the vaccination programme and this is a sensitive area. This potentially could include an argument that forcing them to be vaccinated is a breach of their human right of self-determination.

There is no clear and absolute right for an employer to insist that an employee is vaccinated.

Similarly, although employers have a duty at Common Law and under the Occupational Safety and Health Ordinance to provide, as far as reasonably practicable, a safe working environment for employees, there is no guarantee that enforcing COVID vaccinations would be deemed reasonable for this purpose. This is perhaps more likely in the context of hospital and health workers, or for employees in other businesses requiring frequent and close proximity with others, but it remains highly sensitive and potentially contentious.

Risk of discrimination

The protections under Hong Kong's anti-discrimination legislation include protection against discrimination on

the basis of pregnancy and disability. The definition of "disability" is very broad, including medical conditions and the presence in the body of organisms causing, or capable of causing, illness or disease. Accordingly,

Employers should be cautious as to how they treat employees who refuse to be vaccinated, as well as potential hires who have not been vaccinated.

Data privacy considerations

Employers will also need to take data privacy into account and comply with the requirements of the Personal Data (Privacy) Ordinance if they intend to track which employees have (and have not) been vaccinated or otherwise collect, store or process information relating to the vaccination of employees. This would include informing employees as to whether they are required to provide information and ensuring that any information provided is held securely and kept up-to-date.

Key Points to Consider

- We recommend keeping a close eye on government guidance and updates as the programme is rolled out.

GALL

Contact us:

Nick Gall (nickgall@gallhk.com)

Matthew Durham (matthewdurham@gallhk.com)

Vanessa Ip (vanessaip@gallhk.com)

All material contained in this Handbook is provided for general information purposes only and should not be construed as legal, accounting, financial or tax advice or opinion on any specific facts or circumstances and should not be relied upon in that regard. Gall accepts no responsibility for any loss or damage arising directly or indirectly from action taken, or not taken, which may arise from reliance on information contained in this Handbook. You are urged to seek legal advice concerning your own situation and any specific legal question that you may have.

WWW.GALLHK.COM