

COVID-19 – Next steps for employers



April 2020 marks a new phase for employers in Hong Kong. Due to the Coronavirus outbreak a large number of employers have over the last few months put steps in place so that their employees can now work from home. For employers whose businesses have been suffering since the outbreak, they have already been through the exercise of redeploying staff so that they will be fully utilized. For employers who have not been able to arrange a redeployment of all staff, they have been directing staff to use up their accrued annual leave as well as agreeing that staff go on periods of unpaid leave.

Employers are now assessing how to deal with staff who are surplus to requirements. Staff who are on unpaid leave still accrue basic entitlements such as sick pay and annual leave entitlement during the period in which they are not actively working. Therefore, remaining on the books even if they are off the payroll still has an impact on an employer's finances.

Employers can also now decide whether to avail themselves of the Employment Support Scheme ("ESS") which was announced by the Hong Kong Government on 8th April 2020. The scheme is designed to help employers retain employees and avoid redundancies. Under the ESS, the Government will provide a wage subsidy to *eligible employers* which have been making MPF contributions for employees. In exchange, the employer will have to undertake that they will not implement redundancies. The subsidy is based on 50% of the monthly wages of the employee capped at HK\$18,000. Therefore, the maximum subsidy for each employee will be HK\$9,000 per month for the duration of 6 months. The payment of the subsidy will be made in 2 tranches with the first tranche expected to be paid no later than June 2020. Whether employers will apply for the subsidy will very much depend upon the terms of the scheme and the scope of the undertaking which they will need to provide.

For a large number of employers, the ESS will be of little assistance given that it will only benefit employees at the lower end of the pay scale. Therefore, redundancies are being planned by numerous employers over the next few months. Many factors need to be considered when deciding who will be earmarked for redundancy.

The Employment Ordinance does not regulate how an employer should handle its redundancy process. An employer has complete freedom on deciding which employees will have their employment terminated. The only restriction on an employer is to ensure that the employee has not been selected for redundancy on the basis of a protected characteristic which would mean that the employer has unlawfully discriminated against the employee.

Employers cannot seek to terminate the employment of any employee who:

1. is on sick leave and receiving paid sick leave entitlement;
2. is in the process of making a claim under the Employees' Compensation Ordinance for a work related injury; and
3. is pregnant and has given notice of her pregnancy by a medical certificate.

In selecting a pool of employees who are candidates for redundancy, an employer should ensure that it has a fair selection criteria against which the employees will be judged. The criteria should be objective and applied equally to all employees. Employers should document the assessment which they carry out so that in the event an employee challenges the decision to make them redundant this will enable the employer to protect itself against a possible discrimination claim.

Any decision to terminate an employee's employment for reasons based on their sex, pregnancy, disability, family status, race, colour, descent, national or ethnic origin will be in breach of the anti-discrimination ordinances in Hong Kong and would therefore be unlawful.

Employers which decide to make redundancies must ensure that they comply with their contractual obligations set out in their employment contracts as well as their statutory obligations.

Statutory severance payment

An employee has been employed for at least 24 months, is entitled to a statutory severance payment equal to two-thirds of their last full month's salary, or two thirds of HK\$22,500 whichever is lower, multiplied by

the number of years' service. Where an incomplete year has been served, the severance sum is pro-rated for that year. There is a cap on statutory severance payments which is HK\$390,000.

It is still permissible for an employer to offset the value of its MPF contributions against statutory severance which can reduce the payment to a negligible amount.

When making an employee redundant, the employer must ensure that they comply with the notice requirement in the employee's employment contract if the employee will be required to serve out their notice period or otherwise to make a payment in lieu of the notice period. In addition, the employer must ensure that any contractual entitlement which the employee has is paid within 7 days of the termination of the employment. Such sums would include:

- wages up to the termination date;
- payment in lieu of accrued unused annual leave entitlement;
- reimbursement of expenses incurred for the benefit of the employer;
- accrued end of year payment; and
- payment of any bonuses /commission.

An employer which fails to make payment within 7 days of the termination date commits a criminal offence and is liable to a fine or 3 years imprisonment upon conviction.

Employers should ensure that employees are notified of the termination of their employment due to redundancy at the same time that notice is being given to them. For employers who are winding down their entire operations they should consider providing staff with ex gratia payments or payments above the statutory minimum in order to keep staff engaged and to ensure that they will work up to the termination date. It would be tempting for employees who have been notified of their redundancies to look for alternative employment and in the event that they were able to secure new employment to start work as soon as possible which would put at risk the employer's plans of closing its operations smoothly and on the planned date.

It is inevitable that employers will have to make redundancies to ensure the survival of their businesses. However, such decisions should be taken as a measure of last resort after careful consideration of alternative measures which can be implemented.

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