



GLOBAL EXPANSION GUIDEBOOK EMPLOYMENT

Hong Kong, SAR



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INTRODUCTION

Welcome to the 2024 edition of DLA Piper's *Global Expansion Guidebook – Employment*.

GLOBAL EXPANSION GUIDEBOOK SERIES

Many companies today aim to scale their businesses globally and into multiple countries simultaneously. In order to help clients meet this challenge, we have created a handy set of global guides that cover the basics that companies need to know. The *Global Expansion Guidebook* series reviews business-relevant corporate, employment, equity compensation, intellectual property and technology, and tax laws in key jurisdictions around the world.

EMPLOYMENT

As business grows more global, the challenge for in-house counsel and HR professionals responsible for workforce issues and employment law compliance is intensifying. This guide is designed to meet that challenge head on and has been produced in response to feedback from clients in both established and emerging international businesses. We hope it will become an invaluable resource for you.

This 2024 edition of our popular guide covers all of the employment and labor law basics in 63 key jurisdictions across the Americas, Asia Pacific, Europe, the Middle East and Africa. From corporate presence and payroll set-up requirements, language rules, minimum employment rights, business transfer rules, through to termination and post-termination restraints, we cover the whole employment life span.

We have used our global experience and local knowledge to bring you this newest edition of our guide. With over 300 lawyers, DLA Piper's global Employment group is one of the largest in the world, with one of the widest geographical footprints of any global law firm. We partner with our clients, wherever they do business, to find solutions and manage risk in relation to their legal challenges and objectives.

While this guide provides high-level guidance, it is not a substitute for legal advice, and we encourage you to take advice in relation to specific matters. If you wish to speak to any of our contributors, their contact details are set out towards the back.

We hope that you find this guide valuable and we welcome your feedback.

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This is a general reference document and should not be relied upon as legal advice. The application and effect of any law or regulation upon a particular situation can vary depending upon the specific facts and circumstances, and so you should consult with a lawyer regarding the impact of any of these regimes in any particular instance.

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HONG KONG, SAR



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LEGAL SYSTEM, CURRENCY, LANGUAGE

Common law. The Basic Law of the Hong Kong Special Administrative Region (HKSAR) provides that courts of HKSAR may refer to the precedents of other common law jurisdictions when making decisions. The official currency is the Hong Kong dollar (HKD). The official languages are English and Chinese.

CORPORATE PRESENCE REQUIREMENTS & PAYROLL SET-UP

A foreign entity may engage employees in Hong Kong subject to business, corporate and tax considerations and proper payroll registration.

Payment of Hong Kong tax is the employee's responsibility. Therefore, Hong Kong employers are not required to withhold tax through the payroll system, subject to exceptional circumstance where an employer is required to withhold final payments of an employee who will leave Hong Kong for 1 month or more after termination.

PRE-HIRE CHECKS

Required

Immigration compliance.

Permissible

Any data collected as a result of pre-hire checks must be necessary and not excessive. In order to comply with the Personal Data (Privacy) Ordinance (PDPO), candidates must be expressly informed of the collection, use and disclosure of any personal data related to them by their employer or prospective employer. Asking a candidate to sign a Personal Information Collection Statement will assist an employer in complying with these obligations. A candidate may be asked to undergo a medical examination, but only after the employer has made them a conditional offer of employment. If criminal checks are carried out, an employer must be careful not to dismiss, exclude or display prejudice against the candidate on the basis of any spent conviction – that is, where a person

was previously convicted of an offense for which they were not sentenced to imprisonment for more than 3 months or given a fine of more than HKD10,000, and the person has not been convicted of any other offense for at least 3 years.

IMMIGRATION

Any person who does not have the right of abode in Hong Kong and who undertakes work of any kind, whether paid or unpaid, must hold a valid employment visa, unless they hold a valid dependent visa or other visa which gives them legal entitlement to work in Hong Kong. Processing time for an employment visa application is generally 6 to 8 weeks.

HIRING OPTIONS

Employee

Indefinite, fixed-term, full-time, part-time or casual.

Independent contractor

Independent contractors may be engaged directly by the company or via a personal services company.

Agency worker

Typically, agreements between the agency and the end user stipulate that the end user is not the employer, while an agreement between the worker and the agency stipulates that the worker is either self-employed or an employee of the agency. The placement may be for a fixed term or may be open-ended. The Employment Ordinance (EO) and Employment Agency Regulations regulate employment agencies.

EMPLOYMENT CONTRACTS & POLICIES

Employment contracts

A prospective employee must be provided certain information (ie, wages and wage period, any end-of-year payment and length of notice) prior to commencing employment. An employment contract in writing is not required, but it is common practice to have a written contract signed by both parties.

Probationary periods

Permissible. No statutory limit, but 3 to 6 months is common. Regardless of what the employment contract states, either party can terminate the employment contract without notice or payment in lieu during the first month of the probationary period.

Policies

No mandatory policies, although it is common for employers to implement company policies for its employees, such as an anti-discrimination policy.

Third-party approval

No requirement to lodge employment contracts or policies with or obtain approval from any 3rd-party.

LANGUAGE REQUIREMENTS

No statutory requirements.

WORKING TIME, TIME OFF WORK & MINIMUM WAGE

Employees entitled to minimum employment rights

The EO applies to every employee engaged under a contract of employment, to any employer of such employee and to any contract of employment between such parties. Employees to whom the EO applies are entitled to basic protections including payment of wages, restrictions on wage deductions, the granting of statutory holidays (albeit not necessarily paid) and employment protection in respect to unlawful dismissal. Employees who are employed under a continuous contract (ie, for 18 hours a week for 4 consecutive weeks or where the parties agree that the employee will be continuously employed, known as continuous employment) are entitled to further benefits such as rest days, paid annual leave, sickness allowance, paid statutory holidays, maternity leave, paternity leave, severance payments and long-service payments.

Working hours

Currently no restrictions, except for young employees who are between the ages of 15 and 18 and are employed in an industrial undertaking.

The Labour Department has been engaging its 11 industry-based tripartite committees – comprising representatives of the Labour Department, employers and employees – to formulate non-binding, sector-specific working-hour guidelines for 11 industries.

Overtime

No obligation to provide pay for overtime worked.

Wages

Statutory minimum wage is currently set at HKD40 per hour.

Vacation

Between 7 and 14 days, depending on length of service. In addition, there are 14 statutory holidays. The number of statutory holidays will progressively increase to 17 days by 2030, with 1 additional statutory holiday to be added every 2 years. The next statutory holiday to be added will be in 2026, being the Easter Monday. Banks, educational institutions, governmental departments and many private employers also elect to observe general holidays in addition to the minimum 14 statutory holidays. General holidays are declared to be every Sunday as well as on 17 additional days, a number that includes the 14 statutory holidays.

Sick leave & pay

Employees in continuous employment accrue paid sickness allowance at a rate of 2 paid sickness days for each completed month of service in the 1st year of employment and 4 paid sickness days for each completed month of service thereafter, up to a maximum accrual of 120 sickness days. Sickness allowance is paid by the employer, and payment is only due for sickness days taken by an employee if the employee has taken 4 or more consecutive sickness days off. Once the employee is off for at least 4 sickness days, each sickness day is deemed subject to be paid the sickness allowance, including the first 3 days, up to the maximum accrual; however, this 4-consecutive-day requirement does not apply to any day off taken by a female employee for her pregnancy checkups, post-confinement medical treatment or miscarriage. Sick leave must also be supported by a valid medical certificate (or certificate of attendance for medical examination in relation to pregnancy). Sickness allowance is paid at a daily rate equivalent to 4/5 of the daily average of wages earned by the employee during the period of 12 months immediately before the sickness day or the 1st sickness day, as appropriate – or, if the employee has been employed by the employer for a period shorter than 12 months immediately before the sickness day, the shorter period. From June 17, 2022 onwards, a day on which an employee is absent from work due to compliance with certain anti-epidemic requirements imposed by the government could be deemed as a sickness day, entitling the employee to statutory sickness allowance provided that the other relevant conditions are satisfied.

Maternity/parental leave & pay

14 weeks' maternity leave. This is paid at 4/5 of the employee's average daily wages, subject to a cap of HKD80,000 for the last 4 weeks of the 14-week maternity leave, if the employee has been in continuous employment for no less than 40 weeks at the commencement of maternity leave. For employees without 40 weeks' continuous employment, maternity leave is unpaid. Employers, after payment of all maternity leave pay on the normal payday, may apply to the government for reimbursement of the last 4 weeks' maternity leave pay payable and paid under the EO. Where an employee gives birth later than expected, the employee may extend the period of maternity leave by the number of days between the expected date of birth and the actual date of birth. This period is unpaid.

Finally, an employee may take a further period of up to 4 weeks for illness or disability arising out of the pregnancy or childbirth. This period is unpaid and is in addition to sickness allowance. The EO grants 5 days' paternity leave to male employees who are employed under a continuous contract in Hong Kong in respect of the birth of each child of which he is the father. Provided the employee has been in continuous employment for no less than 40 weeks at the commencement of the paternity leave, the paternity leave is paid at 4/5 of the employee's average daily wages. For employees without 40 weeks' continuous employment, the paternity leave is unpaid.

Other leave/time off work

N/A.

DISCRIMINATION & HARASSMENT

Characteristics protected from unlawful discrimination and victimization include sex, pregnancy, breastfeeding, marital status, family status (ie, responsibility for the care of an immediate family member), disability, race and union affiliation. Characteristics protected from unlawful harassment include sex, pregnancy, breastfeeding, disability and race.

WHISTLEBLOWING

Hong Kong does not have specific legislation which provides for whistleblower protections. There are only piecemeal provisions in various ordinances that provide limited scope of protection to certain whistleblowers for the reporting of specific matters.

Note that listed companies are required to adopt a whistleblowing policy and system as part of the Corporate Governance Code, and it may be prudent for all employers to do so in order to encourage employees to raise concerns internally in the 1st instance.

BENEFITS & PENSIONS

Subject to certain exemptions (eg, for an individual from overseas who enters Hong Kong for employment and who holds an employment visa with a validity period of less than 13 months or is covered by an overseas retirement scheme), once an employee has been employed for 60 days, the employer is required to enroll the employee into a Mandatory Provident Fund (MPF) scheme. Generally, both the employer and the employee are required to contribute a minimum of 5 percent of the employee's "relevant income" up to a capped maximum amount of HKD1,500 (which may be adjusted occasionally), except employee's contribution is not required if "relevant income" is less than HKD7,100. Relevant income includes wages, salaries, leave pay, fee, commission, bonus, gratuity, housing allowance, housing benefits, any perquisite or allowance. It does not include any non-monetary benefits, statutory severance payments or statutory long-service payments.

DATA PRIVACY

The PDPO is principally concerned with 6 data protection principles (DPPs). Broadly, these require:

- That personal data is only collected for a lawful purpose, that only personal data that is necessary and not excessive for that purpose is collected and that individuals are informed of certain things before data is collected or used (DPP 1);
- That all reasonably practicable steps are taken to ensure that personal data is accurate and that it is only retained for as long as is necessary to fulfill its purpose (DPP 2);
- That personal data is not, without the prescribed consent of the job applicant or employee, used for a purpose other than the purpose for which it was collected (DPP 3);
- That all reasonably practicable steps are taken to ensure that the personal data is secure and protected against unauthorized or accidental access, processing, erasure or other use (DPP 4);

- That all reasonably practicable steps are taken to ensure that an individual may access information about the data user's policies and practices in relation to personal data, the kind of personal data about them that is being held and the purposes for which it will be used (DPP 5); and
- That, with some exceptions, an individual is entitled to request access to all personal data held by a data user and to correct that data if it is inaccurate (DPP 6).

There are provisions in the PDPO that restrict the transfer of personal data outside of Hong Kong, but these are not currently in force.

RULES IN TRANSACTIONS/BUSINESS TRANSFERS

No automatic transfer of employment. This includes an associated company transfer or change of business ownership, or a merger situation where the employment entity is changed. Therefore, the previous employer must terminate the employee's employment contract, and the new employer must offer – and the employee must accept – employment. If the employee accepts employment with the new employer or unreasonably refuses employment with the new employer in circumstances where the offer of new employment is on the same terms or terms and conditions no less favorable than those with the previous employer, then the previous employer may be able to avoid liability for a severance payment, subject to satisfaction of other conditions. There is no duty to consult, either individually or collectively, with employees or employee representatives.

EMPLOYEE REPRESENTATION

Although Hong Kong residents have the right and freedom to form and join trade unions, the level of employee participation in trade unions is relatively low, and Hong Kong enjoys a relatively harmonious climate of industrial relations. Collective bargaining agreements are uncommon.

There are no employee representatives or works councils.

TERMINATION

Grounds

Termination with notice or payment in lieu of notice is permissible.

Termination without notice or payment in lieu of notice is permissible if an employee, in relation to their employment:

- Willfully disobeys a lawful and reasonable order
- Engages in misconduct, such conduct being inconsistent with the due and faithful discharge of their duties
- Is guilty of fraud or dishonesty
- Is habitually neglectful of their duties, or

If it is based on any grounds permitted at common law.

Employees with continuous employment of 2 years or more are also protected against "unreasonable dismissal" (ie, there must be a valid reason for termination and, in this regard, any of the following may constitute a valid reason: the conduct of the employee; the capability or qualifications of the employee for performing work of a kind which they were employed to do; redundancy; illegality; or another substantial reason). Unreasonable dismissal is not a criminal offense, but employees are entitled to certain statutory remedies. Presumption of unreasonable dismissal may be rebutted by demonstrating that there is a valid reason for termination. There is then no requirement to show that the termination was "reasonable" or "fair" in these circumstances.

Employers should also ensure they comply with the contractual terms and other implied terms that relate to the reason for, and manner of, dismissal.

Employees subject to termination laws

Employees with continuous employment of 2 years or more are protected against unreasonable dismissal (see above). There are prohibited or restricted terminations for all employees (see below).

Restricted or prohibited terminations

Female employees who are pregnant or on statutory maternity leave, subject to certain exceptions; any employee who is absent from work on sick leave and is in receipt of statutory sickness allowance; any employee who has suffered a work-related injury entitling them to compensation under the Employees' Compensation Ordinance; by reason of an employee's trade union membership and activities; by reason of an employee giving evidence or information in any proceedings or inquiry in connection with the enforcement of the EO, work accidents or breach of work-safety legislation; any employee who has given evidence under the Factories and Industrial Undertaking Ordinance (breach of any of the above may constitute "unlawful dismissal"); any employee who is undertaking jury service; any employee who is taking statutory vacation; and by reason of an employee's spent conviction.

Unlawful dismissal is an offense with a fine up to HKD100,000 upon conviction.

Third-party approval for termination/termination documents

Not applicable for this jurisdiction.

Mass layoff rules

Not applicable for this jurisdiction.

Notice

Minimum 7 days' notice after the 1st month of the probationary period and during subsequent employment. If the notice is specified in the employment agreement, the notice will be the agreed period. If no notice period is specified, it is presumed to be 1 month. Notice is not required for termination for serious misconduct (ie, gross misconduct or cause), but it requires a high threshold.

Statutory right to pay in lieu of notice or garden leave

There is a statutory right to make a payment in lieu of notice. Right to place on garden leave depends on the terms of the contract.

Severance

Statutory severance payment is payable to redundant employees with continuous service for 2 years or more, which is calculated using a base amount per year of service or 2/3 of the employee's last full month's wages (being the monthly average of the wages earned by the employee during the previous 12 months – or a shorter period where the employee has been employed for less than 12 months – or 2/3 of HKD22,500, whichever is less). Total statutory severance payment is capped at HKD390,000. Employers are entitled to offset from liability to pay a statutory severance payment, any gratuity or retirement scheme payment that has been made to the employee in respect to any years of service for which the statutory severance payment is payable. However, abolition of the MPF offsetting arrangement will take effect on May 1, 2025, whereby employers will no longer be allowed to use the accrued benefits derived from employers' mandatory contributions to offset employees' statutory severance or long service payment. Under the new arrangement, accrued benefits derived from employers' voluntary contributions and gratuities based on length of service will generally still be able to be used to offset statutory severance or long service payment. For the purposes of statutory severance payment, there is a statutory presumption that the termination arose by reason of redundancy. This presumption may only be rebutted by an employer who proves that the employment was terminated for reasons wholly unrelated to redundancy.

POST-TERMINATION RESTRAINTS

Those restraints that protect the employer's legitimate business interests may be enforced if reasonable. Garden leave is common for senior employees.

Non-competes

Typically no longer than 3 to 6 months.

Customer non-solicits

Permissible in limited circumstances. Typically no longer than 6 to 12 months.

Employee non-solicits

Permissible in limited circumstances. Typically no longer than 6 to 12 months.

WAIVERS

Enforceable to waive contractual rights. While an employee may be asked to waive statutory rights, there is some uncertainty as to whether such a waiver would be effective in preventing an employee from subsequently bringing a claim to exercise their statutory rights.

REMEDIES

Discrimination

Uncapped compensation, which may include the claimant's financial loss; injury-to-feelings compensation; and, in some instances, exemplary damages.

Specifically, to decide the amount of injury-to-feelings compensation, the courts will consider the Vento guidelines in the UK. The compensation amount under the latest Vento guidelines in the UK is between GBP1,100 and GBP56,200 (with exceptional cases being capable of exceeding this upper limit) as of the date of this publication, though generally the courts in Hong Kong have not formally adopted the current UK limits and have on occasion been adopting the original 2002 Vento guidelines under which the compensation amount is between GBP500 and GBP25,000 (sometimes with upward adjustments).

Unlawful and/or unreasonable dismissal

There is no unfair dismissal regime in Hong Kong. The EO provides a statutory right to remedies which differ depending on the circumstances in which the unlawful dismissal and/or unreasonable dismissal took place.

For unreasonable dismissal, or unreasonable and unlawful dismissal, an employee may claim reinstatement, re-engagement or terminal payments.

In particular, the Labour Tribunal may order compulsory reinstatement or re-engagement of an employment, without securing consent of the employer, if the employee was unreasonably and unlawfully dismissed and it considers that the making of such an order is appropriate and reasonably practicable. If the employer does not reinstate or re-engage the employee as required by the order, the employer shall pay to the employee a further sum, amounting to 3 times the employee's average monthly wages and subject to a ceiling of HKD72,500. The employer commits an offense if they willfully and without reasonable excuse fail to pay the further sum. For unreasonable and unlawful dismissal, where no order for reinstatement or re-engagement has been made, the court or Labour Tribunal may also make an award of compensation, up to HKD150,000, to the employee if the Labour Tribunal considers it just and appropriate.

Failure to inform & consult

There are no information or consultation requirements.

CRIMINAL SANCTIONS

The provisions of the EO are enforced, first by criminal law sanctions (where the usual penalty is a fine, except for payment-of-wages offenses, which can give rise to a sentence of imprisonment), and secondly, by way of civil remedies at the instance of the aggrieved employee. Further, in some instances, liability can be passed to the individual decision-maker of the employing company.

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