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Employment Spotlight: Unpaid Leave and Annual Leave during COVID-19

Background

The COVID-19 situation has caused increasing financial and operational difficulties for businesses. Various employers have either asked employees to take unpaid leave and/or annual leave during this period. This practice note examines the legal requirements for asking employees to take unpaid leave and/or annual leave.

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.

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;

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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.

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 incentivize 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.

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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.

Conclusion

Employment law issues relating to COVID-19 will likely be at the forefront over the coming months. The situation is evolving 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.

For further information in relation to unpaid leave, annual leave and other employment law related matters, please do not hesitate to contact Andrea Randall (andrearandall@gallhk.com / +852 3405 7688).

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